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

The Code of Federal Regulations is sold by the Superintendent of Documents.

DEPARTMENT OF AGRICULTURE

Federal Crop Insurance Corporation

7 CFR Parts 402, 407, and 457

[Docket No. FCIC-17-0004]

RIN 0563-AC56

Catastrophic Risk Protection Endorsement; Area Risk Protection Insurance Regulations; and the Common Crop Insurance Regulations, Basic Provisions

Correction

In rule document 2017-25330 beginning on page 55723 in the issue of Friday, November 24, 2017, make the following corrections:

§ 407.9 [Corrected]

■ 1. In § 407.9, on page 55730, in the third column, in the 45th-47th lines, amendatory instruction 4.a should read:

■ a. Remove the phrase “Web site” wherever it appears and add the word “website” in its place;

■ 2. In the same section, on the same page, in the same column, in the 51st-56th lines, amendatory instruction 4.b.ii should read:

■ ii. In the definition of “Limited resource farmer”, remove “<http://www.lrftool.sc.egov.usda.gov> or a successor website” and add “http://lrftool.sc.egov.usda.gov/LRP_Definition.aspx” in its place;

§ 457.8 [Corrected]

■ 3. In § 457.8, on page 55731, in the second column, in the 33rd-35th lines, amendatory instruction 6.a should read:

■ a. Remove the phrase “Web site” wherever it appears and add the word “website” in its place;

[FR Doc. C1-2017-25330 Filed 12-13-17; 8:45 am]

BILLING CODE 1301-00-D

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA-2017-1103; Product Identifier 2014-NM-063-AD; Amendment 39-19128; AD 2017-25-14]

RIN 2120-AA64

Airworthiness Directives; Fokker Services B.V. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: We are adopting a new airworthiness directive (AD) for Fokker Services B.V. Model F28 Mark 0070 and 0100 airplanes. This AD requires contacting the FAA to obtain instructions for addressing the unsafe condition on these products, and doing the actions specified in those instructions. This AD was prompted by a report of an engine multiple fan blade-off (MFBO) event, caused by engine fan flutter. We are issuing this AD to address the unsafe condition on these products.

DATES: This AD becomes effective December 29, 2017.

We must receive comments on this AD by January 29, 2018.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Fax:* 202-493-2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590.

- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M-30, 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.

Examining the AD Docket

You may examine the AD docket on the internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2017-

1103; or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone: 800-647-5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

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

SUPPLEMENTARY INFORMATION:

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2014-0055, dated March 7, 2014 (referred to after this as the Mandatory Continuing Airworthiness Information, or “the MCAI”), to correct an unsafe condition for Fokker Services B.V. Model F28 Mark 0070 and 0100 airplanes. The MCAI states:

In 2008, EASA issued AD 2008-0088 to require installation of a modified normal maximum (second) detent reverse thrust on F28 Mark 0100 aeroplanes equipped with TAY 620 engines, except those already modified in accordance with Fokker Services Service Bulletin (SB) SBF100-76-016.

Since that [EASA] AD was issued, the investigation into a TAY 620 Multiple Fan Blade-Off (MFBO) event in September 2012 determined that fan flutter was the root cause. It was also determined that, under certain conditions, fan flutter can develop on TAY 620 engines when the N1 engine speed stabilizes within the range of 54 to 72% for more than 7.5 seconds during reverse thrust operation.

This condition, if not corrected, may lead to further MFBO events, possibly resulting in damage to the aeroplane.

To address this potential unsafe condition, Fokker Services published SBF100-76-022 which provides instructions for removing the normal maximum (second) detent reverse thrust position and for changing the Airplane Flight Manual (AFM) of the affected aeroplanes.

For the reasons described above, this [EASA] AD supersedes EASA AD 2008-0088 and requires removal of the normal maximum (second) detent reverse thrust position and introduction of changes to the AFM.

You may examine the MCAI on the internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2017-1103.

FAA’s Determination and Requirements of This AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI. We are issuing this AD because we evaluated all pertinent information and determined the unsafe condition exists and is likely to exist or develop on other products of the same type design.

FAA’s Determination of the Effective Date

Since there are currently no domestic operators of this product, we find good

cause that notice and opportunity for prior public comment are unnecessary. In addition, for the reason(s) stated above, we find that good cause exists for making this amendment effective in less than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and we did not precede it by notice and opportunity for public comment. We invite you to send any written relevant data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include “Docket No. FAA-2017-1103; Product Identifier 2014-NM-063-AD” at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may

amend this AD based on those comments.

We will post all comments we receive, without change, to <http://www.regulations.gov>, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this AD.

Costs of Compliance

Currently, there are no affected U.S.-registered airplanes. This AD requires contacting the FAA to obtain instructions for addressing the unsafe condition, and doing the actions specified in those instructions. Based on the actions specified in the MCAI AD, we are providing the following cost estimates for an affected airplane that is placed on the U.S. Register in the future:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product
Modification, Aircraft Maintenance Manual/AFM updates.	Up to 5 work-hours × \$85 per hour = \$425	\$0	Up to \$425.

Authority for This Rulemaking

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

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

This AD is issued in accordance with authority delegated by the Executive Director, Aircraft Certification Service, as authorized by FAA Order 8000.51C. In accordance with that order, issuance of ADs is normally a function of the Compliance and Airworthiness Division, but during this transition period, the Executive Director has delegated the authority to issue ADs

applicable to transport category airplanes to the Director of the System Oversight Division.

Regulatory Findings

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2017-25-14 Fokker Services B.V.:
Amendment 39-19128; Docket No. FAA-2017-1103; Product Identifier 2014-NM-063-AD.

(a) Effective Date

This AD becomes effective December 29, 2017.

(b) Affected ADs

None.

(c) Applicability

This AD applies to the Fokker Services B.V. airplanes, certificated in any category, identified in paragraphs (c)(1) and (c)(2) of this AD.

- (1) Model F28 Mark 0070 airplanes, all serial numbers.

(2) Model F28 Mark 0100 airplanes equipped with Rolls-Royce Deutschland TAY-620-15 engines.

(d) Subject

Air Transport Association (ATA) of America Code 76, Engine controls.

(e) Reason

This AD was prompted by a report of an engine multiple fan blade-off (MFBO) event, caused by engine fan flutter. We are issuing this AD to prevent engine MFBO events, which could lead to structural damage and possible reduced controllability of the airplane.

(f) Compliance

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

(g) Required Action(s)

Within 30 days after the effective date of this AD, request instructions from the Manager, International Section, Transport Standards Branch, FAA, to address the unsafe condition specified in paragraph (e) of this AD; and accomplish the action(s) at the times specified in, and in accordance with, those instructions. Guidance can be found in Mandatory Continuing Airworthiness Information (MCAI) European Aviation Safety Agency (EASA) AD 2014-0055, dated March 7, 2014.

(h) Alternative Methods of Compliance (AMOCs)

The Manager, International Section, Transport Standards Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Section, send it to the attention of the person identified in paragraph (i)(2) of this AD. Information may be emailed to: 9-ANM-116-AMOC-REQUESTS@faa.gov. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(i) Related Information

(1) Refer to MCAI EASA AD 2014-0055, dated March 7, 2014, for related information. You may examine the MCAI on the internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2017-1103.

(2) For more information about this AD, contact Tom Rodriguez, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 1601 Lind Avenue SW, Renton, WA 98057-3356; telephone: 425-227-1137; fax: 425-227-1149.

(j) Material Incorporated by Reference

None.

Issued in Renton, Washington, on December 6, 2017.

Dionne Palermo,

Acting Director, System Oversight Division, Aircraft Certification Service.

[FR Doc. 2017-26833 Filed 12-13-17; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA-2017-0473; Product Identifier 2016-NM-195-AD; Amendment 39-19124; AD 2017-25-10]

RIN 2120-AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for all The Boeing Company Model 737-100, -200, -200C, -300, -400, and -500 series airplanes. This AD was prompted by a report indicating that wear of the bearing plate slider bushings could cause disconnection of certain elevator hinges, which could excite the horizontal stabilizer under certain in-flight speed/altitude conditions and lead to degradation of the structure. This AD requires repetitive inspections and checks of certain elevator hinges and related components, repetitive replacements and tests of the bearing plate, and related investigative and corrective actions, if necessary. We are issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective January 18, 2018.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 18, 2018.

ADDRESSES: For service information identified in this final rule, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminister Blvd., MC 110-SK57, Seal Beach, CA 90740-5600; telephone 562-797-1717; internet <https://www.myboeingfleet.com>. You may view this service information at the FAA, Transport Standards Branch, 1601 Lind Avenue SW, Renton, WA. For information on the availability of this material at the FAA, call 425-227-1221. It is also available on the internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2017-0473.

Examining the AD Docket

You may examine the AD docket on the internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2017-0473; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (phone: 800-647-5527) is Docket Management Facility, U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT:

George Garrido, Aerospace Engineer, Airframe Section, FAA, Los Angeles ACO Branch, 3960 Paramount Boulevard, Lakewood, CA 90712-4137; phone: 562-627-5357; fax: 562-627-5210; email: george.garrido@faa.gov.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to all The Boeing Company Model 737-100, -200, -200C, -300, -400, and -500 series airplanes. The NPRM published in the **Federal Register** on May 18, 2017 (82 FR 22763). The NPRM was prompted by a report indicating that analysis following a special certification review of the horizontal stabilizer determined that wear of the bearing plate slider bushings could cause disconnection of elevator hinge number 4 or number 6. This disconnection could excite the horizontal stabilizer under certain in-flight speed/altitude conditions and lead to degradation of the structure due to tab flutter, hinge wear, spar chord corrosion, hinge rib web chafing, hinge rib chord cracking, and inspar lower skin cracking. The NPRM proposed to require repetitive inspections and checks of elevator hinge numbers 4 and 6 and related components, repetitive replacements and tests of the bearing plate, and related investigative and corrective actions if necessary.

We are issuing this AD to detect and correct wear of the bearing plate slider bushings, which could result in heavy airplane vibration and damage and could lead to departure of the elevator and/or horizontal stabilizer from the airplane, and loss of continued safe flight and landing.

Comments

We gave the public the opportunity to participate in developing this final rule. The following presents the comments received on the NPRM and the FAA's response to each comment.

Support for the NPRM

Air Line Pilots Association, International (ALPA) concurred with the content of the NPRM.

Request To Change Paragraph (g) of This AD

Boeing stated that no inspections are specified in Boeing Alert Service Bulletin 737-55A1099, Revision 1, dated October 21, 2016, for Group 1 airplanes and requested that the reference to Boeing Alert Service Bulletin 737-55A1099, Revision 1, dated October 21, 2016, be removed from paragraph (g) of this AD.

The European Aviation Safety Agency (EASA) observed that in paragraph (g) of the proposed AD, the reference to Boeing Alert Service Bulletin 737-55A1099, Revision 1, dated October 21, 2016, for Group 1 airplanes, is not consistent with the Accomplishment Instructions of Boeing Alert Service Bulletin 737-55A1099, Revision 1, dated October 21, 2016, which states only that Group 1 airplanes have exceeded their limit of validity (LOV) and gives no further advice.

We agree with the commenters. We have removed the reference to Boeing Alert Service Bulletin 737-55A1099, Revision 1, dated October 21, 2016, from the compliance requirements specified in paragraph (g) of this AD.

Request To Extend Inspections and Checks to All Hinges

EASA suggested that the inspections and checks in the proposed AD be extended to all hinges because any other loose hinge could create overloading in adjacent hinges, and therefore could contribute to the failure of hinges 4 and 6.

We do not agree with the commenter's assessment. We have consulted with Boeing and confirmed the following information.

Hinge fittings 1 and 2 support thrust loads only and do not have the sliding bearing plates. Therefore, these fittings do not need inspections to address the unsafe condition.

Boeing's flutter analysis shows that failure (disconnect) at either hinge 4 or

6 is flutter critical. However, a failed hinge 3 or 5, with the shorter span between adjacent hinges, will have less weight relative to stiffness, such that instability does not occur.

The fatigue loads on the affected Model 737 airplane elevator are not substantial. If hinge 3 or 5 becomes loose, the load increase on hinge 4 or 6 is insignificant. If hinge 3 or 5 fails, the inspection and replacement program in Boeing Alert Service Bulletin 737-55A1099, Revision 1, dated October 21, 2016, will still detect any crack at hinge 4 or 6 before it becomes critical. In addition, the normal maintenance procedure of hinge lubrication per the Maintenance Planning Document during a C check should detect a failed hinge 3 or 5.

We have not changed this AD in this regard.

Request for Clarification of Group 2, Configuration 1 Instructions

EASA requested clarification of the reason that paragraph (i) of the proposed AD includes no repeat instruction for Group 2, Configuration 1 airplanes, regarding bearing plate replacement.

Group 2, Configuration 1 airplanes are not included in paragraph (i) of this AD, which contains requirements for repetitive bearing plate replacements and tests, because these airplanes do not have the bearing plates. We have not changed this AD regarding this issue.

Request for Confirmation of Sufficient Access

EASA requested confirmation that sufficient access exists to adequately inspect and test all areas via the methods defined.

Boeing has confirmed that sufficient access exists. Additionally, Boeing has released 737-55A1099 Information Notice 01, dated May 23, 2017, to notify operators that hinge 4 inspections cannot be accomplished if existing repairs are installed in accordance with Boeing Special Attention Service Bulletin 737-55-1059, Revision 1, dated April 6, 2016. In that case, alternative inspection procedures must be approved in accordance with the procedures specified in paragraph (m) of this AD.

Effect of Winglets on Accomplishment of the Proposed Actions

Aviation Partners Boeing stated that accomplishing the Supplemental Type

Certificate (STC) ST01219SE does not affect the actions specified in the NPRM.

We concur with the commenter. We have redesignated paragraph (c) of the proposed AD as paragraph (c)(1) and added paragraph (c)(2) to this AD to state that installation of STC ST01219SE does not affect the ability to accomplish the actions required by this AD. Therefore, for airplanes on which STC ST01219SE is installed, a "change in product" alternative method of compliance (AMOC) approval request is not necessary to comply with the requirements of 14 CFR 39.17.

Conclusion

We reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting this final rule with the changes described previously and minor editorial changes. We have determined that these minor changes:

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

We also determined that these changes will not increase the economic burden on any operator or increase the scope of this final rule.

Related Service Information Under 1 CFR Part 51

We reviewed Boeing Alert Service Bulletin 737-55A1099, Revision 1, dated October 21, 2016. The service information describes procedures for repetitive inspections and checks of elevator hinge numbers 4 and 6 and related components, repetitive replacements and tests of the bearing plate, and related investigative and corrective actions. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the ADDRESSES section.

Costs of Compliance

We estimate that this AD affects 192 airplanes of U.S. registry. We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Elevator hinge high frequency eddy current (HFEC) inspection, loose bolt check.	15 work-hours × \$85 per hour = \$1,275 per inspection/check cycle.	\$0	\$1,275 per inspection/check cycle.	\$244,800 per inspection/check cycle.
Horizontal stabilizer HFEC and low frequency eddy current (LFEC) inspection, loose bolt check.	13 work-hours × \$85 per hour = \$1,105 per inspection/check cycle.	0	\$1,105 per inspection/check cycle.	\$212,160 per inspection/check cycle.
Horizontal stabilizer detailed corrosion inspection.	5 work-hours × \$85 per hour = \$425 per inspection cycle.	0	\$425 per inspection cycle.	\$81,600 per inspection cycle.
Elevator general visual inspection for ply damage.	Up to 4 work-hours × \$85 per hour = \$340 per inspection cycle.	0	Up to \$340 per inspection cycle.	Up to \$65,280 per inspection cycle.
Elevator skin tap test inspection for delamination.	Up to 6 work-hours × \$85 per hour = \$510 per inspection cycle.	0	Up to \$510 per inspection cycle.	Up to \$97,920 per inspection cycle.
Elevator hinge bearing plate replacement and binding test.	Up to 20 work-hours × \$85 per hour = \$1,700 per replacement/test cycle.	4,860	Up to \$6,560 per replacement/test cycle.	Up to \$1,259,520 per replacement/test cycle.
Elevator hinge fitting HFEC inspection ..	Up to 5 work-hours × \$85 per hour = \$425 per inspection cycle.	0	Up to \$425 per inspection cycle.	Up to \$81,600 per inspection cycle.

We estimate the following costs to do any necessary related investigative and corrective actions that would be required based on the results of the inspection. We have no way of determining the number of aircraft that might need these actions:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Elevator hinge conditional inspections, measurements, replacements, and repairs.	28 work-hours × \$85 per hour = \$2,380	1 \$0	\$2,380
Horizontal stabilizer conditional inspections, replacements, and repairs.	28 work-hours × \$85 per hour = \$2,380	1 \$0	2,380

¹ We have received no definitive data that would enable us to provide cost estimates for the parts for on-condition repairs.

Authority for This Rulemaking

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

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

This AD is issued in accordance with authority delegated by the Executive Director, Aircraft Certification Service, as authorized by FAA Order 8000.51C. In accordance with that order, issuance of ADs is normally a function of the

Compliance and Airworthiness Division, but during this transition period, the Executive Director has delegated the authority to issue ADs applicable to transport category airplanes to the Director of the System Oversight Division.

Regulatory Findings

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

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

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

under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2017–25–10 The Boeing Company:
Amendment 39–19124; Docket No. FAA–2017–0473; Product Identifier 2016–NM–195–AD.

(a) Effective Date

This AD is effective January 18, 2018.

(b) Affected ADs

None.

(c) Applicability

(1) This AD applies to all The Boeing Company Model 737-100, -200, -200C, -300, -400, and -500 series airplanes, certificated in any category.

(2) Installation of Supplemental Type Certificate (STC) ST01219SE ([http://rgl.faa.gov/Regulatory and Guidance Library/rgstc.nsf/0/ebd1cec7b301293e86257cb30045557a/\\$FILE/ST01219SE.pdf](http://rgl.faa.gov/Regulatory%20and%20Guidance%20Library/rgstc.nsf/0/ebd1cec7b301293e86257cb30045557a/$FILE/ST01219SE.pdf)) does not affect the ability to accomplish the actions required by this AD. Therefore, for airplanes on which STC ST01219SE is installed, a "change in product" alternative method of compliance (AMOC) approval request is not necessary to comply with the requirements of 14 CFR 39.17.

(d) Subject

Air Transport Association (ATA) of America Code 55, Stabilizers.

(e) Unsafe Condition

This AD was prompted by a report indicating that wear of the bearing plate slider bushings could cause disconnection of elevator hinge number 4 or number 6, which could excite the horizontal stabilizer under certain in-flight speed/altitude conditions and lead to degradation of the structure, departure of the elevator or horizontal stabilizer from the airplane, and loss of continued safe flight and landing.

(f) Compliance

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

(g) Actions for Group 1 Airplanes

For airplanes identified as Group 1 in Boeing Alert Service Bulletin 737-55A1099, Revision 1, dated October 21, 2016: Within 120 days after the effective date of this AD, do inspections and checks of the elevator and horizontal stabilizer at elevator hinge numbers 4 and 6 and the replacement and test of the bearing plate at elevator hinge numbers 4 and 6, and do all applicable related investigative and corrective actions, using a method approved in accordance with the procedures specified in paragraph (m) of this AD.

(h) Inspections and Checks for Groups 2 and 3 Airplanes

For airplanes identified as Groups 2 and 3 in Boeing Alert Service Bulletin 737-55A1099, Revision 1, dated October 21, 2016: Except as required by paragraph (j)(1) of this AD, at the applicable time specified in paragraph 1.E., "Compliance," of Boeing Alert Service Bulletin 737-55A1099, Revision 1, dated October 21, 2016, do the applicable inspections and checks of elevator hinge numbers 4 and 6 and related components specified in paragraphs (h)(1) through (h)(8) of this AD, and do all applicable related investigative and corrective actions, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 737-55A1099, Revision 1, dated October 21, 2016, except as required by paragraph (j)(2) of this AD. Do all applicable

related investigative and corrective actions before further flight. Repeat the actions specified in paragraphs (h)(1) through (h)(8) of this AD thereafter at the applicable times specified in paragraph 1.E., "Compliance," of Boeing Alert Service Bulletin 737-55A1099, Revision 1, dated October 21, 2016.

(1) For Groups 2 and 3 airplanes: A high frequency eddy current (HFEC) inspection for cracking of the elevator hinge numbers 4 and 6.

(2) For Groups 2 and 3 airplanes: A loose bolt check at elevator hinge numbers 4 and 6.

(3) For Groups 2 and 3 airplanes: An HFEC inspection and low frequency eddy current (LFEC) inspection for cracking of the horizontal stabilizer forward of elevator hinge numbers 4 and 6.

(4) For Groups 2 and 3 airplanes: A loose bolt check of horizontal stabilizer attach plates at elevator hinge numbers 4 and 6.

(5) For Groups 2 and 3 airplanes: A detailed inspection of the horizontal stabilizer rear spar outer mold line, gusset plate, and inspar skin for any corrosion.

(6) For Group 2, Configuration 2, and Group 3 airplanes: A general visual inspection of the elevator front spar around hinge numbers 4 and 6 for any ply damage.

(7) For Group 2 and 3 airplanes: A tap test inspection of the elevator skin for any delamination at elevator hinge numbers 4 and 6.

(8) For Group 2, Configuration 2, and Group 3 airplanes on which elevator hinge fitting assembly 65C31307-() is installed at elevator hinge number 6: An HFEC inspection of the hinge fitting for any crack.

(i) Repetitive Bearing Plate Replacement and Test

For airplanes identified as Group 2, Configuration 2, and Group 3 in Boeing Alert Service Bulletin 737-55A1099, Revision 1, dated October 21, 2016: Except as required by paragraph (j)(1) of this AD, at the applicable time specified in paragraph 1.E., "Compliance," of Boeing Alert Service Bulletin 737-55A1099, Revision 1, dated October 21, 2016, do the actions specified in paragraphs (i)(1) and (i)(2) of this AD, and do all applicable related investigative and corrective actions, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 737-55A1099, Revision 1, dated October 21, 2016, except as required by paragraph (j)(2) of this AD. All applicable related investigative and corrective actions must be done before further flight. Repeat the actions specified in paragraphs (i)(1) and (i)(2) of this AD thereafter at the applicable time specified in paragraph 1.E., "Compliance," of Boeing Alert Service Bulletin 737-55A1099, Revision 1, dated October 21, 2016.

(1) Replace the bearing plates at elevator hinge numbers 4 and 6.

(2) Do an elevator hinge bearing plate binding test at elevator hinge numbers 4 and 6.

(j) Exceptions to Service Information Specifications

(1) Where Boeing Alert Service Bulletin 737-55A1099, Revision 1, dated October 21,

2016, specifies a compliance time "after the original issue date of this Service Bulletin," this AD requires compliance within the specified compliance time after the effective date of this AD.

(2) Although Boeing Alert Service Bulletin 737-55A1099, Revision 1, dated October 21, 2016, specifies to contact Boeing for repair instructions, and specifies that action as "RC" (Required for Compliance), this AD requires repair before further flight using a method approved in accordance with the procedures specified in paragraph (m) of this AD.

(k) Parts Installation Limitation

As of the effective date of this AD: A horizontal stabilizer, an elevator, or a bearing plate may be installed on any airplane, provided the actions required by paragraphs (h) and (i) of this AD are done within the applicable compliance times specified in paragraphs (h) and (i) of this AD.

(l) Credit for Previous Actions

This paragraph provides credit for the actions specified in paragraphs (h) and (i) of this AD, if those actions were performed before the effective date of this AD using Boeing Alert Service Bulletin 737-55A1099, dated July 5, 2016.

(m) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Los Angeles ACO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (n) of this AD. Information may be emailed to: 9-ANM-LAACO-AMOC-Requests@faa.gov.

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

(3) An AMOC that provides an acceptable level of safety may be used for any repair, modification, or alteration required by this AD if it is approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Los Angeles ACO Branch, to make those findings. To be approved, the repair method, modification deviation, or alteration deviation must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(4) Except as required by paragraph (j)(2) of this AD: For service information that contains steps that are labeled as Required for Compliance (RC), the provisions of paragraphs (m)(4)(i) and (m)(4)(ii) of this AD apply.

(i) The steps labeled as RC, including substeps under an RC step and any figures identified in an RC step, must be done to comply with the AD. If a step or substep is labeled "RC Exempt," then the RC requirement is removed from that step or substep. An AMOC is required for any

deviations to RC steps, including substeps and identified figures.

(ii) Steps not labeled as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the RC steps, including substeps and identified figures, can still be done as specified, and the airplane can be put back in an airworthy condition.

(n) Related Information

For more information about this AD, contact George Garrido, Aerospace Engineer, Airframe Section, FAA, Los Angeles ACO Branch, 3960 Paramount Boulevard, Lakewood, CA 90712-4137; phone: 562-627-5357; fax: 562-627-5210; email: george.garrido@faa.gov.

(o) Material Incorporated by Reference

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

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

(i) Boeing Alert Service Bulletin 737-55A1099, Revision 1, dated October 21, 2016.

(ii) Reserved.

(3) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminister Blvd., MC 110-SK57, Seal Beach, CA 90740-5600; telephone 562-797-1717; internet <https://www.myboeingfleet.com>.

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

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

Issued in Renton, Washington, on December 4, 2017.

Jeffrey E. Duven,

Director, System Oversight Division, Aircraft Certification Service.

[FR Doc. 2017-26619 Filed 12-13-17; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA-2017-0911; Product Identifier 2017-CE-025-AD; Amendment 39-19121; AD 2017-25-07]

RIN 2120-AA64

Airworthiness Directives; Alexander Schleicher GmbH & Co. Segelflugzeugbau Gliders

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

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for all Alexander Schleicher GmbH & Co. Segelflugzeugbau Models ASH 25M and ASH 26E gliders. This AD results from mandatory continuing airworthiness information (MCAI) issued by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as fatigue cracks found on the exhaust silencer. We are issuing this AD to require actions to address the unsafe condition on these products.

DATES: This AD is effective January 18, 2018.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 18, 2018.

ADDRESSES: You may examine the AD docket on the internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2017-0911; or in person at Document Management Facility, U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590.

For service information identified in this AD, contact Alexander Schleicher GmbH & Co. Segelflugzeugbau, Alexander-Schleicher-Str. 1, D-36163 Poppenhausen, Germany; phone: +49 (0) 06658 89-0; fax: +49 (0) 06658 89-40; internet: <http://www.alexander-schleicher.de>; email: info@alexander-schleicher.de. You may view this referenced service information at the FAA, Policy and Innovation Division, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329-4148. It is also available on the internet at <http://www.regulations.gov> by searching for Docket No. FAA-2017-0911.

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

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to all Alexander Schleicher GmbH & Co. Segelflugzeugbau Models ASH 25M and ASH 26E gliders. The NPRM was published in the **Federal Register** on September 22, 2017 (82 FR 44361). The NPRM proposed to correct an unsafe condition for the specified products and was based on mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country. The MCAI states:

Occurrences were reported of finding cracks on exhaust silencer part number (P/N) 800.65.0001, installed on ASK 21 Mi powered sailplanes. Subsequent investigation determined that the affected part is susceptible to fatigue cracking and is also installed on other Schleicher powered sailplanes.

This condition, if not corrected, could lead to heat damage in the engine compartment and to the engine installation, possibly resulting in reduced control of the powered sailplane.

To address this potentially unsafe condition, Schleicher issued Technical Note (TN) ASK 21 Mi No. 11, TN ASW 22 BLE 50R No. 16, TN ASH 25 M/Mi No. 32 and TN ASH 26 E No. 19 (single document, hereafter referred to as 'the TN' in this [EASA] AD), to provide replacement instructions.

For the reasons described above, this [EASA] AD requires replacement of the affected exhaust silencer with an improved part and introduces installation restrictions of a part with P/N 800.65.0001.

The MCAI can be found in the AD docket on the internet at <https://www.regulations.gov/document?D=FAA-2017-0911-0002>.

Comments

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

Conclusion

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

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

Related Service Information Under 1 CFR Part 51

We reviewed Alexander Schleicher GmbH & Co. Segelflugzeugbau ASK 21 Mi Technical Note No. 11, ASW 22 BLE 50R Technical Note No. 16, ASH 25 M/ Mi Technical Note No. 32, ASH 26 E Technical Note No. 19 (single document), dated January 8, 2016. The service information describes procedures for replacing the exhaust silencer with an improved part. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section of this AD.

Costs of Compliance

We estimate that this AD will affect 35 products of U.S. registry. We also estimate that it will take about 8 work-hours per product to comply with the basic requirements of this AD. The average labor rate is \$85 per work-hour. Required parts will cost about \$3,900 per product.

Based on these figures, we estimate the cost of this AD on U.S. operators to be \$160,300, or \$4,580 per product.

We have no way of determining the number of products that have an affected exhaust silencer, part number 800.65.0001, installed that will need to be replaced. Therefore, this cost estimate includes all affected gliders on the U.S. registry.

Authority for This Rulemaking

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

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

products identified in this rulemaking action.

This AD is issued in accordance with authority delegated by the Executive Director, Aircraft Certification Service, as authorized by FAA Order 8000.51C. In accordance with that order, issuance of ADs is normally a function of the Compliance and Airworthiness Division, but during this transition period, the Executive Director has delegated the authority to issue ADs applicable to small airplanes, gliders, and domestic business jet transport airplanes to the Director of the Policy and Innovation Division.

Regulatory Findings

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

For the reasons discussed above, I certify this AD:

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

Examining the AD Docket

You may examine the AD docket on the internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2017-0911; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains the NPRM, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone (800) 647-5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator,

the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2017-25-07 Alexander Schleicher GmbH & Co. Segelflugzeugbau: Amendment 39-19121; Docket No. FAA-2017-0911; Product Identifier 2017-CE-025-AD.

(a) Effective Date

This airworthiness directive (AD) becomes effective January 18, 2018.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Alexander Schleicher GmbH & Co. Segelflugzeugbau Models ASH 25M and ASH 26E gliders, all serial numbers, that:

- (1) Have an exhaust silencer, part number (P/N) 800.65.0001, installed; and
- (2) are certificated in any category.

(d) Subject

Air Transport Association of America (ATA) Code 78: Engine Exhaust.

(e) Reason

This AD was prompted by mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as fatigue cracks found on the exhaust silencer. We are issuing this AD to prevent heat damage in the engine compartment and to the engine installation, which could result in reduced control.

(f) Actions and Compliance

Unless already done, do the following actions:

- (1) Before exceeding 150 hours time-in-service (TIS) on the exhaust silencer, P/N 800.65.0001, since new, or within the next 5 hours TIS after January 18, 2018 (the effective date of this AD), whichever occurs later, replace P/N 800.65.0001 with an improved exhaust silencer, P/N 800.65.9010. Do the replacement as specified in Alexander Schleicher GmbH & Co. Segelflugzeugbau ASK 21 Mi Technical Note No. 11, ASW 22 BLE 50 R Technical Note No. 16, ASH 25 M/ Mi Technical Note No. 32, ASH 26 E Technical Note No. 19 (single document), dated January 8, 2016.

- (2) As of January 18, 2018 (the effective date of this AD), do not install a P/N 800.65.0001 exhaust silencer.

(g) Other FAA AD Provisions

The following provisions also apply to this AD:

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

(2) *Contacting the Manufacturer*: For any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, Small Airplane Standards Branch, FAA; or the European Aviation Safety Agency (EASA).

(h) Related Information

Refer to MCAI EASA AD 2017-0136, dated July 31, 2017, for related information. You may examine the MCAI on the internet at <https://www.regulations.gov/document?D=FAA-2017-0911-0002>.

(i) Material Incorporated by Reference

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

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

(i) Alexander Schleicher GmbH & Co. Segelflugzeugbau ASK 21 Mi Technical Note No. 11, ASW 22 BLE 50R Technical Note No. 16, ASH 25 M/Mi Technical Note No. 32, ASH 26 E Technical Note No. 19 (single document), dated January 8, 2016.

(ii) Reserved.

(3) For Alexander Schleicher GmbH & Co. Segelflugzeugbau service information identified in this AD, contact Alexander Schleicher GmbH & Co. Segelflugzeugbau, Alexander-Schleicher-Str. 1, D-36163 Poppenhausen, Germany; phone: +49 (0) 06658 89-0; fax: +49 (0) 06658 89-40; internet: <http://www.alexander-schleicher.de>; email: info@alexander-schleicher.de.

(4) You may view this service information at the FAA, Policy and Innovation Division, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329-4148. In addition, you can access this service information on the internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2017-0911.

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

Issued in Kansas City, Missouri, on December 1, 2017.

Melvin J. Johnson,

Deputy Director, Policy & Innovation Division, Aircraft Certification Service.

[FR Doc. 2017-26620 Filed 12-13-17; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA-2017-0714; Product Identifier 2017-NM-042-AD; Amendment 39-19123; AD 2017-25-09]

RIN 2120-AA64

Airworthiness Directives; Airbus Airplanes

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

ACTION: Final rule.

SUMMARY: We are superseding Airworthiness Directive (AD) 2012-21-04, which applied to all Airbus Model A300 series airplanes; Model A310 series airplanes; and Model A300 B4-600, B4-600R, and F4-600R series airplanes, and Model A300 C4-605R Variant F airplanes (collectively called Model A300-600 series airplanes).

AD 2012-21-04 required repetitive inspections for, and replacement of, any cracked hood halves of fuel pump canisters. Since we issued AD 2012-21-04, we allowed inspections of the wing-outer tank and trim tank fuel pump canister hood halves to be terminated.

This new AD retains the requirements of AD 2012-21-04, reinstates the terminated inspections, and adds optional terminating actions. This AD was prompted by reports of cracked fuel pump canister hoods located in fuel tanks and new in-service events of wing-outer tank fuel pump canister hood cracking. We are issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective January 18, 2018.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of January 18, 2018.

The Director of the Federal Register approved the incorporation by reference of certain other publications listed in this AD as of November 27, 2012 (77 FR 64701, October 23, 2012).

ADDRESSES: For service information identified in this final rule, contact Airbus SAS, Airworthiness Office—

EAW, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone: +33 5 61 93 36 96; fax: +33 5 61 93 44 51; email: account.airworth-eas@airbus.com; internet: <http://www.airbus.com>. You may view this referenced service information at the FAA, Transport Standards Branch, 1601 Lind Avenue SW, Renton, WA. For information on the availability of this material at the FAA, call 425-227-1221. It is also available on the internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2017-0714.

Examining the AD Docket

You may examine the AD docket on the internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2017-0714; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (telephone: 800-647-5527) is Docket Management Facility, U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Dan Rodina, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 1601 Lind Avenue SW, Renton, WA 98057-3356; telephone: 425-227-2125; fax: 425-227-1149.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2012-21-04, Amendment 39-17220 (77 FR 64701, October 23, 2012) (“AD 2012-21-04”). AD 2012-21-04 applied to all Airbus Model A300 series airplanes; Model A310 series airplanes; and Model A300 B4-600, B4-600R, and F4-600R series airplanes, and Model A300 C4-605R Variant F airplanes (collectively called Model A300-600 series airplanes).

The NPRM published in the **Federal Register** on August 2, 2017 (82 FR 35911). The NPRM was prompted by reports of cracked fuel pump canister hoods located in fuel tanks and new in-service events of wing-outer tank fuel pump canister hood cracking. The NPRM proposed to retain the requirements of AD 2012-21-04, reinstate terminated inspections, and add optional terminating actions. We

are issuing this AD to prevent any detached canister hood fragments/debris from being ingested into the fuel feed system, and becoming a potential source of ignition with consequent fire or explosion.

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2017-0051, dated March 23, 2017 (referred to after this as the Mandatory Continuing Airworthiness Information, or “the MCAI”), to correct an unsafe condition for all Airbus Model A300 series airplanes; Model A310 series airplanes; and Model A300-600 series airplanes. The MCAI states:

Reports were received of finding cracked fuel pump canister hoods located in fuel tanks on in-service aeroplanes. Initial analyses, laboratory testing and examinations suggested that vibration-induced fatigue could have caused these cracks. However, initial data could not exclude some other potential contributing factors.

This condition, if not detected and corrected, could lead to detached canister hood fragments or debris being ingested into the fuel feed system. In addition, metallic debris inside the fuel tank could result in a potential source of fuel vapour ignition, possibly resulting in a fire or fuel tank explosion and consequent loss of the aeroplane.

To address this potential unsafe condition, EASA issued AD 2011-0124 (later revised) [FAA AD 2012-21-04 corresponds to EASA AD 2011-0124] to require repetitive inspections of the canister hood halves installed on all fuel pump canisters and, if any damage was found, replacement. EASA AD 2011-0124R1 introduced an optional terminating action for the wing inner and centre fuel tanks, and cancelled the repetitive inspections of the fuel pump canister hoods in outer wing and trim tanks, for which no cracks had been reported following the initial inspection.

Since that [EASA] AD was issued, new in service events of outer tank fuel pump canister hood cracking have been reported. Consequently, the canister hoods of the outer tank fuel pumps and trim tank fuel pumps will need to be inspected.

For the reasons described above, this [EASA] AD retains the requirements of EASA AD 2011-0124R1, which is superseded, retaining the repetitive inspections of fuel pump canister hoods in wing inner and centre tanks, and reintroduces repetitive detailed inspections (DET) for outer tank and trim tank fuel pump canister hoods. This [EASA] AD also retains the existing optional terminating action for the repetitive DET of wing inner and centre tank fuel pump canister hoods, and introduces a new optional terminating action for the repetitive DET of the outer and trim tank fuel pump canister hoods required by this [EASA] AD.

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

and locating Docket No. FAA-2017-0714.

Comments

We gave the public the opportunity to participate in developing this AD. We considered the comment received. The commenter, John Sanderson, supported the NPRM.

Conclusion

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

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

Related Service Information Under 1 CFR Part 51

Airbus has issued the following service information.

- Airbus Service Bulletin A300-28-0089, Revision 03, dated December 16, 2016. This service information describes procedures for repetitive detailed inspections of all fuel pump locations (center, wing-inner, and wing-outer tank), and replacing any cracked hood halves of fuel pump canisters.
- Airbus Service Bulletin A300-28-0092, Revision 01, dated August 29, 2014; Airbus Service Bulletin A300-28-6110, Revision 01, dated August 29, 2014; and Airbus Service Bulletin A310-28-2175, Revision 01, dated August 29, 2014. This service information describes procedures for replacement of the hood halves of the fuel pump canisters with newer design hood halves for the wing-inner tank and the center tank fuel pumps. These documents are distinct since they apply to different airplane models.
- Airbus Service Bulletin A300-28-0094, Revision 00, dated January 9, 2017. This service information describes procedures for replacement of the hood halves of the fuel pump canisters with newer design hood halves for the wing-outer tank.
- Airbus Service Bulletin A300-28-6106, Revision 03, dated December 16, 2016; and Airbus Service Bulletin A310-28-2173, Revision 03, dated December 16, 2016. This service information describes procedures for repetitive detailed inspections of all fuel pump locations (center, wing-inner, wing-outer, and trim tank), and replacing any cracked hood halves of fuel pump canisters. These documents

are distinct since they apply to different airplane models.

- Airbus Service Bulletin A300-28-6114, Revision 00, dated January 9, 2017; and Airbus Service Bulletin A310-28-2178, Revision 00, dated January 9, 2017. This service information describes procedures for replacement of the hood halves of the fuel pump canisters with newer design hood halves for the wing-outer tank and the trim tank fuel pumps. These documents are distinct since they apply to different airplane models.

This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the ADDRESSES section.

Costs of Compliance

We estimate that this AD affects 168 airplanes of U.S. registry.

The actions required by AD 2012-21-04, and retained in this AD take about 12 work-hours per product, at an average labor rate of \$85 per workhour. Based on these figures, the estimated cost of the actions that are required by AD 2012-21-04 is \$1,020 per product.

We also estimate that it will take about 9 work-hours per product to comply with the new basic requirements of this AD, at an average labor rate of \$85 per work-hour. Based on these figures, we estimate the cost of the new basic requirements of this AD on U.S. operators to be \$128,520, or \$765 per product.

In addition, we estimate that the optional terminating actions will take about 1 work-hour and require parts costing \$255, for a cost of \$340 per product. We have no way of determining the number of aircraft that might need these actions.

Authority for This Rulemaking

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

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

products identified in this rulemaking action.

This AD is issued in accordance with authority delegated by the Executive Director, Aircraft Certification Service, as authorized by FAA Order 8000.51C. In accordance with that order, issuance of ADs is normally a function of the Compliance and Airworthiness Division, but during this transition period, the Executive Director has delegated the authority to issue ADs applicable to transport category airplanes to the Director of the System Oversight Division.

Regulatory Findings

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

- 2. The FAA amends § 39.13 by removing Airworthiness Directive (AD) 2012–21–04, Amendment 39–17220 (77 FR 64701, October 23, 2012), and adding the following new AD:

2017–25–09 Airbus: Amendment 39–19123; Docket No. FAA–2017–0714; Product Identifier 2017–NM–042–AD.

(a) Effective Date

This AD is effective January 18, 2018.

(b) Affected ADs

This AD replaces AD 2012–21–04, Amendment 39–17220 (77 FR 64701, October 23, 2012) (“AD 2012–21–04”).

(c) Applicability

This AD applies to the airplanes identified in paragraphs (c)(1), (c)(2), and (c)(3) of this AD, certificated in any category, all certificated models, all manufacturer serial numbers.

(1) Airbus Model A300 B2–1A, B2–1C, B2K–3C, B2–203, B4–2C, B4–103, and B4–203 airplanes.

(2) Airbus Model A310–203, –204, –221, –222, –304, –322, –324, and –325 airplanes.

(3) Airbus Model A300 B4–601, B4–603, B4–620, and B4–622 airplanes, Model A300 B4–605R and B4–622R airplanes, Model A300 F4–605R and F4–622R airplanes, and Model A300 C4–605R Variant F airplanes.

(d) Subject

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

(e) Reason

This AD was prompted by reports of cracked fuel pump canister hoods located in fuel tanks and new in-service events of wing-outer tank fuel pump canister hood cracking. We are issuing this AD to prevent any detached canister hood fragments/debris from being ingested into the fuel feed system, and becoming a potential source of ignition with consequent fire or explosion.

(f) Compliance

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

(g) Retained Initial Inspection and Replacement, With Revised Requirements and Service Information

This paragraph restates the requirements of paragraph (g) of AD 2012–21–04, with revised requirements and service information. Within 30 months after November 27, 2012 (the effective date of AD 2012–21–04), do a detailed inspection for cracking of the fuel pump canister hood halves installed on all center and wing-inner tank fuel pump canisters having part numbers (P/N) 2052C11, 2052C12, and C93R51–601, in accordance with the Accomplishment Instructions of the service bulletin specified in paragraph (g)(1), (g)(2), or (g)(3) of this AD, as applicable. If any crack is found on any fuel pump canister hood half during any inspection, before further flight, replace the fuel pump canister hood half, in accordance with the Accomplishment Instructions of the service bulletin specified in paragraph (g)(1), (g)(2), or (g)(3) of this AD, as applicable.

(1) For Model A300 series airplanes: Airbus Mandatory Service Bulletin A300–28–0089, Revision 01, including Inspection Findings—Reporting Sheet, dated April 15, 2011; or Airbus Service Bulletin A300–28–0089, Revision 03, dated December 16, 2016. As of the effective date of this AD, only use

Airbus Service Bulletin A300–28–0089, Revision 03, dated December 16, 2016.

(2) For Model A300–600 series airplanes: Airbus Mandatory Service Bulletin A300–28–6106, Revision 01, including Inspection Findings—Reporting Sheet, dated April 15, 2011; or Airbus Service Bulletin A300–28–6106, Revision 03, dated December 16, 2016. As of the effective date of this AD, only use Airbus Service Bulletin A300–28–6106, Revision 03, dated December 16, 2016.

(3) For Model A310 series airplanes: Airbus Mandatory Service Bulletin A310–28–2173, Revision 01, including Inspection Findings—Reporting Sheet, dated April 15, 2011; or Airbus Service Bulletin A310–28–2173, Revision 03, dated December 16, 2016. As of the effective date of this AD, only use Airbus Service Bulletin A310–28–2173, Revision 03, dated December 16, 2016.

(h) Retained Repetitive Inspections, With No Changes

This paragraph restates the requirements of paragraph (h) of AD 2012–21–04, with no changes. Within 30 months after accomplishing the actions specified in paragraph (g) of this AD, and thereafter at intervals not to exceed 30 months, repeat the detailed inspection specified in paragraph (g) of this AD.

(i) New Repetitive Inspections and Replacement of the Wing-Outer Tank and Trim Tank Fuel Pump Canister Hood Halves

Within 30 months after the effective date of this AD, do a detailed inspection for cracking of the wing-outer tank and trim tank, as applicable, fuel pump canister hood halves installed on all fuel pump canisters having P/Ns 2052C11, 2052C12, and C93R51–601, in accordance with the Accomplishment Instructions of the service bulletin specified in paragraph (i)(1), (i)(2), or (i)(3) of this AD, as applicable. Repeat the inspection thereafter at intervals not to exceed 30 months. If any crack is found on any fuel pump canister hood half during any inspection, before further flight, replace the fuel pump canister hood half, in accordance with the Accomplishment Instructions of the service bulletin specified in paragraph (i)(1), (i)(2), or (i)(3) of this AD, as applicable.

(1) For Model A300 series airplanes: Airbus Service Bulletin A300–28–0089, Revision 03, dated December 16, 2016.

(2) For Model A300–600 series airplanes: Airbus Service Bulletin A300–28–6106, Revision 03, dated December 16, 2016.

(3) For Model A310 series airplanes: Airbus Service Bulletin A310–28–2173, Revision 03, dated December 16, 2016.

(j) New Optional Terminating Actions

Replacement of the fuel pump canister hood halves installed on all fuel pump canisters having P/Ns 2052C11, 2052C12, and C93R51–601, constitutes terminating action for the inspections required by paragraphs (g) and (h) of this AD for that airplane. The replacement of the fuel pump canister hood halves must be done in accordance with the Accomplishment Instructions of the service information specified in paragraph (j)(1), (j)(2), or (j)(3) of this AD, as applicable.

(1) For Model A300 series airplanes: Airbus Service Bulletin A300–28–0092, Revision 01, dated August 29, 2014 (for center and wing-inner tank fuel pump canister hood halves); and Airbus Service Bulletin A300–28–0094, Revision 00, dated January 9, 2017 (for wing-outer tank fuel pump canister hood halves).

(2) For Model A300–600 series airplanes: Airbus Service Bulletin A300–28–6110, Revision 01, dated August 29, 2014 (for center and wing-inner tank fuel pump canister hood halves); and Airbus Service Bulletin A300–28–6114, Revision 00, dated January 9, 2017 (for wing-outer tank and trim tank fuel pump canister hood halves).

(3) For Model A310 series airplanes: Airbus Service Bulletin A310–28–2175, Revision 01, dated August 29, 2014 (for center and wing-inner tank fuel pump canister hood halves); and Airbus Service Bulletin A310–28–2178, Revision 00, dated January 9, 2017 (for wing-outer tank and trim tank fuel pump canister hood halves).

(k) Credit for Previous Actions

(1) This paragraph provides credit for the actions required by paragraph (g) of this AD, if those actions were performed before the effective date of this AD using the applicable service information specified in paragraph (k)(1)(i), (k)(1)(ii), or (k)(1)(iii) of this AD.

(i) Airbus Service Bulletin A300–28–0089, dated January 13, 2011; or Airbus Service Bulletin A300–28–0089, Revision 02, dated April 25, 2014.

(ii) Airbus Service Bulletin A300–28–6106, dated January 13, 2011; or Airbus Service Bulletin A300–28–6106, Revision 02, dated April 25, 2014.

(iii) Airbus Service Bulletin A310–28–2173, dated January 13, 2011; or Airbus Service Bulletin A310–28–2173, Revision 02, dated April 25, 2014.

(2) This paragraph provides credit for the actions required by paragraph (h) of this AD, if those actions were performed before the effective date of this AD using the applicable service information specified in paragraph (k)(2)(i), (k)(2)(ii), or (k)(2)(iii) of this AD.

(i) Airbus Service Bulletin A300–28–0089, dated January 13, 2011; Airbus Mandatory Service Bulletin A300–28–0089, Revision 01, dated April 15, 2011; or Airbus Service Bulletin A300–28–0089, Revision 02, dated April 25, 2014.

(ii) Airbus Service Bulletin A300–28–6106, dated January 13, 2011; Airbus Mandatory Service Bulletin A300–28–6106, Revision 01, dated April 15, 2011; or Airbus Service Bulletin A300–28–6106, Revision 02, dated April 25, 2014.

(iii) Airbus Service Bulletin A310–28–2173, dated January 13, 2011; Airbus Mandatory Service Bulletin A310–28–2173, Revision 01, dated April 15, 2011; or Airbus Service Bulletin A310–28–2173, Revision 02, dated April 25, 2014.

(3) This paragraph provides credit for the actions specified in paragraph (j) of this AD, if those actions were performed before the effective date of this AD using Airbus Service Bulletin A300–28–6110, Revision 00, dated November 28, 2013.

(l) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs)*: The Manager, International Section, Transport Standards Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Section, send it to the attention of the person identified in paragraph (m)(2) of this AD. Information may be emailed to: 9-ANM-116-AMOC-REQUESTS@faa.gov.

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

(ii) AMOCs approved previously for AD 2012–21–04 are not approved as AMOCs with this AD.

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

(m) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA AD 2017–0051, dated March 23, 2017, for related information. This MCAI may be found in the AD docket on the internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA–2017–0714.

(2) For more information about this AD, contact Dan Rodina, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 1601 Lind Avenue SW, Renton, WA 98057–3356; telephone 425–227–2125; fax 425–227–1149.

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

(n) Material Incorporated by Reference

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

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

(3) The following service information was approved for IBR on January 18, 2018.

(i) Airbus Service Bulletin A300–28–0089, Revision 03, dated December 16, 2016.

(ii) Airbus Service Bulletin A300–28–0092, Revision 01, dated August 29, 2014.

(iii) Airbus Service Bulletin A300–28–0094, Revision 00, dated January 9, 2017.

(iv) Airbus Service Bulletin A300–28–6106, Revision 03, dated December 16, 2016.

(v) Airbus Service Bulletin A300–28–6110, Revision 01, dated August 29, 2014.

(vi) Airbus Service Bulletin A300–28–6114, Revision 00, dated January 9, 2017.

(vii) Airbus Service Bulletin A310–28–2173, Revision 03, dated December 16, 2016.

(viii) Airbus Service Bulletin A310–28–2175, Revision 01, dated August 29, 2014.

(ix) Airbus Service Bulletin A310–28–2178, Revision 00, dated January 9, 2017.

(4) The following service information was approved for IBR on November 27, 2012 (77 FR 64701, October 23, 2012).

(i) Airbus Mandatory Service Bulletin A300–28–0089, Revision 01, including Inspection Findings—Reporting Sheet, dated April 15, 2011.

(ii) Airbus Mandatory Service Bulletin A300–28–6106, Revision 01, including Inspection Findings—Reporting Sheet, dated April 15, 2011.

(iii) Airbus Mandatory Service Bulletin A310–28–2173, Revision 01, including Inspection Findings—Reporting Sheet, dated April 15, 2011.

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

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

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

Issued in Renton, Washington, on December 4, 2017.

Dionne Palermo,

Acting Director, System Oversight Division, Aircraft Certification Service.

[FR Doc. 2017–26627 Filed 12–13–17; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2017–1104; Product Identifier 2017–NM–153–AD; Amendment 39–19130; AD 2017–25–16]

RIN 2120–AA64

Airworthiness Directives; Airbus Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: We are adopting a new airworthiness directive (AD) for all Airbus Model A330–200, A330–200

Freighter, and A330–300 series airplanes; and Airbus Model A340–200, A340–300, A340–500, and A340–600 series airplanes. This AD requires repetitive inspections of certain fuel pumps for cavitation erosion, corrective action if necessary, and revision of the minimum equipment list (MEL). This AD was prompted by a report indicating that a fuel pump showing cavitation erosion breached the fuel pump housing and exposed the fuel pump power supply wires. We are issuing this AD to address the unsafe condition on these products.

DATES: This AD becomes effective December 29, 2017.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of December 29, 2017.

We must receive comments on this AD by January 29, 2018.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Fax:* 202–493–2251.

- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, 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.

For service information identified in this final rule, contact Airbus SAS, Airworthiness Office—EAL, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 45 80; email airworthiness.A330-A340@airbus.com; internet <http://www.airbus.com>. You may view this referenced service information at the FAA, Transport Standards Branch, 1601 Lind Avenue SW, Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221. It is also available on the internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA–2017–1104.

Examining the AD Docket

You may examine the AD docket on the internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA–2017–1104; or in person at the Docket

Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT:

Vladimir Ulyanov, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 1601 Lind Avenue SW, Renton, WA 98057–3356; telephone 425–227–1138; fax 425–227–1149.

SUPPLEMENTARY INFORMATION:

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA Airworthiness Directive 2017–0224, dated November 10, 2017 (referred to after this as the Mandatory Continuing Airworthiness Information, or “the MCAI”), to correct an unsafe condition for all Airbus Model A330–200, A330–200 Freighter, and Airbus Model A340–200, A340–300, A340–500, and A340–600 series airplanes. The MCAI states:

An occurrence was reported of a fuel pump showing cavitation erosion which breached the fuel pump housing through the inlet webs and exposed the fuel pump power supply wires. Inspections accomplished on fuel pumps removed from other aeroplanes identified signs of erosion in varying degrees. However, no other instance of break-through due to cavitation erosion was found. A list of potentially affected fuel pump Part Numbers (P/N) was established.

This condition, if not detected and corrected, could result, in case the pump is running dry, in an ignition source in the fuel tank, which may result in a fuel tank explosion and consequent loss of the aeroplane.

To address this potential unsafe condition, Airbus issued Alert Operators Transmission (AOT) A28L006–17 to provide instructions to inspect some fuel pumps when installed at specific positions, and to update the applicable Master Minimum Equipment List (MMEL).

For the reasons described above, this [EASA] AD requires repetitive inspections of these fuel pumps and, depending on findings, replacement of damaged fuel pumps with serviceable parts. This [EASA] AD also requires an update of the applicable MMEL, and the reporting of inspection results to Airbus.

This [EASA] AD is considered to be an interim measure and further [EASA] AD action may follow.

Although the MCAI requires updating the “master minimum equipment list

(MMEL),” this AD requires revising the “minimum equipment list (MEL).” The MMEL is a master list of the minimum equipment that the airplane can operate with under given circumstances. A MEL is derived from the MMEL and is tailored for individual operators. You may examine the MCAI on the internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA–2017–1104.

Related Service Information Under 1 CFR Part 51

Airbus has issued Alert Operators Transmission A28L006–17, Rev. 00, dated November 3, 2017. The service information describes procedures for inspection of certain fuel pumps for cavitation erosion, and corrective actions. The service information also describes dispatch restrictions that affect the MEL. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA’s Determination and Requirements of This AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are issuing this AD because we evaluated all pertinent information and determined the unsafe condition exists and is likely to exist or develop on other products of these same type designs.

FAA’s Determination of the Effective Date

An unsafe condition exists that requires the immediate adoption of this AD. The FAA has found that the risk to the flying public justifies waiving notice and comment prior to adoption of this rule because the unsafe condition could result in an ignition source in the fuel tank, which could result in a fuel tank explosion. Therefore, we determined that notice and opportunity for public comment before issuing this AD are impracticable and that good cause exists for making this amendment effective in fewer than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and we did not precede it by notice and opportunity for public comment. We invite you to send any written relevant

data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include “Docket No. FAA–2017–1104; Product Identifier 2017–NM–153–AD” at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of

this AD. We will consider all comments received by the closing date and may amend this AD based on those comments.

We will post all comments we receive, without change, to <http://www.regulations.gov>, including any personal information you provide. We will also post a report summarizing each

substantive verbal contact we receive about this AD.

Costs of Compliance

We estimate that this AD affects 107 airplanes of U.S. registry. We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection	4 work-hours × \$85 per hour = \$340 per inspection cycle.	\$0	\$340 per inspection cycle.	\$36,380 per inspection cycle.
Reporting	1 work-hour × \$85 per hour = \$85 per inspection cycle.	0	\$85 per inspection cycle	\$9,095 per inspection cycle.
MEL revision	1 work-hour × \$85 per hour = \$85	0	\$85	\$9,095.

We estimate the following costs to do any necessary replacements that would

be required based on the results of the inspection. We have no way of

determining the number of aircraft that might need these replacements:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Replacement	2 work-hours × \$85 per hour = \$170	\$8,000	\$8,170

Paperwork Reduction Act

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB control number. The control number for the collection of information required by this AD is 2120–0056. The paperwork cost associated with this AD has been detailed in the Costs of Compliance section of this document and includes time for reviewing instructions, as well as completing and reviewing the collection of information. Therefore, all reporting associated with this AD is mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at 800 Independence Ave. SW, Washington, DC 20591, ATTN: Information Collection Clearance Officer, AES–200.

Authority for This Rulemaking

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

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

This AD is issued in accordance with authority delegated by the Executive Director, Aircraft Certification Service, as authorized by FAA Order 8000.51C. In accordance with that order, issuance of ADs is normally a function of the Compliance and Airworthiness Division, but during this transition period, the Executive Director has delegated the authority to issue ADs applicable to transport category airplanes to the Director of the System Oversight Division.

Regulatory Findings

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

responsibilities among the various levels of government.

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2017-25-16 Airbus: Amendment 39-19130; Docket No. FAA-2017-1104; Product Identifier 2017-NM-153-AD.

(a) Effective Date

This AD becomes effective December 29, 2017.

(b) Affected ADs

None.

(c) Applicability

This AD applies to the Airbus airplanes identified in paragraphs (c)(1) through (c)(7) of this AD, certificated in any category, all manufacturer serial numbers.

- (1) Model A330-223F and -243F airplanes.
- (2) Model A330-201, -202, -203, -223, and -243 airplanes.
- (3) Model A330-301, -302, -303, -321, -322, -323, -341, -342, and -343 airplanes.
- (4) Model A340-211, -212, and -213 airplanes.
- (5) Model A340-311, -312, and -313 airplanes.
- (6) Model A340-541 airplanes.
- (7) Model A340-642 airplanes.

(d) Subject

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

(e) Reason

This AD was prompted by a report indicating that a fuel pump showing cavitation erosion breached the fuel pump housing and exposed the fuel pump power supply wires. We are issuing this AD to detect and correct cavitation erosion of certain fuel pumps, which could result, if the pump is running dry, in an ignition source in the fuel tank, and consequent fuel tank explosion.

(f) Compliance

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

(g) Definition of Affected Fuel Pump

(1) For the purpose of this AD, an affected fuel pump has part number (P/N) 568-1-

28300-101, P/N 568-1-28300-103, or P/N 568-1-28300-200, and is located at one of the positions specified in paragraph 3.3 of Airbus Alert Operators Transmission (AOT) A28L006-17, Rev. 00, dated November 3, 2017.

(2) A fuel pump having P/N 568-1-28300-101, P/N 568-1-28300-103, or P/N 568-1-28300-200 that is installed in locations other than those specified in paragraph 3.3 of Airbus AOT A28L006-17, Rev. 00, dated November 3, 2017, is not affected by the inspection requirements of paragraph (i) of this AD.

(h) Airplane Group Designations

For the purpose of this AD, airplane groups are designated as specified in paragraphs (h)(1) and (h)(2) of this AD.

- (1) Group 1 airplanes are equipped with an affected fuel pump.
- (2) Group 2 airplanes are not equipped with an affected fuel pump.

(i) Inspections

For Group 1 airplanes: Before an affected pump exceeds 10,000 flight hours since first installation on an airplane, or the applicable time specified in paragraph (i)(1) or (i)(2) of this AD, whichever occurs later, inspect all affected fuel pumps for cavitation erosion, in accordance with the instruction of Airbus AOT A28L006-17, Rev. 00, dated November 3, 2017. Repeat the inspection thereafter at intervals not to exceed the applicable time specified in table 1 to paragraph (i) of this AD.

(1) For a center tank, rear center tank, or aft transfer fuel pump: Within 30 days after the effective date of this AD.

(2) For a stand-by fuel pump: Within 40 days after the effective date of this AD.

TABLE 1 TO PARAGRAPH (i) OF THIS AD—REPETITIVE INSPECTION INTERVALS

Erosion—as defined in the AOT	Inspection interval in flight hours
No erosion	5,000
Case 1: Light erosion	5,000
Case 2: Medium erosion	800

TABLE 2 TO PARAGRAPH (l)(2) OF THIS AD—AMENDMENT TO MEL ITEMS 28-27-06 AND 28-27-07

Applicability	MEL amendment
Model A340-500 and A340-600 series airplanes.	MEL Items 28-27-06 and 28-27-07 can be applied, provided that the related circuit breaker is pulled and tagged for the duration of the MEL item.

(m) Reporting

At the applicable time specified in paragraph (m)(1) or (m)(2) of this AD: Report the results (including no findings) of each inspection required by paragraph (i) of this AD to *inspection.results@airbus.com*, in accordance with the instructions in Airbus AOT A28L006-17, Rev. 00, dated November 3, 2017.

(1) If the inspection was done on or before the effective date of this AD: Report within 10 days after the effective date of this AD.

(2) If the inspection was done after the effective date of this AD: Report within 10 days after the inspection.

(n) Other FAA AD Provisions

The following provisions also apply to this AD:

(j) Corrective Actions

If, during any inspection required by paragraph (i) of this AD, severe erosion (Case 3), as specified in Airbus AOT A28L006-17, Rev. 00, dated November 3, 2017, is found on a fuel pump: Before further flight, replace that fuel pump with a serviceable part, or deactivate that fuel pump as specified in the minimum equipment list (MEL), in accordance with the instructions of Airbus AOT A28L006-17, Rev. 00, dated November 3, 2017.

(k) Part Installation Limitations

(1) As of the effective date of this AD, a fuel pump having P/N 568-1-28300-101, P/N 568-1-28300-103, or P/N 568-1-28300-200 may be installed on an airplane, provided that the part is new, or, prior to installation, the part has passed the inspection (no erosion or Case 1: Light erosion) required by paragraph (i) of this AD and, following installation, the part is inspected within the applicable repetitive intervals and as required by paragraph (i) of this AD.

(2) As of the effective date of this AD, a fuel pump having P/N 568-1-28300-101, P/N 568-1-28300-103, or P/N 568-1-28300-200, with Case 2 (medium erosion), as specified in Airbus AOT A28L006-17, Rev. 00, dated November 3, 2017, may be installed on an airplane provided the fuel pump is not installed at a location specified in paragraph 3.3 of Airbus AOT A28L006-17, Rev. 00, dated November 3, 2017.

(l) MEL Revision

(1) Within 30 days after the effective date of this AD, revise the applicable MEL, in accordance with the instructions of Airbus AOT A28L006-17, Rev. 00, dated November 3, 2017, and thereafter operate the airplane accordingly.

(2) For Model A340-500 and A340-600 airplanes: In addition to the MEL revision required by paragraph (l)(1) of this AD, revise the applicable MEL to include the information specified in table 2 to paragraph (l)(2) of this AD, and thereafter operate the airplane accordingly.

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Section, Transport Standards Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Section, send it to the attention of the person identified in

paragraph (o)(2) of this AD. Information may be emailed to: 9-ANM-116-AMOC-REQUESTS@faa.gov. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, International Section, Transport Standards Branch, FAA; or the European Aviation Safety Agency (EASA); or Airbus's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(o) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA Airworthiness Directive 2017-0224, dated November 10, 2017, for related information. You may examine the MCAI on the internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2017-1104.

(2) For more information about this AD, contact Vladimir Ulyanov, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 1601 Lind Avenue SW, Renton, WA 98057-3356; telephone 425-227-1138; fax 425-227-1149.

(p) Material Incorporated by Reference

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

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

(i) Airbus Alert Operators Transmission A28L006-17, Rev. 00, dated November 3, 2017.

(ii) Reserved.

(3) For service information identified in this AD, contact Airbus SAS, Airworthiness Office—EAL, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 45 80; email airworthiness.A330-A340@airbus.com; internet <http://www.airbus.com>.

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

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

Issued in Renton, Washington, on December 4, 2017.

Dionne Palermo,

Acting Director, System Oversight Division, Aircraft Certification Service.

[FR Doc. 2017-26842 Filed 12-13-17; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 91

[Docket No.: FAA-2015-8672; Amdt. No. 91-340A]

RIN 2120-AL27

Amendment of the Prohibition Against Certain Flights in Specified Areas of the Sanaa (OYSC) Flight Information Region

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

ACTION: Final rule.

SUMMARY: This action amends the Special Federal Aviation Regulation (SFAR) that prohibits certain flights in specified areas of the Sanaa (OYSC) Flight Information Region (FIR) by all: United States (U.S.) air carriers; U.S. commercial operators; persons exercising the privileges of an airman certificate issued by the FAA, except when such persons are operating U.S.-registered aircraft for a foreign air carrier; and operators of U.S.-registered civil aircraft, except where the operator of such aircraft is a foreign air carrier. There has been a reduction in the level of risk to U.S. civil aviation operations in limited portions of the specified areas of the Sanaa (OYSC) Flight Information region (FIR) where the FAA had prohibited flight operations under the SFAR. As a result, the FAA is reducing the amount of airspace in the Sanaa (OYSC) FIR in which U.S. civil aviation operations are prohibited. However, there continues to be an unacceptable level of risk to U.S. civil aviation operations in the remainder of the specified areas of the Sanaa (OYSC) FIR, as described in this rule, resulting from terrorist and militant activity. Consequently, the FAA is also amending this SFAR to extend its expiration date. The FAA is also republishing, with minor revisions, the approval process and exemption information for this SFAR.

DATES: This final rule is effective on December 14, 2017.

FOR FURTHER INFORMATION CONTACT: Michael Filippell, Air Transportation Division, Flight Standards Service, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone (202) 267-8166; email michael.e.filippell@faa.gov.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

This action amends the prohibition of flight operations in specified areas of the Sanaa (OYSC) FIR by all: U.S. air carriers; U.S. commercial operators; persons exercising the privileges of an airman certificate issued by the FAA, except when such persons are operating U.S.-registered aircraft for a foreign air carrier; and operators of U.S.-registered civil aircraft, except where the operator of such aircraft is a foreign air carrier. Due to a reduction in the level of risk to U.S. civil aviation operating in limited portions of the specified areas of the Sanaa (OYSC) FIR where the FAA had prohibited U.S. civil aviation operations under SFAR No. 115, title 14 Code of Federal Regulations (CFR) 91.1611, this action amends SFAR No. 115, § 91.1611, to reduce the amount of airspace in the Sanaa (OYSC) FIR in which U.S. civil aviation operations are prohibited. Specifically, the FAA is revising SFAR No. 115, § 91.1611, to prohibit U.S. civil aviation operations in the Sanaa (OYSC) FIR, except that airspace east of a line drawn direct from KAPET (163322N 0530614E) to NODMA (152603N 0533359E), southeast of a line drawn direct from NODMA to ORBAT (140638N 0503924E) then from ORBAT to PAKER (115500N 0463500E), south of a line drawn direct from PAKER to PARIM (123142N 0432712E), and west of a line drawn direct from PARIM to RIBOK (154700N 0415230E). However, there continues to be an unacceptable level of risk to U.S. civil aviation operations in the remainder the specified areas of the Sanaa (OYSC) FIR, as described in this rule, resulting from terrorist and militant activity. Consequently, the FAA is also amending this SFAR to extend its expiration date until January 7, 2020. The FAA finds this action necessary due to continued hazards to U.S. civil aviation operations in these areas.

II. Legal Authority and Good Cause

A. Legal Authority

The FAA is responsible for the safety of flight in the U.S. and for the safety of U.S. civil operators, U.S.-registered civil aircraft, and U.S.-certificated airmen throughout the world. The FAA's authority to issue rules on aviation safety is found in title 49, U.S. Code. Subtitle I, sections 106(f) and (g), describe the authority of the FAA Administrator. Subtitle VII of title 49, Aviation Programs, describes in more detail the scope of the agency's authority. Section 40101(d)(1) provides that the Administrator shall consider in the public interest, among other matters, assigning, maintaining, and enhancing

safety and security as the highest priorities in air commerce. Section 40105(b)(1)(A) requires the Administrator to exercise his authority consistently with the obligations of the U.S. Government under international agreements.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, subpart III, section 44701, General requirements. Under that section, the FAA is charged broadly with promoting safe flight of civil aircraft in air commerce by prescribing, among other things, regulations and minimum standards for practices, methods, and procedures that the Administrator finds necessary for safety in air commerce and national security.

This regulation is within the scope of FAA's authority under the statutes cited previously, because it continues to prohibit the persons described in paragraph (a) of SFAR No. 115, § 91.1611, from conducting flight operations in specified areas of the Sanaa (OYSC) FIR due to the continued hazards to the safety of such persons' flight operations, as described in the Background section of this final rule.

B. Good Cause for Immediate Adoption

Title 5 U.S.C. 553(b)(3)(B) authorizes agencies to dispense with notice and comment procedures for rules when the agency for "good cause" finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Section 553(d) also authorizes agencies to forgo the delay in the effective date of the final rule for good cause found and published with the rule. In this instance, the FAA finds good cause to forgo notice and comment, because notice and comment would be impracticable and contrary to the public interest. To the extent that the rule is based upon classified information, such information is not permitted to be shared with the general public. Also, threats to U.S. civil aviation and intelligence regarding these threats are fluid. As a result, the agency's original proposal could become unsuitable for minimizing the hazards to U.S. civil aviation in the affected airspace during or after the notice and comment process. The FAA further finds an immediate need to address the continued hazard to U.S. civil aviation that exists in specified areas of the Sanaa (OYSC) FIR from terrorist and militant activity. This hazard is further described in the Background section of this rule. Finally, it is contrary to the public interest to delay this change in the boundaries of the SFAR to permit U.S. civil aviation operations on two jet routes that were previously prohibited,

thereby potentially reducing travel time and costs.

For the reasons described previously, the FAA finds good cause to forgo notice and comment and any delay in the effective date for this rule. The FAA also finds that this action is fully consistent with the obligations under 49 U.S.C. 40105(b)(1)(A) to ensure that the FAA exercises its duties consistently with the obligations of the United States under international agreements.

III. Background

On January 7, 2016, the FAA published a final rule to prohibit U.S. civil aviation operations in specified areas of the Sanaa (OYSC) FIR, excluding that airspace east and southeast of a line drawn direct from KAPET (163322N 0530614E) to NODMA (152603N 0533359E), then direct from NODMA to PAKER (115500N 0463500E), due to the hazardous situation faced by U.S. civil aviation from ongoing military operations, political instability, violence from competing armed groups, and the continuing terrorism threat from extremist elements associated with the fighting and instability in Yemen. 81 FR 727.

In taking that action, the FAA determined that international civil air routes that transit the specified areas of the Sanaa (OYSC) FIR and aircraft operating to and from Yemeni airports were at risk from terrorist and militant groups potentially employing anti-aircraft weapons, including Man-Portable Air Defense Systems (MANPADS), surface-to-air missiles (SAMs), small-arms fire, and indirect fire from mortars and rockets. Due to the fighting and instability, as of January 2016, the FAA stated that there was a risk of possible loss of state control over more advanced anti-aircraft weapons to terrorist and militant groups. Some of the weapons that the FAA was concerned about have the capability to target aircraft at higher altitudes and/or during approach and departure and have weapon ranges that could extend into the near off-shore areas along Yemen's coastline.

In the January 2016 final rule, the FAA also indicated that U.S. civil aviation was at risk from combat operations and other military-related activity associated with the fighting and instability and that there was an ongoing threat of terrorism. Al-Qa'ida in the Arabian Peninsula (AQAP) remained active in Yemen and had demonstrated the capability and intent to target U.S. and Western aviation interests. Various Yemeni airports had been attacked during the fighting,

including Sanaa International Airport (OYSN) and Aden International Airport (OYAA), resulting in instances of damage to airport facilities and temporary closure of the airports.

Additionally, in the January 2016 final rule, the FAA assessed that there was a risk to U.S. civil aviation from potential strategic SAM systems. Some of these strategic air defense SAMs, at that time, posed a potential threat to civil aviation. On March 28, 2015, a probable SAM missile was launched from the vicinity of Al Hudaydah, Yemen, along the Red Sea. Collectively, the hazards previously described led the FAA to publish SFAR No. 115, § 91.1611, on January 7, 2016.

Over the last two years, the situation in Yemen has slightly improved, as a coalition of Yemeni government forces, supporting nations, and allied militia elements have successfully limited the area of opposition force control and reduced some of the opposition force weapon capabilities. Opposition elements in Yemen do not currently possess functional medium-/long-range strategic SAM capabilities. As a result, there is a reduced level of risk to U.S. civil aviation operations on certain international air routes that transit offshore areas of the Sanaa (OYSC) FIR. The FAA has determined that the risk to U.S. civil aviation in limited areas of the Sanaa (OYSC) FIR, including these international air routes, has been sufficiently reduced to allow the FAA to shrink the boundaries of its prohibition of U.S. civil aviation operations in specified areas of the Sanaa (OYSC) FIR.

Specifically, the FAA is revising SFAR No. 115, § 91.1611, to prohibit flight operations in the Sanaa (OYSC) FIR, excluding that airspace east of a line drawn direct from KAPET (163322N 0530614E) to NODMA (152603N 0533359E), southeast of a line drawn direct from NODMA to ORBAT (140638N 0503924E) then from ORBAT to PAKER (115500N 0463500E), south of a line drawn direct from PAKER to PARIM (123142N 0432712E), and west of a line drawn direct from PARIM to RIBOK (154700N 0415230E). This change will permit U.S. operators to use two jet routes, UT702 and M999, that they were previously prohibited from using under SFAR No. 115, § 91.1611. The FAA emphasizes that use of jet route UN303 remains prohibited.

Opposition forces and terrorist elements continue to operate in various locations with either ongoing fighting or the potential for combat operations to occur with little or no warning. Opposition and terrorist elements, such as AQAP and the Islamic State of Iraq and ash Sham (ISIS) in Yemen, possess

a variety of anti-aircraft weapons, to include MANPADS and possible SAMs, which pose an ongoing risk to U.S. civil aviation in Yemeni territory occupied by or influenced by those elements and in the specified areas of the Sanaa (OYSC) FIR within the revised SFAR boundaries described in this rule.

Therefore, as a result of the significant continuing risk to the safety of U.S. civil aviation in specified areas of the Sanaa (OYSC) FIR, with the revised boundaries previously described, the FAA also amends SFAR No. 115, § 91.1611, to extend its expiration date from January 7, 2018, to January 7, 2020, to maintain the prohibition on flight operations in those areas by all: U.S. air carriers; U.S. commercial operators; persons exercising the privileges of an airman certificate issued by the FAA, except when such persons are operating U.S.-registered aircraft for a foreign air carrier; and operators of U.S.-registered civil aircraft, except where the operator of such aircraft is a foreign air carrier.

The FAA will continue to actively monitor the situation and evaluate the extent to which U.S. civil operators may be able to safely operate in specified areas of the Sanaa (OYSC) FIR, with the revised boundaries previously described, in the future. Further amendments to SFAR No. 115, § 91.1611, may be appropriate if the risk to aviation safety and security changes. The FAA may amend or rescind SFAR No. 115, § 91.1611, as necessary, prior to its expiration date.

The FAA also republishes, with minor revisions, the approval process and exemption information for this SFAR, so that persons described in paragraph (a) of the rule will be able to refer to this final rule, rather than having to search through previous final rules to find the relevant approval process and exemption information. This approval process and exemption information is consistent with other similar SFARs and recent agency practice.

IV. Approval Process Based on a Request From a Department, Agency, or Instrumentality of the United States Government

If a department, agency, or instrumentality of the U.S. Government determines that it has a critical need to engage any person covered under SFAR No. 115, § 91.1611, including a U.S. air carrier or a U.S. commercial operator, to conduct a charter to transport civilian or military passengers or cargo, or other operations, in the specified areas of the Sanaa (OYSC) FIR, that department, agency, or instrumentality may request that the FAA approve persons covered under SFAR No. 115, § 91.1611, to

conduct such operations. An approval request must be made directly by the requesting department, agency or instrumentality of the U.S. Government to the FAA's Associate Administrator for Aviation Safety in a letter signed by an appropriate senior official of the requesting department, agency, or instrumentality. Requests for approval submitted to the FAA by anyone other than the requesting department, agency, or instrumentality will not be accepted and will not be processed. In addition, the senior official signing the letter requesting FAA approval on behalf of the requesting department, agency, or instrumentality must be sufficiently highly placed within the organization to demonstrate that the senior leadership of the requesting department, agency, or instrumentality supports the request for approval and is committed to taking all necessary steps to minimize operational risks to the proposed flights. The senior official must also be in a position to: (1) Attest to the accuracy of all representations made to the FAA in the request for approval and (2) ensure that any support from the requesting U.S. government department, agency, or instrumentality described in the request for approval is in fact brought to bear and is maintained over time. Unless justified by exigent circumstances, requests for approval must be submitted to the FAA no less than 30 calendar days before the date on which the requesting department, agency, or instrumentality wishes the proposed operations, if approved by the FAA, to commence.

The letter must be sent by the requesting department, agency, or instrumentality to the Associate Administrator for Aviation Safety, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591. Electronic submissions are acceptable, and the requesting entity may request that the FAA notify it electronically as to whether the approval request is granted. If a requestor wishes to make an electronic submission to the FAA, the requestor should contact the Air Transportation Division, Flight Standards Service, at (202) 267-8166 to obtain the appropriate email address. A single letter may request approval from the FAA for multiple persons covered under SFAR No. 115, § 91.1611, and/or for multiple flight operations. To the extent known, the letter must identify the person(s) covered under the SFAR on whose behalf the U.S. Government department, agency, or instrumentality is seeking FAA approval, and it must describe—

- The proposed operation(s), including the nature of the mission being supported;
- The service to be provided by the person(s) covered by the SFAR;
- To the extent known, the specific locations in the specified areas of the Sanaa (OYSC) FIR where the proposed operation(s) will be conducted, including, but not limited to, the flight path and altitude of the aircraft while it is operating in the specified areas of the Sanaa (OYSC) FIR and the airports, airfields and/or landing zones at which the aircraft will take-off and land; and
- The method by which the department, agency, or instrumentality will provide, or how the operator will otherwise obtain, current threat information and an explanation of how the operator will integrate this information into all phases of the proposed operations (e.g., the pre-mission planning and briefing, in-flight, and post-flight phases).

The request for approval must also include a list of operators with whom the U.S. Government department, agency, or instrumentality requesting FAA approval has a current contract(s), grant(s), or cooperative agreement(s) (or with whom its prime contractor has a subcontract(s)) for specific flight operations in the specified areas of the Sanaa (OYSC) FIR. Additional operators may be identified to the FAA at any time after the FAA approval is issued. However, all additional operators must be identified to, and obtain an Operations Specification (OpSpec) or Letter of Authorization (LOA), as appropriate, from the FAA for operations in the specified areas of the Sanaa (OYSC) FIR, before such operators commence such operations. The approval conditions discussed below will apply to any such additional operators. Updated lists should be sent to the email address to be obtained from the Air Transportation Division by calling (202) 267-8166.

If an approval request includes classified information, requestors may contact Aviation Safety Inspector Michael Filippell for instructions on submitting it to the FAA. His contact information is listed in the For Further Information Contact section of this final rule.

FAA approval of an operation under SFAR No. 115, § 91.1611, does not relieve persons subject to this SFAR of their responsibility to comply with all other applicable FAA rules and regulations. Operators of civil aircraft must also comply with the conditions of their certificate, OpSpecs, and LOAs, as applicable. Operators must further comply with all rules and regulations of

other U.S. Government departments and agencies that may apply to the proposed operations, including, but not limited to, the Transportation Security Regulations issued by the Transportation Security Administration, Department of Homeland Security.

Approval Conditions

If the FAA approves the request, the FAA's Aviation Safety Organization will send an approval letter to the requesting department, agency, or instrumentality informing it that the FAA's approval is subject to all of the following conditions:

(1) The approval will stipulate those procedures and conditions that limit, to the greatest degree possible, the risk to the operator, while still allowing the operator to achieve its operational objectives.

(2) Before any approval takes effect, the operator must submit to the FAA:

(a) A written release of the U.S. Government from all damages, claims, and liabilities, including without limitation legal fees and expenses, relating to any event arising out of or related to the approved operations in the specified areas of the Sanaa (OYSC) FIR; and

(b) the operator's agreement to indemnify the U.S. Government with respect to any and all third-party damages, claims, and liabilities, including without limitation legal fees and expenses, relating to any event arising out of or related to the approved operations in the specified areas of the Sanaa (OYSC) FIR.

(3) Other conditions that the FAA may specify, including those that may be imposed in OpSpecs or LOAs, as applicable.

The release and agreement to indemnify do not preclude an operator from raising a claim under an applicable non-premium war risk insurance policy issued by the FAA under chapter 443 of title 49, United States Code.

If the proposed operation(s) is approved, the FAA will issue an OpSpec or an LOA, as applicable, to the operator(s) identified in the original request authorizing them to conduct the approved operation(s), and will notify the department, agency, or instrumentality that requested the FAA's approval of any additional conditions beyond those contained in the approval letter. The requesting department, agency, or instrumentality must have a contract, grant, or cooperative agreement (or its prime contractor must have a subcontract) with the person(s) described in paragraph (a) of this SFAR No. 115, § 91.1611, on whose behalf the

department, agency, or instrumentality requests FAA approval.

V. Requests for Exemption

Any operations not conducted under an approval issued by the FAA through the approval process set forth previously must be conducted under an exemption from SFAR No. 115, § 91.1611. A request by any person covered under SFAR No. 115, § 91.1611, for an exemption must comply with 14 CFR part 11, and will require exceptional circumstances beyond those contemplated by the approval process set forth above. In addition to the information required by 14 CFR 11.81, at a minimum, the requestor must describe in its submission to the FAA—

- The proposed operation(s), including the nature of the operation;
- The service to be provided by the person(s) covered by the SFAR;
- The specific locations in the specified areas of the Sanaa (OYSC) FIR where the proposed operation(s) will be conducted, including, but not limited to, the flight path and altitude of the aircraft while it is operating in the specified areas of the Sanaa (OYSC) FIR and the airports, airfields and/or landing zones at which the aircraft will take-off and land;
- The method by which the operator will obtain current threat information, and an explanation of how the operator will integrate this information into all phases of its proposed operations (*e.g.*, the pre-mission planning and briefing, in-flight, and post-flight phases); and
- The plans and procedures that the operator will use to minimize the risks, identified in the Background section of this rule, to the proposed operations, so that granting the exemption would not adversely affect safety or would provide a level of safety at least equal to that provided by this SFAR. The FAA has found comprehensive, organized plans and procedures of this nature to be helpful in facilitating the agency's safety evaluation of petitions for exemption from other flight prohibition SFARs.

Additionally, the release and agreement to indemnify, as referred to above, will be required as a condition of any exemption that may be issued under SFAR No. 115, § 91.1611.

The FAA recognizes that operations that may be affected by SFAR No. 115, § 91.1611, including this amendment, may be planned for the governments of other countries with the support of the U.S. Government. While these operations will not be permitted through the approval process, the FAA will process exemption requests for such operations on an expedited basis

and prior to any private exemption requests.

VI. Regulatory Notices and Analyses

Changes to Federal regulations must undergo several economic analyses. First, Executive Orders 12866 and 13563 direct that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (Pub. L. 96-354), as codified in 5 U.S.C. 603 *et seq.*, requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act of 1979 (Pub. L. 96-39), 19 U.S.C. Chapter 13, prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, the Trade Agreements Act requires agencies to consider international standards and, where appropriate, that they be the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4), as codified in 2 U.S.C. Chapter 25, requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more annually (adjusted for inflation with base year of 1995). This portion of the preamble summarizes the FAA's analysis of the economic impacts of this final rule.

In conducting these analyses, the FAA has determined that this final rule has benefits that justify its costs and is a "significant regulatory action" as defined in section 3(f) of Executive Order 12866, because it raises novel policy issues contemplated under that Executive Order. The rule is also "significant" as defined in DOT's Regulatory Policies and Procedures. The final rule will not have a significant economic impact on a substantial number of small entities, will not create unnecessary obstacles to the foreign commerce of the United States, and will not impose an unfunded mandate on State, local, or tribal governments, or on the private sector, by exceeding the threshold identified previously.

A. Regulatory Evaluation

Department of Transportation Order 2100.5 prescribes policies and procedures for simplification, analysis, and review of regulations. If the expected cost impact is so minimal that a proposed or final rule does not warrant a full evaluation, this order

permits a statement to that effect and the basis for it to be included in the preamble if a full regulatory evaluation of the costs and benefits is not prepared. Such a determination has been made for this final rule. The reasoning for this determination follows.

Due to the significant hazards to U.S. civil aviation described in the Background section of this rule, this rule extends the prohibition against U.S. civil flights in specified areas of the Sanaa (OYSC) FIR, as described in this rule. Since there has been a reduction in the level of risk to U.S. civil aviation operations in limited portions of the specified areas of the Sanaa (OYSC) FIR in which the FAA had previously prohibited such operations, this action amends SFAR No. 115, § 91.1611, to reduce the amount of airspace in which U.S. civil flight operations are prohibited. This change will permit U.S. operators to use two jet routes that they were previously prohibited from using under SFAR No. 115, § 91.1611: UT702 and M999.

The FAA believes there are very few U.S. operators who wish to operate in the specified areas of the Sanaa (OYSC) FIR where U.S. civil aviation operations will continue to be prohibited. The FAA has not received any requests for approval or exemption to conduct flight operations in the specified areas of the Sanaa (OYSC) FIR covered by this regulation. Consequently, the FAA estimates the costs of this rule to be minimal. These minimal costs are exceeded by the benefits of avoided deaths, injuries, and property damage that could result from a U.S. operator's aircraft being shot down (or otherwise damaged) due to the hazards described in the Background section of this final rule. In addition, allowing U.S. civil aviation to use the M999 and UT702 routes will benefit U.S. operators who regularly transit the Middle East area, since they will no longer be required to use less direct routes. This change may reduce flight times and certain operating expenses, such as fuel, resulting in potential cost savings for affected U.S. operators. Consequently, the FAA estimates that the benefits of this rule will exceed the costs.

B. Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (Pub. L. 96-354) (RFA) establishes "as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle,

agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration." The RFA covers a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a rule will have a significant economic impact on a substantial number of small entities. If the agency determines that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA. However, if an agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear. As discussed above, the FAA estimates the costs of this rule to be minimal. Moreover, few, if any, operators will be affected by this rule, as the FAA believes that most operators do not wish to operate in specified areas of the Sanaa (OYSC) FIR in which U.S. civil flight operations will continue to be prohibited, due to the hazards described in the Background section of this rule. Additionally, this rule will allow U.S. civil aviation to use the M999 and UT702 routes, and, to that extent, it may benefit small U.S. operators if they regularly transit the Middle East area, since they will no longer be required to use less direct routes. This change may reduce flight times and certain operating expenses, such as fuel, resulting in potential cost savings for affected small U.S. operators.

Therefore, as provided in section 605(b), the head of the FAA certifies that this rulemaking will not result in a significant economic impact on a substantial number of small entities.

C. International Trade Impact Assessment

The Trade Agreements Act of 1979 (Pub. L. 96-39) prohibits Federal agencies from establishing standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Pursuant to this Act, the establishment of standards is not considered an unnecessary obstacle to the foreign commerce of the United States, so long as the standard has a legitimate domestic objective, such as the protection of safety, and does not

operate in a manner that excludes imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards.

The FAA has assessed the effect of this final rule and determined that its purpose is to protect the safety of U.S. civil aviation from a hazard to their operations in specified areas of the Sanaa (OYSC) FIR, a location outside the U.S. Therefore, the rule is in compliance with the Trade Agreements Act.

D. Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of \$100 million or more (in 1995 dollars) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a "significant regulatory action." The FAA currently uses an inflation-adjusted value of \$155.0 million in lieu of \$100 million.

This final rule does not contain such a mandate. Therefore, the requirements of Title II of the Act do not apply.

E. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that the FAA consider the impact of paperwork and other information collection burdens imposed on the public. The FAA has determined that there is no new requirement for information collection associated with this final rule.

F. International Compatibility and Cooperation

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA's policy to conform to International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA has determined that there are no ICAO Standards and Recommended Practices that correspond to this regulation.

G. Environmental Analysis

The FAA has analyzed this action under Executive Order 12114, Environmental Effects Abroad of Major Federal Actions (44 FR 1957, January 4, 1979), and DOT Order 5610.1C, Paragraph 16. Executive Order 12114 requires the FAA to be informed of environmental considerations and take those considerations into account when

making decisions on major Federal actions that could have environmental impacts anywhere beyond the borders of the United States. The FAA has determined that this action is exempt pursuant to Section 2–5(a)(i) of Executive Order 12114, because it does not have the potential for a significant effect on the environment outside the United States.

In accordance with FAA Order 1050.1F, “Environmental Impacts: Policies and Procedures,” paragraph 8–6(c), FAA has prepared a memorandum for the record stating the reason(s) for this determination; this memorandum has been placed in the docket for this rulemaking.

VII. Executive Order Determinations

A. Executive Order 13132, Federalism

The FAA has analyzed this final rule under the principles and criteria of Executive Order 13132, Federalism. The agency has determined that this action would 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, would not have Federalism implications.

B. Executive Order 13211, Regulations That Significantly Affect Energy Supply, Distribution, or Use

The FAA analyzed this final rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001). The agency has determined that it would not be a “significant energy action” under the executive order and would not be likely to have a significant adverse effect on the supply, distribution, or use of energy.

C. Executive Order 13609, Promoting International Regulatory Cooperation

Executive Order 13609, Promoting International Regulatory Cooperation, (77 FR 26413, May 4, 2012) promotes international regulatory cooperation to meet shared challenges involving health, safety, labor, security, environmental, and other issues and to reduce, eliminate, or prevent unnecessary differences in regulatory requirements. The FAA has analyzed this action under the policies and agency responsibilities of Executive Order 13609, and has determined that this action would have no effect on international regulatory cooperation.

D. Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs

This rule is not subject to the requirements of E.O. 13771 (82 FR 9339, February 3, 2017) because it is issued with respect to a national security function of the United States.

VIII. Additional Information

A. Availability of Rulemaking Documents

An electronic copy of rulemaking documents may be obtained from the internet by—

- Searching the Federal eRulemaking Portal (<http://www.regulations.gov>);
- Visiting the FAA’s Regulations and Policies web page at http://www.faa.gov/regulations_policies or
- Accessing the Government Publishing Office’s web page at <http://www.gdsys.gov>.

Copies may also be obtained by sending a request (identified by amendment or docket number of this rulemaking) to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue SW, Washington, DC 20591, or by calling (202) 267–9677. Please identify the docket or amendment number of this rulemaking in your request.

Except for classified material, all documents the FAA considered in developing this rule, including economic analyses and technical reports, may be accessed from the internet through the Federal eRulemaking Portal referenced above.

B. Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) requires FAA to comply with small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction. A small entity with questions regarding this document may contact its local FAA official, or the person listed under the **FOR FURTHER INFORMATION CONTACT** section at the beginning of the preamble. To find out more about SBREFA on the internet, visit http://www.faa.gov/regulations_policies/rulemaking/sbre_act/.

List of Subjects in 14 CFR Part 91

Air traffic control, Aircraft, Airmen, Airports, Aviation safety, Freight, Yemen.

The Amendment

In consideration of the foregoing, the Federal Aviation Administration amends chapter I of title 14, Code of Federal Regulations as follows:

PART 91—GENERAL OPERATING AND FLIGHT RULES

- 1. The authority citation for part 91 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 1155, 40101, 40103, 40105, 40113, 40120, 44101, 44111, 44701, 44704, 44709, 44711, 44712, 44715, 44716, 44717, 44722, 46306, 46315, 46316, 46504, 46506–46507, 47122, 47508, 47528–47531, 47534, Pub. L. 114–190, 130 Stat. 615 (49 U.S.C. 44703 note); articles 12 and 29 of the Convention on International Civil Aviation (61 Stat. 1180), (126 Stat. 11).

- 2. Revise § 91.1611 to read as follows:

§ 91.1611 Special Federal Aviation Regulation No. 115—Prohibition Against Certain Flights in Specified Areas of the Sanaa (OYSC) Flight Information Region (FIR).

(a) *Applicability.* This Special Federal Aviation Regulation (SFAR) applies to the following persons:

- (1) All U.S. air carriers and U.S. commercial operators;
- (2) All persons exercising the privileges of an airman certificate issued by the FAA, except when such persons are operating U.S.-registered aircraft for a foreign air carrier; and
- (3) All operators of U.S.-registered civil aircraft, except where the operator of such aircraft is a foreign air carrier.

(b) *Flight prohibition.* Except as provided in paragraphs (c) and (d) of this section, no person described in paragraph (a) of this section may conduct flight operations in the Sanaa (OYSC) Flight Information Region (FIR), except that airspace east of a line drawn direct from KAPET (163322N 0530614E) to NODMA (152603N 0533359E), southeast of a line drawn direct from NODMA to ORBAT (140638N 0503924E) then from ORBAT to PAKER (115500N 0463500E), south of a line drawn direct from PAKER to PARIM (123142N 0432712E), and west of a line drawn direct from PARIM to RIBOK (154700N 0415230E). Use of jet route UT702 is authorized; however, use of jet route UN303 is not authorized.

(c) *Permitted operations.* This section does not prohibit persons described in paragraph (a) of this section from conducting flight operations in the Sanaa (OYSC) FIR in that airspace west of a line drawn direct from KAPET (163322N 0530614E) to NODMA (152603N 0533359E), northwest of a line drawn direct from NODMA to ORBAT (140638N 0503924E) then from ORBAT to PAKER (115500N 0463500E), north of a line drawn direct from PAKER to PARIM (123142N 0432712E), and east of a line drawn direct from PARIM to RIBOK (154700N 0415230E), provided that such flight operations are

conducted under a contract, grant, or cooperative agreement with a department, agency, or instrumentality of the U.S. government (or under a subcontract between the prime contractor of the department, agency, or instrumentality, and the person subject to paragraph (a)), with the approval of the FAA, or under an exemption issued by the FAA. The FAA will process requests for approval or exemption in a timely manner, with the order of preference being: First, for those operations in support of U.S. government-sponsored activities; second, for those operations in support of government-sponsored activities of a foreign country with the support of a U.S. government department, agency, or instrumentality; and third, for all other operations.

(d) *Emergency situations.* In an emergency that requires immediate decision and action for the safety of the flight, the pilot in command of an aircraft may deviate from this section to the extent required by that emergency. Except for U.S. air carriers and commercial operators that are subject to the requirements of 14 CFR part 119, 121, 125, or 135, each person who deviates from this section must, within 10 days of the deviation, excluding Saturdays, Sundays, and Federal holidays, submit to the nearest FAA Flight Standards District Office (FSDO) a complete report of the operations of the aircraft involved in the deviation, including a description of the deviation and the reasons for it.

(e) *Expiration.* This SFAR will remain in effect until January 7, 2020. The FAA may amend, rescind, or extend this SFAR as necessary.

Issued in Washington, DC, under the authority of 49 U.S.C. 106(f) and (g), 40101(d)(1), 40105(b)(1)(A), and 44701(a)(5), on December 8, 2017.

Michael P. Huerta,

Administrator.

[FR Doc. 2017-26903 Filed 12-13-17; 8:45 am]

BILLING CODE 4910-13-P

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1460

[Docket No. CPSC-2015-0006]

Revision to Children's Gasoline Burn Prevention Act Regulation

AGENCY: Consumer Product Safety Commission.

ACTION: Direct final rule.

SUMMARY: The Children's Gasoline Burn Prevention Act (CGBPA or the Act)

adopted as a consumer product safety rule, the child-resistance requirements for closures on portable gasoline containers published in the ASTM voluntary standard, *Standard Specification for Determination of Child Resistance of Portable Fuel Containers for Consumer Use*, ASTM F2517-05. ASTM F2517 was revised in 2015. These revisions became law under the Act, which the Commission codified through a direct final rule in 2015. On November 13, 2017, the Commission received notice from ASTM that a revision to ASTM F2517 was published in November 2017. In this direct final rule the Commission reviews and evaluates the revised ASTM F2517, finding that the revisions carry out the purposes of the CGBPA's requirements. Accordingly, the 2017 revisions to the child-resistance requirements will be automatically incorporated and apply as the statutorily mandated standard for closures on portable gasoline containers. This direct final rule updates the Commission's regulation to reflect that the requirements for closures on portable gasoline containers must meet the requirements in ASTM F2517-17.

DATES: This rule will be effective on January 12, 2018, unless the Commission receives significant adverse comment by December 28, 2017. If we receive timely significant adverse comments, we will publish notification in the **Federal Register** withdrawing this direct final rule. The incorporation by reference of the publication listed in this rule is approved by the Director of the Federal Register as of January 12, 2018.

ADDRESSES: You may submit comments, identified by Docket No. CPSC-2015-0006, by any of the following methods:

Electronic Submissions: Submit electronic comments to the Federal eRulemaking Portal at: <http://www.regulations.gov>. Follow the instructions for submitting comments. The Commission does not accept comments submitted by electronic mail (email), except through www.regulations.gov. The Commission encourages you to submit electronic comments by using the Federal eRulemaking Portal, as described above.

Written Submissions: Submit written comments (paper, disk, or CD-ROM submissions) by mail/hand delivery/courier to: Office of the Secretary, Consumer Product Safety Commission, Room 820, 4330 East West Highway, Bethesda, MD 20814; telephone (301) 504-7923.

Instructions: All submissions received must include the agency name and docket number for this notice. All

comments received may be posted without change, including any personal identifiers, contact information, or other personal information provided, to <http://www.regulations.gov>. Do not submit confidential business information, trade secret information, or other sensitive or protected information that you do not want to be available to the public. If furnished at all, such information should be submitted in writing.

FOR FURTHER INFORMATION CONTACT: John Boja, Office of Compliance and Field Operations, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814-4408; telephone (301) 504-7300; jboja@cpsc.gov.

SUPPLEMENTARY INFORMATION:

I. Background

The Children's Gasoline Burn Prevention Act. The CGBPA was enacted on July 17, 2008. The Act established as a consumer product safety rule ASTM International's (ASTM) F2517-05's child-resistance requirements for closures on portable gasoline containers. All portable gasoline containers manufactured on or after January 17, 2009 for sale to consumers in the United States must conform to ASTM F2517's child-resistance requirements. By mandating closures that resist access by children up to 51 months of age (4 years and 3 months), the Act seeks to reduce hazards to children, including children ingesting gasoline and inhaling gasoline fumes, and the risk of burns from fires and explosions that may occur when children access gasoline stored in portable gasoline containers. The Act did not require the Commission to undertake any action for the Act's provisions to take effect; rather, ASTM 2715-05's child-resistance requirements were made mandatory through operation of law. The Children's Gasoline Burn Prevention Act, Public Law 110-278; 122 Stat. 2602, Sec. 2(b) (July 17, 2008), codified as a note to 15 U.S.C. 2056.

CGBPA Provisions Regarding Updates to ASTM F2517. Under the Act, ASTM must notify the Commission of any revision to the child-resistance requirements for closures contained in ASTM F2517. Once ASTM notifies the CPSC of ASTM's revisions to this voluntary standard, the revisions will be incorporated by operation of law and will become the consumer product safety standard within 60 days after such notice. However, the Commission can prevent such incorporation if the Commission determines that revisions to the voluntary standard do not carry

out the purposes of the child-resistance requirements for closures on portable gasoline containers as specified in ASTM F2517, and so notifies ASTM.

On February 11, 2015, ASTM gave notice to CPSC of revisions to ASTM F2517–05. The revised standard was designated as ASTM F2517–15. The Commission determined that the revisions to the voluntary standard stated in ASTM F2517–15 carried out the purposes of the child-resistance requirements for closures on portable gasoline containers. Accordingly, by operation of law, the revisions became effective 60 days after February 11, 2015, on April 13, 2015. So that the Code of Federal Regulations would include the standard, the Commission published a direct final rule, 80 FR 16961 (March 31, 2015), codifying the Commission's incorporation by reference of ASTM F2517–15 at 16 CFR part 1460.

2017 Revisions to ASTM F2517. On November 13, 2017, ASTM notified the Commission that it has again revised ASTM F2517. On October 1, 2017, ASTM approved publication of ASTM F2517–17, and published the standard in November 2017. Unless the Commission determines that the revisions to ASTM F2517–17 fail to carry out the purposes of the child-resistance requirements for closures on portable gasoline containers specified in ASTM F2517, and notifies ASTM of this determination, the revisions to ASTM F2517 become a mandatory consumer product safety standard by operation of law, effective January 12, 2018.

As set forth in this preamble, the Commission has determined that the revisions made to ASTM F2517 carry out the purposes of the child-resistance requirements for closures on portable gasoline containers. Accordingly, by operation of law, the requirements for closures on portable gasoline containers, as specified in ASTM F2517–17, are mandatory for all such containers sold or imported into the United States that were manufactured on or after January 12, 2018. To provide clarity to the regulated industry, the Commission will revise our regulation at 16 CFR part 1460 to reflect the incorporation by reference of this revised voluntary standard.

II. Description of the Rule

The rule codifies the child-resistance requirements for closures on portable gasoline containers as stated in ASTM F2517–17. These requirements are mandatory effective January 12, 2018. The Commission is publishing this direct final rule incorporating by reference ASTM F2517–17 so that the

Code of Federal Regulations will reflect the current version of this mandatory standard.

Revisions to ASTM F2517 in the 2017 update increase the stringency of the testing requirements or refine the testing environment to aid in test reliability. These changes are described in more detail in the Staff's Briefing Memorandum.¹ Changes to the voluntary standard include:

- Reducing the amount of water required in a tested container from a half-filled container to a quarter-filled container. Decreasing the amount of liquid required for the test makes the container weigh less, increasing the likelihood that children are able to manipulate a container to access the liquid.
- For containers with multiple closures, removing the requirement to seal off closures not being tested. Manufacturers report that children are distracted by sealing mechanisms on closures not being tested. Accordingly, this revision removes the distraction and focuses the children's attention on attempting to open, or "get the liquid out" of the closure being tested. Although children are instructed to try and open one closure at a time on the container, the test is strengthened by failing a container if a child is able to access liquid from any closure during testing.
- Adding requirements to measure and document the torque needed to secure a closure. Currently, the standard requires testing on new portable gasoline containers that have not been exposed to fuel or residue. ASTM members are concerned that degradation of a portable gasoline container could occur after exposure to fuel, which may affect the torque value of the child-resistant closures. This requirement is intended to aid in consideration of a future provision that would limit the change in torque value after exposure to fuel.
- Clarifying test instructions and requirements to remove possible ambiguities in the test procedure. ASTM F2517–17 adds information and instructions regarding how manufacturers should seek consent for testing children at daycare facilities. The revised standard also updates instructions given to the children during testing to reflect newer child resistant closure technology that does not necessarily "open" in the traditional sense. Children are now instructed:

"Please try to open this for me or get the liquid out."

- Allowing the option to use central location testing. Previously, testing was primarily conducted at daycare facilities. Manufacturers expressed frustration with the decreasing number of daycare facilities willing to participate in testing portable gasoline containers. ASTM F2517–17 allows the option to conduct testing at a central location, providing a more feasible testing venue and allowing the industry to continue to develop newer child-safe products. Additionally, a new Appendix to ASTM F2517–17 provides non-mandatory recommendations for laboratory testing procedures that are intended to prevent fraud in testing.

After reviewing the changes to the child-resistance requirements in F2517–17, as outlined above, the Commission determines that the revised standard carries out the purposes of the Act for closures on portable gasoline containers. Each revision increases the stringency of the testing requirements or refines the testing environment to aid in test reliability. Accordingly, the 2017 revisions to the child-resistance requirements of ASTM F2517 will be incorporated into the CPSC mandatory rule, as provided in the Act. However, because the scope of the consumer product safety rule is established by the CGBPA, this rule does not incorporate by reference the scope section of ASTM F2517–17 or Appendix X2 that relates to the scope section of ASTM F2517–17.

III. Direct Final Rule

The Commission is issuing this rule as a direct final rule. The Administrative Procedure Act (APA) generally requires notice and comment rulemaking except when the agency, for good cause, finds that notice and public procedure are "impracticable, unnecessary, or contrary to the public interest." The Administrative Conference of the United States (ACUS) endorsed direct final rulemaking as an appropriate procedure to expedite promulgation of rules that are noncontroversial and that are not expected to generate significant adverse comment. ACUS also recommended using direct final rulemaking when an agency concludes that notice and comment is "unnecessary" under the APA's good cause exemption. See ACUS, Recommendation, 95–4, 60 FR 43108, 43110 (August 18, 1995).

This rule will revise the reference at 16 CFR part 1460 to refer to ASTM F2517–17, which will be in full force and effect by operation of law on January 12, 2018. In these circumstances, where the substantive

¹ Staff Briefing Memorandum available at https://www.cpsc.gov/s3fs-public/ChildrensGasolineBurnPreventionActRegulation.pdf?OrMoO3W9UP6IAQT1mSA5JLORRPjA_n9.

requirements are mandated by statute and become effective under the statute, public comment on updating the reference to the ASTM standard serves little purpose. Moreover, we do not expect that updating the reference would be controversial or result in significant adverse comment. As a result, the Commission believes that a direct final rule codifying the revised standard in these circumstances is appropriate.

Unless we receive a significant adverse comment by December 28, 2017, the rule will become effective on January 12, 2018. In accordance with ACUS's recommendation, the Commission considers a significant adverse comment to be one in which the commenter explains why the rule would be inappropriate, including an assertion challenging the rule's underlying premise or approach, or a claim that the rule would be ineffective or unacceptable without change. Should the Commission receive a significant adverse comment, the Commission would withdraw this direct final rule. Depending on the comments and other circumstances, the Commission may then incorporate the adverse comment into a subsequent direct final rule or publish a notice of proposed rulemaking providing an opportunity for public comment.

IV. Incorporation by Reference

Section 1460.3 of the final rule provides that closures on portable gasoline containers must comply with the child-resistance requirements of ASTM F2517-17. The Office of the Federal Register (OFR) has regulations concerning incorporation by reference. 16 CFR part 51. The OFR's regulation requires that, for a final rule, agencies must discuss in the rule's preamble 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 to the rule must summarize the material. 16 CFR 51.5(b).

In accordance with the OFR's requirements, section II of this preamble summarizes the provisions of ASTM F2517-17. Interested persons may purchase a copy of ASTM F2517-17 from ASTM, either through ASTM's website or by mail at the address provided in the rule. One may also inspect a copy of the standard at the CPSC's Office of the Secretary, U.S. Consumer Product Safety Commission.

V. Effective Date

As discussed in the preceding section, this is a direct final rule. Unless the

Commission receives a significant adverse comment by December 28, 2017, the rule will become effective on January 12, 2018. Portable gasoline containers manufactured or imported on or after January 12, 2018 must comply with the child-resistance requirements for closures on portable gasoline containers in ASTM F2517-17.

VI. Other Relevant Statutory Provisions

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the APA or any other statutes unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603 and 605. This rule updates the reference in part 1460 to reflect requirements in the revised voluntary standard, ASTM F2517-17, that will take effect through operation of law, as specified in the CGBPA. Because the rule does not impose any requirements beyond those put in place by the CGBPA, the rule does not create new substantive obligations for any entity, including any small entity. Accordingly, the Commission certifies that the rule will not have a significant impact on a substantial number of small entities.

B. Environmental Considerations

The Commission's regulations provide a categorical exclusion for the Commission's rules from any requirement to prepare an environmental assessment or an environmental impact statement because they "have little or no potential for affecting the human environment." 16 CFR 1021.5(c)(2). This rule falls within the categorical exclusion, so no environmental assessment or environmental impact statement is required.

C. Paperwork Reduction Act

This direct final rule contains no collection of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520) is not required.

VII. Preemption

Section 26(a) of the Consumer Product Safety Act (CPSA), 15 U.S.C. 2075(a), provides that where a "consumer product safety standard under [the CPSA]" is in effect and applies to a product, no state or political subdivision of a state may either establish or continue in effect a requirement dealing with the same risk

of injury unless the state requirement is identical to the federal standard. As discussed above, under the CGBPA, the child-resistance requirements of ASTM F2517 are a consumer product safety standard under the CPSA. Children's Gasoline Burn Prevention Act, Public Law 110-278, Sec. 2(a) (July 17, 2008). The child-resistance requirements of ASTM F2517-17, which will be codified under this rule, will invoke the preemptive effect of section 26(a) of the CPSA.

VIII. Certification

Section 14(a) of the CPSA requires that products subject to a consumer product safety rule under the CPSA, or to a similar rule, ban, standard, or regulation under any other act enforced by the Commission, be certified as complying with all applicable CPSC requirements. 15 U.S.C. 2063(a). Such certification must be based on a test of each product, or on a reasonable testing program. Because ASTM F2517-17 is a consumer product safety rule under the CPSA, portable gasoline containers manufactured or imported on or after January 12, 2018, are subject to the testing and certification requirements of section 14 of the CPSA with respect to ASTM F2517-17.

List of Subjects in 16 CFR Part 1460

Consumer protection, Gasoline, Incorporation by reference, Safety.

For the reasons stated above, the Commission amends 16 CFR part 1460 as follows:

PART 1460—CHILDREN'S GASOLINE BURN PREVENTION ACT REGULATION

■ 1. The authority citation for part 1460 continues to read as follows:

Authority: Sec. 2, Pub. L. 110-278, 122 Stat. 2602.

■ 2. Revise § 1460.3 to read as follows:

§ 1460.3 Requirements for child-resistance for closures on portable gasoline containers.

Each portable gasoline container manufactured on or after January 12, 2018 for sale in the United States shall conform to the child-resistance requirements for closures on portable gasoline containers specified in sections 2 through 6 of ASTM F2517-17 (including Appendices X1, X3, and X4), *Standard Specification for Determination of Child Resistance of Portable Fuel Containers for Consumer Use*, approved on October 1, 2017. The Director of the Federal Register approves the incorporation by reference listed in this section in accordance with

5 U.S.C. 552(a) and 1 CFR part 51. You may obtain a copy of these ASTM standards from ASTM International, 100 Barr Harbor Drive, PO Box C700, West Conshohocken, PA 19428-2959 USA; telephone: 610-832-9585; <http://www.astm.org/>. You may inspect copies at the Office of the Secretary, U.S. Consumer Product Safety Commission, Room 820, 4330 East West Highway, Bethesda, MD 20814, telephone 301-504-7923, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030, or go to: www.archives.gov/federal-register/cfr/ibr-locations.html.

Alberta E. Mills,

Acting Secretary, U.S. Consumer Product Safety Commission.

[FR Doc. 2017-26954 Filed 12-13-17; 8:45 am]

BILLING CODE 6355-01-P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 229, 232, 239 and 249

[Release Nos. 33-10446; 34-82280; File No. S7-19-16]

RIN 3235-AL95

Compliance Date for Form 10-D Hyperlink Requirements

AGENCY: Securities and Exchange Commission.

ACTION: Notification of compliance date.

SUMMARY: The Securities and Exchange Commission (“Commission”) is publishing this document to inform the public that it has set a compliance date for its previously-adopted exhibit hyperlinking requirements for Form 10-Ds that require hyperlinks to any exhibits filed with Form ABS-EE. The Commission on March 1, 2017 required registrants that file registration statements and reports subject to the exhibit requirements under Item 601 of Regulation S-K, or that file Forms F-10 or 20-F, to include a hyperlink to each exhibit listed in the exhibit index of these filings, but deferred setting a compliance date with respect to any Form 10-D that will require hyperlinks to any exhibits filed with Form ABS-EE until the Commission announced that technical programming changes to allow issuers to include Form 10-D and Form ABS-EE in a single submission had been completed, and published a notification of the compliance date for Form 10-D in the **Federal Register**.

DATES: The compliance date with respect to any Form 10-D that will

require hyperlinks to any exhibits filed with Form ABS-EE is June 1, 2018.

FOR FURTHER INFORMATION CONTACT: Kayla Roberts, Special Counsel, at (202) 551-3850, in the Office of Structured Finance, Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: On March 1, 2017, the Commission adopted rule and form amendments requiring registrants that file registration statements and reports subject to the exhibit requirements under Item 601 of Regulation S-K,¹ or that file Forms F-10² or 20-F,³ to include a hyperlink to each exhibit listed in the exhibit index of these filings.⁴ To enable the inclusion of hyperlinks, the amendments also require that registrants submit all filings on EDGAR in HyperText Markup Language (“HTML”) format because the American Standard Code for Information Interchange (“ASCII”) format cannot support functional hyperlinks.⁵

The amendments took effect on September 1, 2017 for most registrants. Registrants that are “smaller reporting companies,” as defined in Rule 405⁶ under the Securities Act of 1933 and Rule 12b-2⁷ under the Securities Exchange Act of 1934, or are neither “large accelerated filers” nor “accelerated filers,” as defined in Exchange Act Rule 12b-2, and that submit filings in ASCII will not need to comply with the new rules until September 1, 2018, one year after the effective date for other filers.⁸ The Commission deferred establishing a compliance date for any Form 10-D filing that will require a hyperlink to an exhibit filed with Form ABS-EE until Commission staff completed programming changes to EDGAR to allow Form 10-D filers to include the Form 10-D and Form ABS-EE in a single EDGAR submission so that the required hyperlinks could be created at the time the Form 10-D is filed.⁹ Such

¹ 17 CFR 229.601.

² 17 CFR 239.40.

³ 17 CFR 249.220f

⁴ *Exhibit Hyperlinks and HTML Format*, Release Nos. 33-10322, 34-80132 (March 1, 2017) [82 FR 14130 (March 17, 2017)] (“Hyperlinks Release”).

⁵ See *id.* at Section I.

⁶ 17 CFR 230.405.

⁷ 17 CFR 240.12b-2.

⁸ See Hyperlinks Release, *supra* note 1, at Section II.B.3.

⁹ See Hyperlinks Release, *supra* note 1, at n. 55 (explaining that asset-backed issuers are required to incorporate by reference Form ABS-EE information in Form 10-D and how the hyperlinking requirement applies with respect to Form 10-D filings) & n.72 and accompanying text.

programming changes have now been completed.¹⁰

Any registrant filing a Form 10-D on or after June 1, 2018, must include a hyperlink to any exhibit filed with Form ABS-EE that is included in the exhibit index of Form 10-D.¹¹

By the Commission.

Dated: December 11, 2017.

Brent J. Fields,

Secretary.

[FR Doc. 2017-26982 Filed 12-13-17; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 232, 239, 249, 270, and 274

[Release Nos. 33-10442; 34-82241; IC-32936; File No. S7-08-15]

RIN 3235-AL42

Investment Company Reporting Modernization

AGENCY: Securities and Exchange Commission.

ACTION: Temporary final rule.

SUMMARY: The Securities and Exchange Commission (the “Commission”) is adopting a temporary final rule that requires funds in larger fund groups to maintain in their records the information that is required to be included in Form N-PORT, in lieu of filing reports with the Commission, until April 2019. As a result, larger funds groups will be required to begin submitting reports on Form N-PORT on the Electronic Data Gathering, Analysis, and Retrieval (“EDGAR”) system by April 30, 2019, and smaller fund groups will be required to begin submitting reports on Form N-PORT by April 30, 2020. The information that funds in larger fund groups maintain in their records will be subject to examination by the Commission. In addition, the Commission is delaying the rescission of current Form N-Q and delaying the effectiveness of certain amendments to other rules and forms.

DATES: Effective January 16, 2018 until March 31, 2026. The effective date for the amendments to 17 CFR 232.401, 249.332, 270.8b-33, 270.30a-2,

¹⁰ *Adoption of Updated EDGAR Manual*, Release No. 33-10444, (December 8, 2017), available at <https://www.sec.gov/rules/final.shtml>.

¹¹ Issuers are not required to submit their Form 10-D and Form ABS-EE in a single submission. An issuer may file a Form 10-D and Form ABS-EE in separate submissions and comply with the new requirements by including an external hyperlink in the Form 10-D to a previously filed Form ABS-EE.

270.30a-3, 270.30b1-5, and 17 274.130 and in Instructions 54, 57, 59, and 61 in the final rule published at 81 FR 81870 on November 18, 2016, is delayed until May 1, 2020. The applicable compliance dates are discussed below.

FOR FURTHER INFORMATION CONTACT: J. Matthew DeLesDernier, Senior Counsel, Jacob D. Krawitz, Branch Chief, or Brian McLaughlin Johnson, Assistant Director, at (202) 551-6792, Investment Company Rulemaking Office, Division of Investment Management, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission is adopting new temporary rule 30b1-9(T) [17 CFR 270.30b1-9(T)] under the Investment Company Act of 1940 [15 U.S.C. 80a-1 *et seq.*] (“Investment Company Act”). The Commission is also delaying the compliance dates associated with the requirement for smaller fund complexes to file reports on new Form N-PORT [referenced in 17 CFR 274.150] under the Investment Company Act [15 U.S.C. 80a-1 *et seq.*] and new rule 30b1-9 [17 CFR 270.30b1-9] under the Investment Company Act. In addition, the Commission is delaying the effective date associated with: the rescission of rule 30b1-5 [17 CFR 270.30b1-5] under the Investment Company Act; amendments to rules 8b-33 [17 CFR 270.8b-33], 30a-2 [17 CFR 270.30a-2], 30a-3 [17 CFR 270.30a-3], and 30d-1 [17 CFR 270.30d-1] under the Investment Company Act; amendments to Forms N-1A [referenced in 17 CFR 274.11A], N-2 [referenced in 274.11a-1], and N-3 [referenced in 274.11b] under the Investment Company Act and the Securities Act of 1933 [15 U.S.C. 77a *et seq.*] (“Securities Act”); the rescission of Form N-Q [referenced in 17 CFR 274.130] under the Investment Company Act and Securities Exchange Act of 1934 [15 U.S.C. 78a *et seq.*] (“Exchange Act”); and amendments to rule 401 [17 CFR 232.401] of Regulation S-T [17 CFR 232].

I. Discussion

In recognition of the importance of sound data security practices and protocols for sensitive, nonpublic information, the Commission is modifying its approach to the requirement to submit reports on Form N-PORT on the EDGAR system. Funds in larger fund groups would have been required to submit reports on Form N-PORT in EDGAR no later than July 30, 2018. The Commission is adopting a temporary final rule that requires funds in larger fund groups to maintain in their records the information that is

required to be included in Form N-PORT beginning no later than July 30, 2018. This information will be subject to examination by Commission staff. As a result, funds in larger fund groups must begin to submit reports on Form N-PORT on EDGAR by April 30, 2019, and smaller fund groups must begin to submit reports on Form N-PORT by April 30, 2020. In addition, the Commission is delaying the rescission of current Form N-Q and delaying the effectiveness of certain amendments to other rules and forms.

A. Form N-PORT

On October 13, 2016, the Commission adopted new rules and forms as well as amendments to its rules and forms to modernize the reporting and disclosure of information by registered investment companies.¹ In particular, the Commission adopted new Form N-PORT, which requires certain registered investment companies to report information about their monthly portfolio holdings to the Commission in a structured data format. We also adopted new Form N-CEN, which requires registered investment companies, other than face-amount certificate companies, to annually report certain census-type information to the Commission in a structured data format. In addition, we rescinded current Forms N-Q (effective August 1, 2019) and N-SAR and amended certain other rules and forms.²

As the Commission stated in the Adopting Release, Form N-PORT, as well as new rules, other forms, and amendments to existing rules and forms will, among other things, improve the information that the Commission receives from investment companies and assist the Commission, in its role as primary regulator of investment companies, to better fulfill its mission of protecting investors; maintaining fair, orderly, and efficient markets; and facilitating capital formation. Investors and other potential users can also utilize this information to help them make more informed investment decisions.

Form N-PORT is a new portfolio holdings reporting form that will be filed by all registered management investment companies, other than

money market funds and small business investment companies, and by unit investment trusts that operate as exchange-traded funds (collectively, “funds”).³ Form N-PORT requires reporting of a fund’s complete portfolio holdings and additional information that will facilitate risk analysis and other Commission oversight. Reports on Form N-PORT are required to be filed in an extensible markup language (“XML”) structured data format no later than 30 days after the close of each month using the Commission’s EDGAR system.⁴ In general, reports on Form N-PORT for every third month of each fiscal quarter will be available to the public 60 days after the end of the fiscal quarter.⁵

Certain information reported on Form N-PORT will be kept nonpublic. As we noted in the Adopting Release, we recognize that more frequent portfolio disclosure than was currently required could potentially harm fund shareholders by expanding the opportunities for professional traders to engage in predatory trading practices.⁶ In addition, some of the information required by Form N-PORT could imply a false sense of precision because such data, by design, are an aggregation of multiple assumptions and projections.⁷ In light of these considerations, the Commission in the Adopting Release determined not to make public the information reported on Form N-PORT for the first and second months of each fund’s fiscal quarter that is identifiable to any particular fund or adviser: any information reported with regards to country of risk and economic exposure, delta, or miscellaneous securities; or explanatory notes related to any of those topics that is identifiable to any particular fund or adviser.⁸ In addition, the information on Form N-PORT that will be made public will only be made public after an additional 30-day delay (*i.e.*, 60 days after quarter-end). Moreover, we determined to make all reports for the first six months following June 1, 2018 nonpublic in order to allow funds and the Commission a period of time to fine-tune the technical specifications and data validation processes for reports on Form N-PORT.⁹

When we adopted the Form N-PORT filing requirement, we provided for an effective date of January 17, 2017, with a tiered set of compliance dates based

¹ Investment Company Reporting Modernization, Investment Company Act Release No. 32314 (Oct. 13, 2016) [81 FR 81870 (Nov. 18, 2016)] (“Adopting Release”).

² The Commission also adopted amendments to Regulation S-X, which require standardized, enhanced disclosure about derivatives in investment company financial statements, as well as other amendments. Finally, it adopted amendments to Forms N-1A, N-3, and N-CSR to require certain disclosures regarding securities lending activities. *Id.*

³ Form N-PORT.

⁴ See rule 30b1-9.

⁵ General Instruction F to Form N-PORT.

⁶ See Adopting Release, *supra* note 1, Part II.A.4.

⁷ See *id.*

⁸ General Instruction F to Form N-PORT.

⁹ See Adopting Release, *supra* note 1, Part II.H.1.

on a fund group's asset size. Specifically, for larger entities—funds that together with other investment companies in the same “group of related investment companies” have net assets of \$1 billion or more as of the end of the most recent fiscal year of the fund (“larger fund groups”)—we adopted a compliance date of June 1, 2018.¹⁰ This would have resulted in larger fund groups filing their first reports on Form N–PORT, reflecting data as of June 30, no later than July 30, 2018.¹¹ For smaller fund groups, we adopted a compliance date of June 1, 2019, anticipating that smaller fund groups would benefit from this extra time to comply and potentially would benefit from the lessons learned by the larger fund groups during the adoption period for Form N–PORT.¹²

B. Commission's Determination To Delay Form N–PORT Filing Requirement

As we noted in the Adopting Release, we recognize the importance of sound data security practices and protocols for sensitive, nonpublic information, including information that may be competitively sensitive.¹³ To that end, the Adopting Release acknowledged that Commission staff was working to design controls and systems for the use and handling of Form N–PORT data in a manner that reflects the sensitivity of the data and is consistent with the maintenance of its confidentiality.¹⁴ In the Adopting Release, the Commission also stated that it “expect[ed] that the staff will have reviewed the controls and systems in place for the use and handling of nonpublic information reported on Form N–PORT.”¹⁵

In May 2017, the Commission's Chairman initiated an assessment of the Commission's internal cybersecurity risk profile and its approach to cybersecurity.¹⁶ The Chairman also directed the staff to take a number of steps designed to strengthen the Commission's cybersecurity risk profile, with an initial focus on EDGAR.¹⁷ As the Chairman explained, the Commission receives, stores, and transmits substantial amounts of data, including sensitive and nonpublic data,

in support of its mission.¹⁸ Much of that data is collected through EDGAR, which receives and processes over 1.7 million electronic filings per year.¹⁹ Thus, as part of the Commission's efforts to strengthen its cybersecurity risk profile going forward, the Commission has initiated a focused review and, as necessary or appropriate, uplift of the EDGAR system.²⁰ The Commission has added, and expects to continue to add, additional resources to these efforts, which are expected to include outside consultants, and will increase the focus on data security matters.²¹ As the Chairman has indicated, these efforts will require substantial time and effort to complete.²²

Certain of these measures, which will be designed to improve EDGAR's functionality and security, could negatively affect EDGAR's ability to validate and accept Form N–PORT filings in a timely manner, in particular during peak filing periods. Efforts to address any such potential effects on performance are underway, but we have determined to delay by nine months the requirement that funds file reports on Form N–PORT through the EDGAR system in order to provide time to complete this review and to implement and test any resulting modifications to the EDGAR system.²³ This delay of filing reports on Form N–PORT on EDGAR is necessary for Commission staff to complete and review any modifications to EDGAR that are necessary to process these filings effectively and securely, given their frequency, volume, and complexity, as well as the nonpublic nature of much of the data.

C. Temporary Rule 30b1–9(T)

To effectuate the nine-month delay, we have determined to adopt temporary rule 30b1–9(T), which will have the effect of delaying the EDGAR submission requirements associated with Form N–PORT for larger fund groups until April 2019. As a result, funds in larger fund groups that previously would have been required to submit their first reports on Form N–PORT on EDGAR for the period ending

June 30, 2018 (no later than July 30, 2018) will now be required to submit their first reports on EDGAR by April 30, 2019.²⁴ During this period, funds in larger fund groups that are subject to the June 1, 2018 compliance date must satisfy their reporting obligation by maintaining in their records the information required to be included in Form N–PORT instead of submitting the information via EDGAR.²⁵ To provide for Commission access to this information for a reasonable period of time, consistent with current record retention requirements for registered investment companies, the temporary rule provides that the information maintained in the company's records shall be treated as a record under section 31 of the Investment Company Act and rule 31a–1 hereunder and subject to the requirements of rule 31a–2.²⁶ Like all fund records under the Act, this information is subject to examination by Commission staff.²⁷ Temporary rule 30b1–9(T) does not change the June 1, 2018 compliance date adopted for Form N–PORT for larger fund groups—it instead requires a temporary method for larger fund groups to fulfill their Form N–PORT reporting obligations.²⁸

The Adopting Release delayed compliance for smaller fund groups by one year so that they could benefit from the lessons learned by the larger fund groups' earlier compliance date.²⁹ In order to maintain this benefit the compliance date for smaller fund groups

²⁴ See Rule 30b1–9(T)(a).

²⁵ *Id.* Furthermore, the EDGAR reporting requirements added to Form N–PORT by the Investment Company Liquidity Risk Management Programs Adopting Release (“Liquidity Adopting Release”) will also be delayed by the temporary rule. See Investment Company Liquidity Risk Management Program, Investment Company Act Release No. 32315 (Oct. 13, 2016) [81 FR 82142 (Nov. 18, 2016)]. However, funds will only be required to comply with temporary rule 30b1–9(T) with respect to these liquidity-related additions to Form N–PORT based on the compliance date set forth in the Liquidity Adopting Release for these additions.

²⁶ See rule 31a–2(a)(2) (providing that funds must preserve certain records for a period not less than six years from the end of the fiscal year, the first two years in an easily accessible place); see generally rule 31a–2(f) (requirements for electronic records). Because rule 31a–2 provides for preservation for not less than six years from the end of the fiscal year, the temporary rule will no longer be effective March 31, 2026.

²⁷ 15 U.S.C. 80a–30(b)(1).

²⁸ See rule 30b1–9(T)(a). While neither this temporary rule nor rule 31a–2(f) require that the information maintained in the funds' records be stored in an XML format, we believe that doing so would facilitate the filing of Form N–PORT following the nine-month delay as we believe funds can use this delay to gain greater facility with the structured reporting format.

²⁹ See Adopting Release, *supra* note 1, at Part II.H.1.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ See Adopting Release, *supra* note 1, Part II.A.3.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Statement on Cybersecurity (September 20, 2017), available at <https://www.sec.gov/news/public-statement/statement-clayton-2017-09-20>.

¹⁷ Update on Review of 2016 Cyber Intrusion Involving EDGAR System (Oct. 2, 2017), available at <https://www.sec.gov/news/press-release/2017-186>.

¹⁸ Statement on Cybersecurity (Sept. 20, 2017), available at <https://www.sec.gov/news/public-statement/statement-clayton-2017-09-20>.

¹⁹ *Id.*

²⁰ Update on Review of 2016 Cyber Intrusion Involving EDGAR System (Oct. 2, 2017), available at <https://www.sec.gov/news/press-release/2017-186>.

²¹ *Id.*

²² *Id.*

²³ The Commission has not considered any other changes to Form N–PORT, rules, other forms, and amendments besides those that are discussed in this release.

will be delayed by nine months from the original compliance date (until March 1, 2020). Not providing smaller fund groups with a compliance date delay would deprive them of receiving the full benefit of the tiered filing requirement that we previously adopted. However, the temporary rule is not relevant to these smaller fund groups,³⁰ as the relevant provision of the temporary rule applies until April 1, 2019—before the new compliance date for smaller fund groups (March 1, 2020). As a result, smaller fund groups are not subject to a requirement to prepare and then retain as a record the information required on Form N–PORT; rather, they will, pursuant to the Adopting Release and this release, need to prepare and file Form N–PORT beginning on or after the delayed March 1, 2020 compliance date.

D. Form N–Q Filing Requirement

In order for investors and other users to continue to receive at the least the same information that they currently receive regarding fund portfolio holdings, we are requiring funds to continue filing public reports on Form N–Q until they begin filing reports on Form N–PORT using EDGAR (*i.e.*, the March 31, 2019 reporting period for larger fund groups and March 31, 2020 for smaller fund groups). As the Commission concluded in the Adopting Release, Form N–PORT will render reports on Form N–Q unnecessarily duplicative. To that end, the Commission staff recently provided guidance that once a fund begins filing reports on Form N–PORT, it will no longer be required to file reports on Form N–Q.³¹ The Adopting Release rescinded Form N–Q, effective August 1, 2019. This effective date would have allowed funds sufficient time to satisfy Form N–Q’s 60-day filing requirement with regard to their final filing on Form N–Q for the reporting period preceding their first filing on Form N–PORT.³² We also adopted certain changes to Form N–CSR to account for the rescission of Form N–Q.³³ Specifically, as we noted in the Adopting Release, when a fund ceases filing reports on Form N–Q, its certification on Form N–CSR must state that the certifying officer has disclosed any change in the registrant’s internal control over financial reporting that

occurred during the most recent fiscal half-year, rather than the registrant’s most recent fiscal quarter as currently required.³⁴

As a result of this delay of the compliance date for filing reports on Form N–PORT for smaller fund groups by nine months, smaller fund groups will now satisfy their final filing requirements for Form N–Q by May 1, 2020. We are therefore delaying the effective date for the rescission of Form N–Q until May 1, 2020.³⁵ Correspondingly, the compliance dates for the amendments to the certification requirements of Form N–CSR will be March 1, 2019, for larger fund groups, and March 1, 2020, for smaller fund groups.³⁶

E. Six-Month Nonpublic Reporting Period

In the Adopting Release, the Commission determined that having a six-month time period where larger fund groups are required to file reports on Form N–PORT with the Commission, but where those reports are not disclosed publicly, will allow funds and the Commission to make adjustments to fine-tune the technical specifications and data validation processes.³⁷ Because larger fund groups will now be required to submit the reports on EDGAR as of March 31, 2019, those reports for the periods ending March 31, 2019 through September 30, 2019 will be kept nonpublic to preserve the six-month period noted above.³⁸ As before,

³⁴ See *supra* note 1, at Part II.B.2; see also Investment Company Reporting Modernization Frequently Asked Questions, available at https://www.sec.gov/investment/investment-company-reporting-modernization-faq#_ftnref5.

³⁵ Money market funds currently file reports on Form N–Q, but upon its rescission will not have to file reports on Form N–PORT (as money market funds currently file monthly reports on Form N–MFP). While the Commission is extending the effective date for the rescission of Form N–Q until May 1, 2020, money market funds that were relying on the Commission’s original August 1, 2019 rescission date for Form N–Q do not have to file reports on Form N–Q after August 1, 2019 despite the new rescission date of May 1, 2020.

³⁶ We are also delaying the effective date for the corresponding amendments to references to the availability of portfolio holdings schedules in Form N–1A, N–2, and N–3 and the amendments to remove references to Form N–Q in rule 401 of Regulation S–T and rules 8b–33, 30a–2, 30a–3, and 30d–1 under the Investment Company Act, to May 1, 2020, the same day the rescission of Form N–Q will now be effective.

³⁷ See Adopting Release, *supra* note 1, Part II.H.1.

³⁸ As in the Adopting Release, here, smaller fund groups will not be required to file reports on Form N–PORT through the EDGAR system until after the six-month nonpublic period for larger fund groups has elapsed. This will allow smaller fund groups to benefit from any adjustments to fine-tune the technical specifications and data validation processes that occurred during the six-month nonpublic period for larger fund groups.

portfolio information attached as exhibits to Form N–PORT for the first and third quarters of a fund’s fiscal year will still be made public during this period, to ensure that information about funds’ portfolio holdings continues to be publicly available to investors and other users during the six-month period when reports on Form N–PORT will not be made publicly available.³⁹

F. Form N–CEN

We note that our action today does not affect requirements with respect to Form N–CEN.⁴⁰ Because those reports will be immediately made public upon filing and because their annual frequency of filing and their smaller size are expected to impose fewer demands on the EDGAR system, we have determined not to change the submission requirements with respect to that form at this time.

G. Procedural and Other Matters

The Administrative Procedure Act (“APA”) generally requires an agency to publish notice of a rulemaking in the **Federal Register** and provide an opportunity for public comment.⁴¹ This requirement does not apply, however, if the agency “for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”⁴² We have determined to immediately adopt this temporary rule delaying the requirement that funds file reports on Form N–PORT through the EDGAR system for nine months and making the accompanying changes described above. The Commission has determined that the range of potential technological matters accompanying the ongoing and anticipated improvements to the EDGAR system warrant a delay in accepting this entirely new set of EDGAR filings, which involve complex structured data files, until after the EDGAR upgrades that are underway are tested. This judgment is based on the Commission’s ongoing, internal assessment of the range of potential modifications to enhance the EDGAR system’s functionality, performance, and security. Accordingly, we have concluded that soliciting public comment on this issue would be neither necessary, practicable, nor in the public interest.

In addition, providing immediate certainty to funds is critical because we

³⁹ See Adopting Release, *supra* note 1, Part II.H.1.

⁴⁰ Form N–CEN [referenced in 17 CFR 274.101] under the Investment Company Act. Accordingly, the rescission of Form N–SAR will not be delayed by this action.

⁴¹ See 5 U.S.C. 553(b)–(c).

⁴² 5 U.S.C. 553(b)(3)(B).

³⁰ See rule 30b1–9(T)(a).

³¹ See Investment Company Reporting Modernization Frequently Asked Questions, available at https://www.sec.gov/investment/investment-company-reporting-modernization-faq#_ftnref5.

³² Adopting Release, *supra* note 1, at 81966.

³³ *Id.* at 81912–13. We also adopted certain technical and conforming amendments related to the rescission of Form N–Q and the adoption of Form N–PORT. See *id.* at 81965–66.

understand that funds are currently organizing their systems and procedures to comply with the requirements and dates set forth in the Adopting Release. Funds need to know that there will be a nine-month delay of the requirement that they file reports on Form N–PORT through the EDGAR system, and that as a result they will have to maintain their systems for filing reports on Form N–Q longer than contemplated in the Adopting Release. The Commission is concerned, for example, that absent the certainty provided by a final rule funds may eliminate those systems as part of the transition to Form N–PORT. Providing notice and comment would defeat this goal of giving certainty as to funds' obligations in light of the necessary delays stemming from the Commission's recent cybersecurity initiatives. Under these circumstances, notice and comment would be both impracticable and contrary to the public interest.

For these reasons, the Commission finds that good cause exists to dispense with notice and comment regarding the delay of the requirement to submit reports on Form N–PORT on EDGAR and the associated changes outlined above.⁴³

II. Economic Analysis

A. Introduction

The Commission is sensitive to the economic effects, including the benefits and costs and the effects on efficiency, competition, and capital formation that will result from this temporary final rule and from the nine-month delay of the requirement that funds submit reports on Form N–PORT through EDGAR, the associated delay for the same period of the rescission of Form N–Q, the delay of the semi-annual certification requirement in Form N–CSR, the delay of the effectiveness of certain amendments to other rules and forms, and the change in the six-month period during which filed reports on Form N–PORT with the Commission will be kept nonpublic.⁴⁴

⁴³ See Section 553(b)(3)(B) of the Administrative Procedure Act (5 U.S.C. 553(b)(3)(B)) (an agency may dispense with prior notice and comment when it finds, for good cause, that notice and comment are “impracticable, unnecessary, or contrary to the public interest”). This finding also satisfies the requirements of 5 U.S.C. 808(2), allowing the amendments to become effective notwithstanding the requirement of 5 U.S.C. 801 (if a federal agency finds that notice and public comment are impractical, unnecessary or contrary to the public interest, a rule shall take effect at such time as the federal agency promulgating the rule determines). The amendments also do not require analysis under the Regulatory Flexibility Act. See 5 U.S.C. 604(a).

⁴⁴ See Parts I.C, I.D, and I.E for the specific framework of the nine-month delay in the submission of Form N–PORT on EDGAR.

The Commission relies on information included in reports filed by funds to monitor trends, identify risks, and inform its regulatory functions. Similarly, investors and other market participants rely on funds' public filings to assist in their investment decisions and understanding of financial markets. Form N–PORT, which requires reporting of a fund's complete portfolio holdings on a monthly basis with every third month available to the public, will contribute substantially to information made available to the Commission and the public by funds. As the Commission has previously stated,⁴⁵ the adoption of Form N–PORT will modernize fund reporting, improve the ability of the Commission to fulfill its regulatory functions, and allow investors to make more informed investment decisions.

The Commission has now determined to delay the requirement that funds submit Form N–PORT through the EDGAR system by nine months to provide time to complete the necessary adjustments to the technical specifications and data validation processes and to complete the necessary functionality, performance, and security enhancements. The Commission's implementation of this delay, while facilitating changes to the EDGAR system, will impose certain costs on market participants, including costs associated with delayed access to structured portfolio holdings data, costs associated with continuing to file Form N–Q, and recordkeeping costs associated with Form N–PORT for larger fund groups. The economic effects of the delay are discussed in more detail below.

B. Economic Baseline

The current required reporting of information by funds (e.g., reports on Forms N–Q, N–CSR, and N–SAR), as well as the changes in reporting and disclosure brought by the adoption of Form N–PORT, serve as the baseline against which the costs and benefits as well as the impact on efficiency, competition, and capital formation are discussed.⁴⁶ Additionally, the baseline takes into account the fact that some funds likely have started updating their systems and processes to comply with the new Form N–PORT requirements adopted in October 2016.

The entities affected by the delay of the EDGAR submission requirement for reports on Form N–PORT are generally the funds that will report using Form N–PORT; those entities that currently

⁴⁵ See Adopting Release, *supra* note 1, at 81870, 81872.

⁴⁶ See Adopting Release, *supra* note 1, at 81969.

report using Form N–Q and would have ceased doing so as of the applicable Form N–PORT compliance date; and those entities that will rely on either filed information, including the Commission and current and future users of investment company portfolio information including investors, third-party information providers, and other interested potential users.

As of the end of 2016, approximately 95.8 million individuals owned shares of registered investment companies, representing 55.9 million or 44.4% of U.S. households.⁴⁷ We estimate that, as of the end of 2016, there were 17,072 funds registered with the Commission, of which 11,548 are required to file Form N–PORT (i.e., 9,090 mutual funds (excluding money market funds), 1,716 ETFs (including eight ETFs organized as UITs and 1,708 ETFs that are management investment companies), and 742 closed-end funds (excluding SBICs)).⁴⁸ Of the fund groups required to file Form N–PORT, 68.9% of fund groups, representing 0.6% of all fund assets, have net assets below \$1 billion. We also estimate that there are 11,540 funds that currently report on Form N–Q and will be required to report on Form N–PORT,⁴⁹ all of which would have ceased reporting on Form N–Q as of the applicable Form N–PORT compliance date(s).⁵⁰

C. Economic Impacts

We are mindful of the costs and benefits of the delay in filings on Form N–PORT, the new recordkeeping requirement, and the associated delays in the effectiveness of certain amendments and rescissions. The Commission notes that, where possible, it has sought to quantify the benefits and costs, and effects on efficiency, competition, and capital formation expected to result from the delay in the date for submitting Form N–PORT on EDGAR, the related delay in the rescission of Form N–Q, and the other changes made in this release. However, the Commission is unable to quantify

⁴⁷ 2017 Investment Company FactBook (“2017 IC FactBook”), A Review of Trends and Activities in the Investment Company Industry, 57th edition, at 2, available at https://www.ici.org/pdf/2017_factbook.pdf.

⁴⁸ Based on data obtained from the 2017 IC FactBook and registrants' filings with the Commission on Form N–SAR as of the end of 2016.

⁴⁹ 11,540 is equal to 11,548 funds that are required to file Form N–PORT minus 8 ETFs organized as UITs that are required to file Form N–PORT but are not required to file form N–Q. Estimates are based on staff analysis of data obtained from Morningstar Direct, as of December 31, 2016.

⁵⁰ Based on data obtained from the 2017 IC FactBook and registrants' filings with the Commission on Form N–SAR as of the end of 2016.

many of the economic effects because it lacks information necessary to provide reasonable estimates. Effects that we are unable to quantify include the extent to which investors would be able to use the information in Form N-PORT to make more informed investment decisions either through direct use or through third-party service providers.

1. Economic Impacts of Delay in Form N-PORT EDGAR Submission Requirement

The EDGAR submission requirement was designed to enhance the Commission's ability to access efficiently and timely monthly investment portfolio information of a large number of funds in a structured format, and to also enhance investors' ability to make more informed investment decisions. The delay in the requirement to submit Form N-PORT on EDGAR will benefit reporting funds as well as funds' current and prospective investors, because it will allow the Commission time to make progress in the EDGAR system review and to implement and test resulting modifications to the EDGAR system.⁵¹ This will allow the large amounts of new, complex data to be submitted on EDGAR with additional security measures in place. This, in turn, will help ensure that the information contained in Form N-PORT, once submitted to EDGAR, is readily accessible and usable.

The Commission acknowledges, however, that there are costs to a delay in the receipt of Form N-PORT information. The delay in the EDGAR submission requirement could potentially temporarily affect the Commission's ability to readily incorporate Form N-PORT information into its mission through better informed policy decisions and oversight, more specific guidance and comments in the disclosure review process, and more targeted examination and enforcement efforts.⁵² This impact is likely mitigated, however, because during the nine-month delay in the EDGAR submission

requirement, larger fund groups must still prepare and maintain in their records the information that is required to be included on Form N-PORT.⁵³ Further, both smaller fund groups and larger fund groups must also prepare and submit reports on Form N-Q. There is overlap between the information that funds will continue to report on Form N-Q and that required in Form N-PORT; however, funds file Form N-Q in a non-structured data format, file the form less frequently, and report fewer data points than on Form N-PORT.⁵⁴

The nine-month delay of the EDGAR submission requirement will also delay the ability of current and future users of investment company portfolio information, including investors, third-party information providers, and academics, to access additional publicly available data in a structured format. This delay in the Form N-PORT submission will defer the increase in the transparency of a fund's investment strategies and will also postpone the increase in the ability of investors and other potential users to more efficiently identify the funds' risk exposures, differentiate investment companies based on their investment strategies, and make more informed investment decisions. Any costs of such a temporary delay are partially mitigated by the fact that users of investment company portfolio information will continue to have access to relevant investment company information via the reports on Form N-Q and N-CSR for the duration of the Form N-PORT submission delay.

To the extent that the delay in the requirement to submit Form N-PORT on EDGAR for larger fund groups and the delay in the requirement to file Form N-PORT for smaller fund groups change costs borne by fund groups, these changes will come in the form of a reduction in the cost of submitting reports on Form N-PORT on EDGAR. For larger fund groups, there will be a cost saving associated with the nine-

month delay in the requirement to prepare the funds' systems to accommodate the XML-based reports to the extent those fund groups choose another format to prepare and maintain the information that is required to be included in Form N-PORT during the delay period.⁵⁵ For smaller fund groups, there will be a cost saving associated with the nine-month delay in both preparing and submitting reports on Form N-PORT on EDGAR.

Based on the cost estimates in the Adopting Release for compiling and submitting Form N-PORT on EDGAR, we believe that the cost savings for larger fund groups associated with the delay in submitting Form N-PORT on EDGAR and the delay in preparing the funds' systems to accommodate the XML Form N-PORT format requirement will be minimal. While filing with the Commission is delayed for nine months, temporary rule 30b1-9(T) will still require larger fund groups to compile the information that is required to be included in Form N-PORT during the nine months that the EDGAR submission requirement is delayed and these funds will incur the additional cost of maintaining the information required by Form N-PORT in the funds' records in an easily accessible place as required by the temporary final rule. We believe that the cost savings for smaller fund groups associated with the delay in preparing and submitting Form N-PORT on EDGAR for nine months will be likely higher compared to the cost savings for larger fund groups. These cost savings likely comprise a nine-month deferral of initial costs associated with preparing the necessary systems and processes for Form N-PORT filings and a reduction in ongoing costs associated with preparing, reviewing, and filing reports on Form N-PORT for nine months.⁵⁶ Finally, for both larger and smaller funds groups, the proposed delay will temporarily defer costs associated with the public release of information that was previously held private.⁵⁷

⁵¹ To the extent that the Commission's EDGAR review and modernization efforts during the nine-month delay improve current data security for nonpublic information posted on EDGAR, funds will also benefit from efforts to strengthen the Commission's cybersecurity risk profile going forward.

⁵² To the extent that larger fund groups do not prepare and maintain their reports in XML format during the delay period, the nine-month delay in the EDGAR submission requirement could also temporarily negatively affect the Commission because fund reports will not be available in a structured XML format that allows the Commission staff to more efficiently review and analyze fund portfolio information. See Adopting Release, *supra* note 1, at 81876, 81906-7.

⁵³ See *supra* Part I.C.

⁵⁴ As detailed in the Adopting Release, Form N-PORT requires additional information concerning fund portfolio holdings that is not currently required by Form N-Q. See Adopting Release, *supra* note 1, at 81875-76. For example, Form N-PORT requires reporting of additional information relating to derivative investments. The form also includes certain risk metric calculations that measure a fund's exposure and sensitivity to changing market conditions, such as changes in asset prices, interest rates, or credit spreads. Form N-PORT also requires information about certain fund transactions and activities such as securities lending, repurchase agreements, and reverse repurchase agreements, including information regarding the counterparties to which the fund is exposed in those transactions, as well as in over-the-counter derivatives transactions.

⁵⁵ This cost saving comprises a deferral of initial costs because larger fund groups must prepare their systems to accommodate the XML-based reports with a nine-month delay and a reduction in ongoing costs because larger fund groups have to accommodate the XML-based reports for nine months less. It is possible that certain funds have already started preparing their systems and processes to accommodate the Form N-PORT requirements adopted in October 2016. Any cost reductions and deferrals for those funds are likely lower.

⁵⁶ See Adopting Release *supra* note 1, footnotes 1300-1304 for details on the initial and ongoing costs associated with preparing, reviewing, and filing reports on Form N-PORT.

⁵⁷ Such costs include potential "front-running," "predatory trading," and "copycatting/reverse

2. Economic Impacts of Delay in Form N-Q Rescission

The nine-month delay in the Form N-PORT submission on EDGAR likely imposes additional costs to funds required to file reports on Form N-Q for an additional nine months. First, the requirement to submit Form N-Q for an additional nine months as well as prepare and maintain the information that is required to be included in a larger fund group's report on Form N-PORT will impose filing costs for Form N-Q and some duplicative preparation and recordkeeping costs on larger fund groups that will be required to prepare and maintain information that is included in both forms. Using estimates from the Adopting Release, we calculate that preparing and filing Form N-Q imposes annual total cost of \$78,518,160 for all funds, or \$6,804 per fund annually.⁵⁸ However, because substantially all of Form N-Q questions have been incorporated into Form N-PORT, we estimate that much of the estimated burden encompasses the cost of gathering and preparing relevant data as well as developing or maintaining the systems and records to generate the data that will be required by both forms. As a result, the additional costs of preparing and filing Form N-Q during the nine-month delay will likely be administrative in nature, and small in relation to the costs that funds already bear for preparing and reviewing Form N-PORT.⁵⁹

Second, the delay in the Form N-PORT submission requirement will impose an additional cost on funds that must continue seeking certification of

the Form N-Q for nine more months until Form N-Q is rescinded.⁶⁰ As mentioned above, once Form N-Q is rescinded, the certifying officer will be required to state that he or she has disclosed in Form N-CSR any change in the registrant's internal control over financial reporting that occurred during the most recent fiscal half-year rather than the most recent quarter to fill the gap in certification coverage that would otherwise occur once Form N-Q is rescinded. Nevertheless, we believe any additional certification costs arising from the delay in the Form N-Q rescission will be minimal.⁶¹

3. Analysis of Effects on Efficiency, Competition, and Capital Formation

Market participants rely on the ability of EDGAR to perform effectively in order to provide the Commission and investors with timely reporting. The Commission prioritizes a secure and fully functional EDGAR for receiving information about its registrants and providing that information to market participants. The delay in the Form N-PORT submission requirement and the resulting delay in the Form N-Q rescission will provide the Commission with time to make progress in the EDGAR system review and to implement and test resulting modifications to the EDGAR system to allow EDGAR to accept new, large, and complex structured data disclosures made by funds effectively, with additional security measures in place, thereby facilitating the ready accessibility of the disclosures by investors and other market participants.

The Commission acknowledges, however, that the delay will temporarily prevent the Commission, investors, and other market participants from accessing the more comprehensive and structured portfolio information that would be made available by funds filing Form N-PORT. The enhanced disclosures in

Form N-PORT would allow the Commission to better monitor industry trends and identify industry outliers, provide guidance and comments to improve disclosure, identify risks, inform policy and rulemaking, and assist the Commission in its oversight efforts. The enhanced disclosures in Form N-PORT would also allow investors and other market participants to more efficiently analyze investment portfolio information, better differentiate investment companies based on their investment strategies and other activities, select funds based on security selection, industry focus, level of diversification, and the use of leverage and derivatives. The enhanced disclosures therefore would ultimately allow investors to allocate capital across reporting funds more in line with their risk preferences and increase the competition among funds for investor capital. Hence, the delay in the Form N-PORT submission requirement might temporarily negatively impact investors; the fair, orderly, and efficient functioning of the markets; and capital formation. Importantly, however, this temporary negative impact is mitigated by delaying the rescission of Form N-Q until May 1, 2020 so that funds will continue to provide some fund portfolio holdings information on Form N-Q.

The delay may have an incremental competitive effect on larger fund groups, which remain subject to the requirement to prepare the information required by Form N-PORT and Form N-Q, but to retain the former and submit the latter, for an additional nine months, while smaller fund groups are not subject to the costs of preparing and retaining the information required by Form N-PORT. These effects are likely small, given the relative size of the larger fund groups to the smaller fund groups and will only last for nine months.

D. Alternatives

As an alternative to the nine-month delay of the EDGAR submission requirement for reports on Form N-PORT, we considered a longer or shorter delay period. While a shorter period would have reduced the costs to the Commission and other current and future users of investment company portfolio information of not receiving investment portfolio information in a more timely manner, the Commission believes that a shorter period would be inadequate for review and testing of the EDGAR system's ability to validate and accept Form N-PORT filings effectively. At this time, the Commission also believes that a longer period is not necessary and would increase the costs to the Commission and other users of

engineering of trading strategies" by other investors as well as the public release of previously private and sensitive information, such as the identities and weights of all of the individual components in custom baskets or indexes comprising the reference instruments underlying the fund's derivative investments, information regarding fees and financing terms for certain derivatives contracts, information regarding the variable financing rates for swaps that pay or receive financing payments, and the reporting of distressed debt issued by private companies. See Adopting Release, *supra* note 1, at 81977-80.

⁵⁸ The estimated annual cost per-fund is based upon the following calculations: \$6,804 = 21 hours/fund × \$324/hour compensation for professionals commonly used in preparation of Form N-Q filings. (\$324 = (\$308 per hour for senior programmers + \$340 per hour for compliance attorneys) ÷ 2 (as half of the time will be performed by senior programmers and half by compliance attorneys)), as we believe these employees would commonly be responsible for completing reports on Form N-Q. The estimated annual total cost is based on the following calculation: \$78,518,160 = \$6,804 annual per fund cost × 11,540 funds. Funds are currently required to file a quarterly report on Form N-Q after the close of the first and third quarters of each fiscal year. See Adopting Release, *supra* note 1, at 81998.

⁵⁹ See Adopting Release, *supra* note 1, at page 81975.

⁶⁰ On the other hand, the proposed delay in the Form N-Q rescission will also temporarily defer for some funds any costs associated with the rescission of Form N-Q, depending on a particular fund's fiscal year. In particular, the rescission of Form N-Q will eliminate certifications of the accuracy of the portfolio schedules reported for the first and third fiscal quarters and funds will only certify their disclosure controls and procedures and internal control over financial reporting in Form N-CSR semi-annually. To the extent that Form N-Q's certifications about the accuracy of portfolio holdings improve the accuracy of the data reported during the first and third quarters, reducing the frequency of certifications from quarterly to semiannually could affect the quality of the data reported. The delay in the rescission of Form N-Q could thus delay the potential cost of reduced data quality due to the reduction in the data certification frequency.

⁶¹ See Adopting Release, *supra* note 1, at 81975, 82005.

investment company portfolio information.

As an alternative to the tiered EDGAR submission requirement on Form N-PORT for larger and smaller fund groups, we considered a nine-month delay in the Form N-PORT submission requirement only for larger fund groups. Such a delay would not allow smaller fund groups to benefit from the extra time to comply with the new requirements and potentially benefit from the lessons learned by larger fund groups. As discussed above, we are not revisiting the decision made in the Adopting Release to maximize the potential for smaller fund groups (and any external vendors that would be used by both larger and smaller fund groups) to benefit from lessons learned by larger fund groups, and therefore we are preserving a tiered requirement for the Form N-PORT EDGAR submission process.⁶² Relatedly, similar to larger fund groups, we considered requiring smaller fund groups to prepare and maintain records of the information that is required to be included in Form N-PORT during the delay. However, delaying the filing requirement for smaller fund groups allows them to benefit from the lessons learned by larger fund groups in preparing and filing Form N-PORT on EDGAR as discussed in the Adopting Release.⁶³

As an alternative to the delay in the rescission of Form N-Q, we considered not delaying the rescission of Form N-Q while delaying the N-PORT EDGAR submission requirement by nine months. Such an alternative would decrease the information that is available to the Commission and various market participants, such as investors, about fund portfolio performance. Such a reduction in information availability could adversely impact investors, market efficiency, and capital formation.

We did not revisit the decision made in the Adopting Release to require that funds prepare the information that must be included on Form N-PORT by June 1, 2018 for larger fund groups. The sole purpose of the nine-month delay is to allow the Commission time to make progress in the EDGAR system review and to implement and test resulting modifications to the EDGAR system to allow EDGAR to accept new, large, and complex structured data disclosures made on Form N-PORT by funds effectively, with additional security measures in place.

III. Paperwork Reduction Act

The Commission is delaying the requirement to submit reports on Form N-PORT on the EDGAR system by nine months for larger fund groups from July 30, 2018 to April 30, 2019 and for smaller fund groups from July 30, 2019 to April 30, 2020. The Commission is also adopting rule 30b1-9(T) that requires funds in larger fund groups to maintain in their records the information required in Form N-PORT during that nine-month delay. In addition, the Commission is delaying the rescission of current Form N-Q and delaying the effectiveness of certain amendments to other rules and forms. We do not believe that any of these changes will make any substantive modifications to any existing collection of information requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").⁶⁴

A. Form N-PORT

Rule 30b1-9(T) will require larger fund groups, during the nine-month delay, to satisfy their reporting obligation by maintaining in their records the information required to be included in Form N-PORT instead of submitting the information via EDGAR. We believe that the burden associated with preserving the information required by Form N-PORT in the fund's records in an easily accessible place is similar to the burden associated with submitting the prepared report on EDGAR. Moreover, we believe that some of the burden for smaller fund groups associated with filing Form N-PORT will be deferred for nine months, but because many of the burdens associated with preparing Form N-PORT will be incurred by funds before then, we believe that there will be no substantive modification to the existing collection of information for Form N-PORT. As a result, the Commission believes that the current PRA burden estimates for the existing collection of information requirements remain appropriate.⁶⁵

B. Rescission of Form N-Q

As discussed in the Adopting Release, in connection with our adoption of Form N-PORT, we determined to rescind Form N-Q effective August 1, 2019 in order to eliminate unnecessarily duplicative reporting requirements once smaller funds began reporting on Form N-PORT.⁶⁶ The rescission of Form N-Q will affect all management investment

companies required to file reports on the form. Because larger fund groups that are subject to rule 30b1-9(T) will be required to file public reports on Form N-Q at the time they prepare and preserve the information required by Form N-PORT, these requirements include certain requirements that are duplicative, though they will not involve duplicative public reporting requirements. Because we are delaying the effective date of the rescission of Form N-Q by nine months to May 1, 2020, the burden reduction we estimated will be realized nine months later than contemplated by the Adopting Release. As a result, the Commission believes that the current PRA burden estimates for the existing collection of information requirements remain appropriate.⁶⁷

C. Registration Statement Forms

We are delaying the effective date of technical and conforming changes to Forms N-1A, N-2, and N-3 referring to the availability of portfolio holdings schedules to May 1, 2020, the same day the rescission of Form N-Q will now be effective.

In the Adopting Release, we did not estimate a change to burden hours or the external costs related to the technical and conforming amendments related to the availability of portfolio holdings schedules. Therefore, we do not believe that there is a change to burden hours or the external costs resulting from the delay of the effective date of these amendments. Accordingly, the Commission believes that the current PRA burden estimates for the existing collection of information requirements remain appropriate.⁶⁸

D. Amendments to Form N-CSR

As discussed in the Adopting Release, in connection with the rescission of Form N-Q, we also adopted amendments to Form N-CSR, the reporting form used by management companies to file certified shareholder reports under the Investment Company Act and the Exchange Act.⁶⁹

⁶⁷ "Form N-Q—Quarterly Schedule of Portfolio Holdings of Registered Management Investment Company" (OMB Control No. 3235-0578).

⁶⁸ "Form N-1A under the Securities Act of 1933 and under the Investment Company Act of 1940, Registration Statement of Open-End Management Investment Companies" (OMB Control No. 3235-0307); "Form N-2 under the Investment Company Act of 1940 and Securities Act of 1933, Registration Statement of Closed-End Management Investment Companies" (OMB Control No. 3235-0026); and "Form N-3 Under the Investment Company Act of 1940, Registration Statement of Separate Accounts Organized as Management Investment Companies" (OMB Control No. 3235-0316).

⁶⁹ Adopting Release, *supra* note 1, at 82004. Compliance with the certification requirements will

⁶² See *supra* Part I.C.

⁶³ See Adopting Release, *supra* note 1, at 81966.

⁶⁴ 44 U.S.C. 3501 through 3521.

⁶⁵ "Form N-PORT Under the Investment Company Act, Monthly Portfolio Investments Report" (OMB Control No. 3235-0730).

⁶⁶ Adopting Release, *supra* note 1, at 81998.

In the Adopting Release, we estimated that the amendments to the certification requirements of Form N-CSR would not change the annual hour burden or external costs associated with Form N-CSR.⁷⁰ Therefore, we do not believe that there is a change to burden hours or the external costs resulting from the delay of the effective date of these amendments. Accordingly, the Commission believes that the current PRA burden estimates for the existing collection of information requirements remain appropriate.⁷¹

IV. Statutory Authority

We are adopting the rules contained in this document under the authority set forth in the Securities Act [15 U.S.C. 77a *et seq.*], the Exchange Act, particularly sections 10, 13, 15, 23, and 35A thereof [15 U.S.C. 78a *et seq.*], the Investment Company Act, particularly sections 8, 30, 31, and 38 thereof [15 U.S.C. 80a *et seq.*], and 44 U.S.C. 3506.

List of Subjects

17 CFR Part 232

Administrative practice and procedure, Reporting and recordkeeping requirements, Securities.

17 CFR Part 239

Reporting and recordkeeping requirements, Securities.

17 CFR Part 249

Reporting and recordkeeping requirements, Securities.

17 CFR Parts 270 and 274

Investment companies, Reporting and recordkeeping requirements, Securities.

For reasons set forth in the preamble, title 17, chapter II of the Code of Federal Regulations is amended as follows:

PART 270—RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1940

■ 1. The authority citation for part 270 continues to read, in part, as follows:

Authority: 15 U.S.C. 80a-1 *et seq.*, 80a-34(d), 80a-37, 80a-39, and Pub. L. 111-203, sec. 939A, 124 Stat. 1376 (2010), unless otherwise noted.

* * * * *

■ 2. Section 270.30b1-9(T) is added to read as follows:

be mandatory, and responses are not kept confidential.

⁷⁰ *Id.* at 82005.

⁷¹ “Form N-CSR under the Securities Exchange Act of 1934 and under the Investment Company Act of 1940, Certified Shareholder Report of Registered Management Investment Companies” (OMB Control No. 3235-0570).

§ 270.30b1-9(T) Temporary rule regarding monthly report.

(a) Until April 1, 2019, each registered management investment company subject to § 270.30b1-9 of this chapter must satisfy its reporting obligation under that section by maintaining in its records the information that is required to be included in Form N-PORT (§ 274.150 of this chapter).

(b) The information maintained in the registered management investment company's records under paragraph (a) of this section shall be treated as a record under section 31(a)(1) of the Act [15 U.S.C. 80a-30(a)(1)] and § 270.31a-1(b) of this chapter subject to the requirements of § 270.31a-2(a)(2) of this chapter.

(c) This section will expire and no longer be effective on March 31, 2026.

By the Commission.

Dated: December 8, 2017.

Brent J. Fields,

Secretary.

[FR Doc. 2017-26922 Filed 12-13-17; 8:45 am]

BILLING CODE 8011-01-P

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 232

[Docket ID: DOD-2017-OS-0038]

RIN 0790-ZA13

Military Lending Act Limitations on Terms of Consumer Credit Extended to Service Members and Dependents

AGENCY: Under Secretary of Defense for Personnel and Readiness, Department of Defense.

ACTION: Interpretive rule; amendment.

SUMMARY: The Department of Defense (Department) is amending its interpretive rule for the Military Lending Act (the MLA). The MLA, as implemented by the Department, limits the military annual percentage rate (MAPR) that a creditor may charge to a maximum of 36 percent, requires certain disclosures, and provides other substantive consumer protections on “consumer credit” extended to Service members and their families. On July 22, 2015, the Department amended its regulation primarily for the purpose of extending the protections of the MLA to a broader range of closed-end and open-end credit products (the July 2015 Final Rule). On August 26, 2016, the Department issued the first set of interpretations of that regulation in the form of questions and answers; the

present interpretive rule amends and adds to those questions and answers to provide guidance on certain questions the Department has received regarding compliance with the July 2015 Final Rule.

DATES: Effective Date: This interpretive rule is effective December 14, 2017.

FOR FURTHER INFORMATION CONTACT: Andrew Cohen, 703-692-5286.

SUPPLEMENTARY INFORMATION:

I. Background and Purpose

In July 2015, the Department of Defense (Department) issued a final rule¹ (July 2015 Final Rule) amending its regulation implementing the Military Lending Act (MLA)² primarily for the purpose of extending the protections of the MLA to a broader range of closed-end and open-end credit products, rather than the limited credit products that had been defined as “consumer credit.”³ Among other amendments, the July 2015 Final Rule modified provisions relating to the optional mechanism a creditor may use when assessing whether a consumer is a “covered borrower,” modified the disclosures that a creditor must provide to a covered borrower, and implemented the enforcement provisions of the MLA.

Subsequently, the Department received requests to clarify its interpretation of points raised in the July 2015 Final Rule. The Department elected to inform the public of its views by issuing an interpretive rule in the form of questions and answers to assist industry in complying with the July 2015 Final Rule. The Department issued the first set of such interpretations on August 26, 2016 (August 26, 2016 Interpretive Rule).⁴ The present interpretive rule amends and adds to those questions and answers. This interpretive rule does not change the regulation implementing the MLA, but merely states the Department's preexisting interpretations of an existing regulation. Therefore, under 5 U.S.C. 553(b)(A), this rulemaking is exempt from the notice and comment requirements of the Administrative Procedure Act, and, pursuant to 5 U.S.C. 553(d)(2), this rule is effective immediately upon publication in the **Federal Register**.

II. Interpretations of the Department

The following questions and answers represent official interpretations of the Department on issues related to 32 CFR

¹ 80 FR 43560 (July 22, 2015).

² 10 U.S.C. 987.

³ 32 CFR 232.3(b) as implemented in a final rule published at 72 FR 50580 (Aug. 31, 2007).

⁴ 81 FR 58840 (August 26, 2016).

part 232. For ease of reference, the following terms are used throughout this document: MLA refers to the Military Lending Act (codified at 10 U.S.C. 987); MAPR refers to the military annual percentage rate, as defined in 32 CFR 232.3(p).

In order to provide further guidance to industry and the public on the Department's view of its existing regulation, the Department amends its guidance on three questions and provides one additional question and answer. The numbering of this document follows the numbering of the questions and answers provided in the August 26, 2016 Interpretive Rule.

2. *Does credit that a creditor extends for the purpose of purchasing a motor vehicle or personal property, which secures the credit, fall within the exception to "consumer credit" under 32 CFR 232.3(f)(2)(ii) or (iii) where the creditor simultaneously extends credit in an amount greater than the purchase price of the motor vehicle or personal property?*

Answer: The answer will depend on what the credit beyond the purchase price of the motor vehicle or personal property is used to finance. Generally, financing costs related to the object securing the credit will not disqualify the transaction from the exceptions, but financing credit-related costs will disqualify the transaction from the exceptions.

Section 232.3(f)(1) defines "consumer credit" as credit offered or extended to a covered borrower primarily for personal, family, or household purposes that is subject to a finance charge or payable by written agreement in more than four installments. Section 232.3(f)(2) provides a list of exceptions to paragraph (f)(1), including an exception for any credit transaction that is expressly intended to finance the purchase of a motor vehicle when the credit is secured by the vehicle being purchased and an exception for any credit transaction that is expressly intended to finance the purchase of personal property when the credit is secured by the property being purchased.

A credit transaction that finances the object itself, as well as any costs expressly related to that object, is covered by the exceptions in § 232.3(f)(2)(ii) and (iii), provided it does not also finance any credit-related product or service. For example, a credit transaction that finances the purchase of a motor vehicle (and is secured by that vehicle), and also finances optional leather seats within that vehicle and an extended warranty for service of that vehicle is eligible for the exception

under § 232.3(f)(2)(ii). Moreover, if a covered borrower trades in a motor vehicle with negative equity as part of the purchase of another motor vehicle, and the credit transaction to purchase the second vehicle includes financing to repay the credit on the trade-in vehicle, the entire credit transaction is eligible for the exception under § 232.3(f)(2)(ii) because the trade-in of the first motor vehicle is expressly related to the purchase of the second motor vehicle. Similarly, a credit transaction that finances the purchase of an appliance (and is secured by that appliance), and also finances the delivery and installation of that appliance, is eligible for the exception under § 232.3(f)(2)(iii).

In contrast, a credit transaction that also finances a credit-related product or service rather than a product or service expressly related to the motor vehicle or personal property is not eligible for the exceptions under § 232.3(f)(2)(ii) and (iii). For example, a credit transaction that includes financing for Guaranteed Auto Protection insurance or a credit insurance premium would not qualify for the exception under § 232.3(f)(2)(ii) or (iii). Similarly, a hybrid purchase money and cash advance credit transaction is not expressly intended to finance the purchase of a motor vehicle or personal property because the credit transaction provides additional financing that is unrelated to the purchase. Therefore, any credit transaction that provides purchase money secured financing of a motor vehicle or personal property along with additional "cashout" financing is not eligible for the exceptions under § 232.3(f)(2)(ii) and (iii) and must comply with the provisions set forth in the MLA regulation.

17. *Does the limitation in § 232.8(e) on a creditor using a check or other method of access to a deposit, savings, or other financial account maintained by the covered borrower prohibit the borrower from granting a security interest to a creditor in the covered borrower's checking, savings or other financial account?*

Answer: No. The prohibition in § 232.8(e) does not prohibit covered borrowers from granting a security interest to a creditor in the covered borrower's checking, savings, or other financial account, provided that it is not otherwise prohibited by other applicable law and the creditor complies with all other provisions of the MLA regulation, including the limitation on the MAPR to 36 percent. As discussed in Question and Answer #16 of these Interpretations, § 232.8(e) prohibits a creditor from using the borrower's account information to create

a remotely created check or remotely created payment order in order to collect payments on consumer credit from a covered borrower or using a post-dated check provided at or around the time credit is extended.

Section 232.8(e)(3) further clarifies that covered borrowers may convey security interests in checking, savings, or other financial accounts by describing a permissible security interest granted by covered borrowers. Borrowers may convey security interests for all types of consumer credit covered by the MLA regulation.

Creditors should also note, however, that 32 CFR 232.7(a) provides that the MLA does not preempt any State or Federal law, rule or regulation to the extent that such law, rule or regulation provides greater protection to covered borrowers than the protections provided by the MLA. For example, although the MLA regulation does not prohibit borrowers from conveying security interests in all types of consumer credit covered by the regulation, including credit card accounts, such accounts may also be subject to other laws, rules and regulations governing offsets and security interests. *See, e.g.*, 12 CFR 1026.12(d).

18. *Does the limitation in § 232.8(e) on a creditor using a check or other method of access to a deposit, savings, or other financial account maintained by the covered borrower prohibit a creditor from exercising a statutory right, or a right arising out of a security interest a borrower grants to a creditor, to take a security interest in funds deposited within a covered borrower's account at any time?*

Answer: No. In addition to the security interests granted by borrowers to creditors, as discussed in Question and Answer #17 of these Interpretations, above, under certain circumstances Federal or State statutes may grant creditors statutory liens on funds deposited within covered borrowers' asset accounts. Section 232.8(e) does not prohibit a creditor from exercising rights to take a security interest in funds deposited into a covered borrower's account at any time, including enforcing statutory liens, provided that it is not otherwise prohibited by other applicable law and the creditor complies with all other provisions of the MLA regulation, including the limitation on the MAPR to 36 percent. For example, under 12 U.S.C. 1757(11) Federal credit unions may "enforce a lien upon the shares and dividends of any member, to the extent of any loan made to him and any dues or charges payable by him."

As discussed in Question and Answer #16 of these Interpretations, § 232.8(e) serves to prohibit a creditor from using the borrower's account information to create a remotely created check or remotely created payment order in order to collect payments on consumer credit from a covered borrower or using a postdated check provided at or around the time credit is extended. Section 232.8(e)(3) describes a permissible activity under § 232.8(e). However, the fact that § 232.8(e)(3) specifies a particular time when a creditor may take a security interest in funds deposited in an account does not change the general effect of the prohibition in § 232.8(e). Therefore, § 232.8(e) does not impede a creditor from—for example—exercising a statutory right to take a security interest in funds deposited in an account at any time, provided that the security interest is not otherwise prohibited by other applicable law and the creditor complies with all other provisions of the MLA regulation, including the limitation on the MAPR to 36 percent.

Creditors may exercise the right to take a security interest in funds deposited into a covered borrower's account in connection with all types of consumer credit covered by the MLA regulation, including credit card accounts, provided the creditor's actions are not prohibited by other State or Federal law, rule or regulation that provides greater protection to covered borrowers than the protections provided in the MLA. For example, although the MLA regulation does not prohibit borrowers from conveying security interests in all types of consumer credit covered by the regulation, including credit card accounts, such accounts may also be subject to other laws, rules and regulations governing offsets and security interests. *See, e.g.*, 12 CFR 1026.12(d).

20. *To qualify for the optional safe harbor under 32 CFR 232.5(b)(3), must the creditor determine the consumer's covered borrower status simultaneously with the consumer's submission of an application for consumer credit or exactly 30 days prior?*

Answer: No. Section 232.5(b)(3)(i) and (ii) permit the creditor to qualify for the safe harbor when it makes a timely determination regarding the status of a consumer at the time the consumer either initiates the transaction or submits an application to establish an account, or anytime during a 30-day period of time prior to such action. Therefore, a creditor qualifies for the safe harbor under § 232.5(b) when the qualified covered borrower check that the creditor relies on is conducted at the

time a consumer initiates a credit transaction or applies to establish an account, or up to 30 days prior to the action taken by the consumer. Similarly, the timing provisions in § 232.5(b)(3)(i) and (ii) permit a creditor to qualify for the safe harbor when it conducts a qualified covered borrower check simultaneously with the initiation of the transaction or submission of an application by the consumer or during the course of the creditor's processing of that application for consumer credit.

III. Regulatory Impact

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

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. It has been determined that this is not a significant rule. This interpretive rule will not have an annual effect of \$100 million or more on the economy, or adversely affect productivity, competition, jobs, the environment, public health or safety, or State or local governments. This rulemaking will not interfere with an action taken or planned by another agency, or raise new legal or policy issues. Finally, this rulemaking will not alter the budgetary impacts of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients of such programs.

This amended interpretive rule does not change the regulation implementing the MLA, but merely states the Department's preexisting interpretations of an existing regulation. Moreover, the Department's interpretive views do not further prohibit or limit the sale of credit and ancillary credit-related products beyond any limits that may be set forth in the final rule. For example, under the final rule as issued, the inclusion of ancillary credit products in a hybrid transaction makes the credit transaction ineligible for the exemption from "consumer credit" under 32 CFR 232.3(f)(2)(ii) and (iii). This amended interpretive rule merely provides guidance on how the rule applies when such products are included in a credit transaction. Neither the final rule nor

this amended interpretive rule prohibits the sale of ancillary credit products by the creditor as part of the credit transaction or as a separate transaction, nor does either prohibit a covered borrower from purchasing such products from the creditor or from another source. The Department estimates there remains a variety of venues for creditors to offer ancillary credit products and covered borrowers to acquire such ancillary credit products.

In evaluating any potential economic impact, the Department has consulted with the Consumer Financial Protection Bureau ("Bureau")⁵ to assess the scope of the market for motor vehicle loans that also provide financing for a credit-related product or service, as such loans would not meet the exception from "consumer credit" in 32 CFR 232.3(f)(2)(ii). Specifically, the Department's assessment focused on guaranteed asset protection (GAP) and other credit insurance premiums, such as credit life and credit disability insurance, that are financed in connection with a credit transaction expressly intended to purchase a motor vehicle. In conducting its assessment, the Department excluded financing costs that are expressly related to the object being purchased because, as clarified in this interpretive rule, such costs would not prevent an otherwise exempt credit transaction from qualifying for the exemptions from "consumer credit" in 32 CFR 232.3(f)(2)(ii) and (iii).⁶ In assessing the scope of the market, the Department, in consultation with the Bureau, relied on informal surveys and reports regarding the market for financed motor vehicle transactions, the utilization of GAP and other credit insurance premiums in that market, and the typical costs to

⁵ The Bureau monitors, analyzes, and performs outreach to the auto lending industry through its Office of Consumer Lending, Reporting & Collection Markets. The Bureau, as part of its ongoing assistance to the Department, provided the Department with certain data regarding the auto lending marketplace.

⁶ For example, the Department excluded from this analysis credit transactions that also finance extended warranty protection or include financing to repay the credit on a trade-in vehicle because the Department interprets such costs as expressly related to the object (motor vehicle) being financed.

consumers associated with such ancillary credit-related products.⁷

Based on available data, the Department estimates the annual total market revenue for these products at \$6,116.5 and \$3,761.7 million, respectively, or a total of \$9,878.1 million. The Department estimates that the covered borrower market for these products is .95 percent of the total market for these products, as covered borrower households represent .95 percent of total U.S. households, which implies a total possible market for covered borrowers of approximately \$93.8 million. Of these covered borrowers, the Department estimates that only a very small portion of these consumers could include the Service members and their families covered by the MLA. As an example, if the typical consumer of such a product is an enlisted Service member under 25, does not have a college degree, and owns a car, the possible market value relevant to the MLA and this interpretive rule might be more like \$21.7 million.⁸ Within this further market segment, an undetermined percentage of these products actually offer interest rates greater than 36 percent and would actually be purchased by this group, which would represent the share of products that fall under the MLA requirement. Generally, in this and other possible scenarios across age groups and other demographic characteristics, the Department anticipates the universe of products that

⁷ See Experian, "State of the Automotive Finance Market: A Look at Loans and Leases in Q4 2016," at 11, 19 (2016); Colonnade Advisors, "F&I Products Industry Market Commentary," at 2 (2016), available at coladv.com/wp-content/uploads/FI-Product-Industry-Report-April-2016.pdf; F&I and Showroom, "Tracking F&I Performance," <http://www.fi-magazine.com/article/story/2012/01/tracking-fi-performance.aspx> (last visited Sept. 20, 2017). The Department's research indicates that the available data regarding credit-related ancillary products in the auto lending marketplace are limited and primarily derived from informal surveys and reports.

⁸ Approximately 82 percent of Service members are enlisted; 91 percent do not have college degrees; 44 percent are under 25 years of age; and 67 percent of those under 25 own or lease at least one vehicle. The intersection of these portions creates a factor of approximately .22, which can be applied to the total market value of approximately \$93.8 million, resulting in a possible market segment of approximately \$21.7 million. This segment would then require further apportionment to reflect the share of the products therein that offer interest rates above the 36 percent cap. See 2015 Demographics Profile of the Military Community, Chapter 2, Department of Defense, available at <http://download.militaryonesource.mil/12038/MOS/Reports/2015-Demographics-Report.pdf> and Table 3202. Consumer units with reference person under age 25 by income before taxes: Average annual expenditures, Consumer Expenditure Survey, 2015–2016, Bureau of Labor Statistics, available at <https://www.bls.gov/cex/2016/CrossTabs/agebyinc/xunder25.PDF>.

exceed 36 percent interest in this category is very small and possibly negligible, especially considering the time that has passed since the final rule was issued. This number is anticipated to be even more likely to be negligible when considering the number of covered borrowers who would choose to consume this product particularly in light of the existing MLA requirement.

2 U.S.C. Ch. 25, "Unfunded Mandates Reform Act"

Section 202 of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532) requires agencies to 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 2014, that threshold is approximately \$141 million. This rule will not mandate any requirements for State, local, or tribal governments, nor will it affect private sector costs.

Public Law 96–354, "Regulatory Flexibility Act" (5 U.S.C. Ch. 6)

The Department of Defense certifies that this rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. Therefore, the Regulatory Flexibility Act, as amended, does not require us to prepare a regulatory flexibility analysis.

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

This rule does not impose reporting and record keeping requirements under the Paperwork Reduction Act of 1995.

Executive Order 13132, "Federalism"

This rule was analyzed in accordance with the principles and criteria contained in Executive Order 13132 ("Federalism"). It has been determined that it does not have sufficient Federalism implications to warrant the preparation of a Federalism summary impact statement. This rule has no substantial effect on the States, or on the current Federal-State relationship, or on the current distribution of power and responsibilities among the various local officials. Nothing in this rule preempts any State law or regulation. Therefore, the Department did not consult with State and local officials because it was not necessary.

Dated: December 11, 2017.

Patricia L. Toppings,
OSD Federal Register Liaison Officer,
Department of Defense.

[FR Doc. 2017–26974 Filed 12–13–17; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2017–1053]

RIN 1625–AA00

Safety Zone; Delaware River, Pipeline Removal, Marcus Hook, PA

AGENCY: Coast Guard, DHS.

ACTION: Interim rule and request for comments.

SUMMARY: This interim rule modifies and extends the effective period of the existing temporary safety zone encompassing all navigable waters within a 250-yard radius of Commerce Construction vessels and machinery conducting diving and pipeline removal operations in the Delaware River, in the vicinity of Anchorage 7, near Marcus Hook, PA. The safety zone is needed to protect personnel, vessels, and the marine environment from potential hazards created by diving and pipeline removal operations. Entry of vessels or persons into this zone is prohibited unless specifically authorized by the Captain of the Port Delaware Bay. We invite your comments on this rulemaking.

DATES: This rule is effective without actual notice from December 14, 2017. For the purposes of enforcement, actual notice will be used from December 9, 2017, through December 14, 2017. Comments and related material must be received by the Coast Guard on or before January 16, 2018.

ADDRESSES: Documents mentioned in this preamble are part of Docket Number USCG–2017–1053. To view documents mentioned in this preamble as being available in the docket, go to <http://www.regulations.gov>, type the docket number in the "SEARCH" box and click "SEARCH." Click on "Open Docket Folder" on the line associated with this rulemaking. You may submit comments, identified by docket number, using the Federal eRulemaking Portal at <http://www.regulations.gov>. See the "Public Participation and Request for Comments" portion of the **SUPPLEMENTARY INFORMATION** section for

further instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions about this rulemaking, call or email Petty Officer Amanda Boone, Waterways Management Branch, U.S. Coast Guard Sector Delaware Bay; telephone (215) 271-4889, email *Amanda.N.Boone@uscg.mil*.

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Regulatory History and Information

On November 28, 2017, the Coast Guard published a temporary safety zone titled Safety Zone; Delaware River, Pipeline Removal, Marcus Hook, PA (82 FR 56170). The temporary safety zone established a safety zone from November 21, 2017, through December 8, 2017. The safety zone covers all navigable waters within 250 yards of vessels and machinery being used by personnel to conduct diving and pipe removal operations. Due to unforeseen issues with the operation, the expected dates of work have been changed and extended to February 28, 2018.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be impracticable because immediate action is needed to address the potential safety hazards associated with diving and pipeline removal operations.

III. Background, Purpose, and Legal Basis

The Coast Guard is issuing this rule under authority in 33 U.S.C. 1231. The Captain of the Port Delaware Bay has determined that potential hazards associated with diving and pipe removal operations currently underway in the Delaware River, will be a safety concern for anyone within a 250-yard radius of diving and pipe removal vessels and machinery. This rule is needed to protect personnel, vessels, and the marine environment in the navigable waters within the safety zone while the operations are being conducted.

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

Only two changes have been made to the existing temporary rule. First, the

original end date for enforcement of the safety zone was December 8, 2017, and the end date for the enforcement of the safety zone is being changed to February 28, 2018. Second, the enforcement period regulatory text, paragraph (d), has been amended to indicate what time of day the zone will be enforced. This timeframe was discussed in the regulatory analyses statements of the temporary final rule but was not included in the regulatory text itself.

This rule establishes a safety zone from December 9, 2017, through February 28, 2018. The safety zone will cover all navigable waters within 250 yards of vessels and machinery being used by personnel to conduct diving and pipe removal operations.

V. Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders (E.O.s) related to rulemaking. Below we summarize our analyses based on a number of these statutes and E.O.s and we discuss First Amendment rights of protestors.

A. Regulatory Planning and Review

E.O.s 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. E.O. 13771 directs agencies to control regulatory costs through a budgeting process. This rule has not been designated a “significant regulatory action,” under E.O. 12866. Accordingly, the rule has not been reviewed by the Office of Management and Budget (OMB), and pursuant to OMB guidance it is exempt from the requirements of E.O. 13771.

This regulatory action determination is based on the size, location and duration of the security zone. Vessel traffic will be able to safely transit around this safety zone which would impact a small designated area of the Delaware River from December 9, 2017, through February 28, 2018. Moreover, the Coast Guard will issue a Broadcast Notice to Mariners via VHF-FM marine channel 16, Local Notice to Mariners, and Marine Safety Information Bulletin about the zone, and the rule would allow vessels to seek permission to enter the zone.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term “small entities” comprises small businesses, not-for-profit organizations

that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule would not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels that intend to transit the security zone may be small entities, for the reasons stated in section V.A above this rule would not have a significant economic impact on any vessel owner or operator.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

C. Collection of Information

This rule would not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under E.O. 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this rule does not have tribal implications under E.O. 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the

distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this rule has implications for federalism or Indian tribes, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.1D, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone that will prohibit entry within 250 yards of vessels and machinery being used by personnel to conduct diving and pipe removal operations. It is categorically excluded from further review under paragraph L60(d) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 01. A Record of Environmental Consideration (REC) is available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this rule.

G. Protest Activities

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

VI. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking, and will consider all comments and material received during the comment period.

Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number USCG–2017–1053 for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

We encourage you to submit comments through the Federal eRulemaking Portal at <http://www.regulations.gov>. If your material cannot be submitted using <http://www.regulations.gov>, contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

We accept anonymous comments. All comments received will be posted without change to <http://www.regulations.gov> and will include any personal information you have provided. For more about privacy and the docket, you may review a Privacy Act notice regarding the Federal Docket Management System in the March 24, 2005, issue of the **Federal Register** (70 FR 15086).

Documents mentioned in this rule as being available in the docket, and all public comments, will be in our online docket at <http://www.regulations.gov> and can be viewed by following that website's instructions. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted or a final rule is published.

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add § 165.T05–1053, to read as follows:

§ 165.T05–1053 Safety Zone, Delaware River; Pipeline Removal; Marcus Hook, PA.

(a) *Location.* The following areas are safety zones: All navigable waters within 250 yards of the towing vessel JOKER, Commerce Construction crane barge KELLY, and associated diving and pipe removal vessels, as well as any

associated equipment, operating in Marcus Hook Range and Anchorage No. 7 near Marcus Hook, PA, on the Delaware River.

(b) *Definitions*—(1) *Captain of the Port* means the Commander, Sector Delaware Bay or any Coast Guard commissioned, warrant, or petty officer who has been authorized by the Captain of the Port to act on his behalf.

(2) *Designated representative* means any Coast Guard commissioned, warrant or petty officer who has been authorized by the Captain of the Port, Delaware Bay, to assist with the enforcement of safety zones described in paragraph (a) of this section.

(c) *Regulations.* The general safety zone regulations found in 33 CFR part 165 subpart C apply to the safety zone created by this section.

(1) Entry into or transiting within either safety zone is prohibited unless vessels obtain permission from the Captain of the Port via VHF–FM channel 16, or make satisfactory passing arrangements via VHF–FM channels 13 or 80 with the towing vessel JOKER per this section and the rules of the Road (33 CFR subchapter E). Vessels requesting to transit shall contact the towing vessel JOKER on channel 13 or 80 at least 1 hour, as well as 30 minutes, prior to arrival.

(2) Vessels granted permission to enter and transit the safety zone must do so in accordance with any directions or orders of the Captain of the Port, his designated representative, or the towing vessel JOKER. No person or vessel may enter or remain in a safety zone without permission from the Captain of the Port or the towing vessel JOKER.

(3) There are three sections of pipeline that will be removed. The first two sections of pipeline to be removed are in Anchorage No. 7, Marcus Hook Anchorage, in the Delaware River. During removal of these sections of pipeline, the safety zone will restrict vessels from anchoring in the lower portion of Anchorage No. 7.

(4) During removal of the third section of pipeline, operations will be conducted within the main navigational channel and vessels will be required to transit through the lower portion of Anchorage No. 7. The Coast Guard will issue a Broadcast Notice to Mariners via VHF–FM marine channel 16, Local Notice to Mariners, and Marine Safety Information Bulletin further defining specific work locations and traffic patterns.

(5) All vessels must operate at the minimum safe speed necessary to maintain steerage and reduce wake.

(6) This section applies to all vessels that intend to transit through the safety

zone except vessels that are engaged in the following operations: enforcement of laws, service of aids to navigation, and emergency response.

(d) *Enforcement periods.* This section will be enforced from December 8, 2017, through February 28, 2018. Enforcement will generally be between the hours of 5 a.m. and 7 p.m., Monday through Sunday, while the zone is in effect.

Dated: December 8, 2017.

Scott E. Anderson,

Captain, U.S. Coast Guard, Captain of the Port, Delaware Bay.

[FR Doc. 2017-26935 Filed 12-13-17; 8:45 am]

BILLING CODE 9110-04-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R10-OAR-2017-0677; FRL-9971-88-Region 10]

Finding of Failure To Submit a Section 110 State Implementation Plan for Interstate Transport for the 2012 Annual National Ambient Air Quality Standards for Fine Particles

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action finding that Washington State failed to submit an infrastructure State Implementation Plan (SIP) to satisfy certain interstate transport requirements of the Clean Air Act (CAA) with respect to the 2012 annual fine particles (PM_{2.5}) national ambient air quality standard (NAAQS). Specifically, these requirements pertain to significant contribution to nonattainment, or interference with maintenance, of the 2012 annual PM_{2.5} NAAQS in other states. This finding of failure to submit establishes a 2-year deadline for the EPA to promulgate a Federal Implementation Plan (FIP) to address the interstate transport SIP requirements pertaining to significant contribution to nonattainment and interference with maintenance unless, prior to the EPA promulgating a FIP, the state submits, and the EPA approves, a SIP that meets these requirements.

DATES: This final rule is effective on January 16, 2018.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA-R10-OAR-2017-0677. All documents in the dockets are listed on <http://www.regulations.gov>. Although listed in the index, some information is

not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly-available docket materials are available at <http://www.regulations.gov> or in hard copy at the EPA Region 10, Office of Air and Waste, 1200 Sixth Avenue, Seattle, Washington, 98101. The EPA requests that if at all possible, you contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8:00 a.m. to 4:00 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Jeff Hunt, Air Planning Unit, Office of Air and Waste (OAW-150), EPA, Region 10, 1200 Sixth Ave., Suite 900, Seattle, Washington 98101; (206) 553-0256; hunt.jeff@epa.gov.

SUPPLEMENTARY INFORMATION:

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- I. General Information
- II. Background and Overview
- III. Finding of Failure To Submit for Washington State
- IV. Environmental Justice Considerations
- V. Statutory and Executive Order Reviews

I. General Information

A. Notice and Comment Under the Administrative Procedures Act (APA)

Section 553 of the APA, 5 U.S.C. 553(b)(3)(B), provides that, when an agency for good cause finds that notice and public procedure are impracticable, unnecessary or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. The EPA has determined that there is good cause for making this rule final without prior proposal and opportunity for comment because no significant EPA judgment is involved in making a finding of failure to submit SIPs, or elements of SIPs, required by the CAA, where states have made no submissions or incomplete submissions, to meet the requirement. Thus, notice and public procedure are unnecessary. The EPA finds that this constitutes good cause under 5 U.S.C. 553(b)(3)(B).

B. How is the Preamble organized?

II. Background and Overview

A. Interstate Transport SIPs

CAA section 110(a) imposes an obligation upon states to submit SIPs that provide for the implementation, maintenance and enforcement of a new or revised NAAQS within 3 years

following the promulgation of that NAAQS. Section 110(a)(2) lists specific requirements that states must meet in these SIP submissions, as applicable. The EPA refers to this type of SIP submission as the “infrastructure” SIP because it ensures that states can implement, maintain and enforce the air standards. Within these requirements, section 110(a)(2)(D)(i) contains requirements to address interstate transport of NAAQS pollutants. A SIP revision submitted for this sub-section is referred to as an “interstate transport SIP.” In turn, section 110(a)(2)(D)(i)(I) requires that such a plan contain adequate provisions to prohibit emissions from the state that will contribute significantly to nonattainment of the NAAQS in any other state (“prong 1”) or interfere with maintenance of the NAAQS in any other state (“prong 2”). Interstate transport prongs 1 and 2, also called the “good neighbor” provisions, are the requirements relevant to this finding.

Pursuant to CAA section 110(k)(1)(B), the EPA must determine no later than 6 months after the date by which a state is required to submit a SIP whether a state has made a submission that meets the minimum completeness criteria established per section 110(k)(1)(A). The EPA refers to the determination that a state has not submitted a SIP submission that meets the minimum completeness criteria as a “finding of failure to submit.” If the EPA finds a state has failed to submit a SIP to meet its statutory obligation to address section 110(a)(2)(D)(i)(I), pursuant to section 110(c)(1) the EPA has not only the authority, but the obligation, to promulgate a FIP within 2 years to address the CAA requirement. This finding therefore starts a 2-year clock for promulgation by the EPA of a FIP, in accordance with section 110(c)(1), unless prior to such promulgation the state submits, and the EPA approves, a submittal from the state to meet the requirements of section 110(a)(2)(D)(i)(I) for the 2012 annual PM_{2.5} NAAQS. The EPA will work with the state subject to this finding of failure to submit and provide assistance as necessary to help the state develop an approvable submittal in a timely manner. The EPA notes this action does not start a mandatory sanctions clock pursuant to CAA section 179 because this finding of failure to submit does not pertain to a part D plan for nonattainment areas required under section 110(a)(2)(I) or a SIP call pursuant section 110(k)(5).

B. Background on the 2012 Annual PM_{2.5} NAAQS

On December 14, 2012, the EPA promulgated a revised primary annual PM_{2.5} NAAQS to provide increased protection of public health and welfare from fine particle pollution.¹ In that action, the EPA revised the primary annual PM_{2.5} standard, strengthening it from 15.0 micrograms per cubic meter (µg/m³) to 12.0 µg/m³, which is attained when the 3-year average of the annual arithmetic means does not exceed 12.0 µg/m³. Infrastructure SIPs addressing the revised standard were due on December 14, 2015.

III. Finding of Failure To Submit for Washington State

To date, Washington State has not submitted a good neighbor SIP for the 2012 annual PM_{2.5} NAAQS. Accordingly, the EPA is issuing a finding that Washington State has failed to submit a SIP addressing the requirements of section 110(a)(2)(D)(i)(I) of the CAA, 42 U.S.C. 7410(a)(2)(D)(i)(I) (prongs 1–2), for the 2012 annual PM_{2.5} NAAQS.

IV. Environmental Justice Considerations

This notice is making a procedural finding that Washington State has failed to submit a SIP to address CAA section 110(a)(2)(D)(i)(I) for the 2012 annual PM_{2.5} NAAQS. The EPA did not conduct an environmental analysis for this rule because this rule would not directly affect the air emissions from particular sources. Because this rule will not directly affect the air emissions from particular sources, it does not affect the level of protection provided to human health or the environment. Therefore, this action will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income or indigenous populations.

V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This action is not an Executive Order 13771 regulatory action because it is not a significant regulatory action under Executive Order 12866.

C. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the provisions of the PRA, 44 U.S.C. 3501 *et seq.* This final rule does not establish any new information collection requirement apart from what is already required by law.

D. Regulatory Flexibility Act (RFA)

This action is not subject to the RFA. The RFA applies only to rules subject to notice and comment rulemaking requirements under the APA, 5 U.S.C. 553, or any other statute. This rule is not subject to notice and comment requirements because the agency has invoked the APA “good cause” exemption under 5 U.S.C. 553(b).

E. Unfunded Mandates Reform Act of 1995 (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action implements mandates specifically and explicitly set forth in the CAA under section 110(a) without the exercise of any policy discretion by the EPA.

F. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175. This rule responds to the requirement in the CAA for states to submit SIPs under section 110(a) to address CAA section 110(a)(2)(D)(i)(I) for the 2012 annual PM_{2.5} NAAQS. No tribe is subject to the requirement to submit an implementation plan under section 110(a) within 3 years of promulgation of a new or revised NAAQS. Thus, Executive Order 13175 does not apply to this action.

H. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

I. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution or Use

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

J. National Technology Transfer and Advancement Act

This rulemaking does not involve technical standards.

K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

The EPA believes the human health or environmental risk addressed by this action will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income or indigenous populations because it does not affect the level of protection provided to human health or the environment. The EPA’s evaluation of environmental justice considerations is contained in section IV of this document.

L. Congressional Review Act (CRA)

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

M. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 12, 2018. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to

¹ 78 FR 3086; January 15, 2013.

enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

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

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

Dated: November 30, 2017.

Michelle L. Pirzadeh,

Acting Regional Administrator, Region 10.

[FR Doc. 2017-26894 Filed 12-13-17; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R09-OAR-2017-0580; FRL-9972-02-Region 9]

Contingency Measures for the 1997 PM_{2.5} Standards; California; San Joaquin Valley; Correction of Deficiency

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA or “Agency”) is taking final action to determine that the deficiency that formed the basis for a disapproval of the contingency measures submitted for the San Joaquin Valley nonattainment area for the 1997 fine particulate matter (PM_{2.5}) national ambient air quality standards (NAAQS) has been corrected. The effect of this action is to permanently stop the sanctions clocks triggered by the disapproval.

DATES: This final rule is effective December 14, 2017.

ADDRESSES: The EPA has established a docket for this action under Docket No. EPA-R09-OAR-2017-0580. All documents in the docket are listed on the <https://www.regulations.gov> website. Although listed on the website, some information is not publicly available, *e.g.*, Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through <https://www.regulations.gov>, or please contact the person identified in the **FOR FURTHER**

INFORMATION CONTACT section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Rory Mays, EPA Region IX, (415) 972-3227, mays.rory@epa.gov.

SUPPLEMENTARY INFORMATION:

Throughout this document, whenever “we,” “us,” or “our” is used, we mean the EPA.

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- I. Proposed Action
- II. Public Comments and EPA Responses
- III. Final Action
- IV. Statutory and Executive Order Reviews

I. Proposed Action

On October 23, 2017 (82 FR 48944) (herein “proposed rule”), we proposed to determine that the deficiency that formed the basis for a disapproval of the contingency measures submitted for the San Joaquin Valley¹ nonattainment area for the 1997 PM_{2.5} NAAQS (“1997 PM_{2.5} standards”)² has been corrected. We did so based on the Agency’s approval of California regulations establishing standards and other requirements relating to the control of emissions from new on-road and new and in-use off-road vehicles and engines (herein, “waiver measures”) into the California State Implementation Plan (SIP), and a finding that the purposes of the contingency measure requirement, as applicable to the San Joaquin Valley based on its initial designation as a nonattainment area for the 1997 PM_{2.5} standards, have been fulfilled.

Our proposed rule provides a detailed background section that describes the relevant NAAQS, area designations, the relevant SIP submittal requirements, and the relevant SIP revisions submitted and either approved or disapproved by the EPA under Clean Air Act (CAA or “Act”) section 110.

In short, under CAA section 172(c)(9), SIPs for areas designated as nonattainment for a NAAQS must be revised to provide for the implementation of specific measures (“contingency measures”) to take effect if the area fails to make reasonable further progress (RFP) or fails to attain by the applicable attainment date. The EPA disapproved the contingency measure element of a set of SIP revisions collectively referred to as the “2008 PM_{2.5} Plan,” which was developed and submitted by California

to address SIP requirements triggered by the designation of the San Joaquin Valley as a nonattainment area for the 1997 PM_{2.5} NAAQS.³

In response to the EPA’s disapproval of the contingency measure element of the 2008 PM_{2.5} Plan, California submitted a SIP revision referred to as the “2013 Contingency Measure SIP.” The 2013 Contingency Measure SIP primarily relied upon California’s waiver measures, *i.e.*, California mobile source regulations that had been waived or authorized by the EPA under CAA section 209, to provide post-attainment year emissions reductions equivalent to one year’s worth of RFP.⁴

The EPA approved,⁵ but later disapproved,⁶ the 2013 Contingency Measure SIP in the wake of a court decision⁷ that undermined the basis for the EPA’s approval. The court decision at issue held that waiver measures must be approved into the SIP if California relies upon them to meet CAA SIP requirements, thereby rejecting the EPA’s longstanding practice allowing California SIP credit for waiver measures notwithstanding their absence from the SIP. Our disapproval of the 2013 Contingency Measure SIP became effective on June 13, 2016, and started a sanctions clock for imposition of offset sanctions 18 months after June 13, 2016, and highway sanctions 6 months later, pursuant to CAA section 179 and our regulations at 40 CFR 52.31, unless the State submits and the EPA approves, prior to the implementation of the sanctions, a SIP submission that corrects the deficiencies identified in the disapproval action.⁸

Since the disapproval of the 2013 Contingency Measure SIP, we have approved the waiver measures as

³ 76 FR 69896 (November 9, 2011) (final action on the 2008 PM_{2.5} Plan).

⁴ One year’s worth of RFP is the yardstick the EPA has cited historically as the approximate quantity of emissions reductions that contingency measures should provide to satisfy CAA section 172(c)(9). *See, e.g.*, 81 FR 58010, at 58066 (August 24, 2016) (final rule implementing the PM_{2.5} NAAQS).

⁵ 79 FR 29327 (May 22, 2014) (final action approving the 2013 Contingency Measure SIP).

⁶ 81 FR 29498 (May 12, 2016) (final action disapproving the 2013 Contingency Measure SIP).

⁷ *Committee for a Better Arvin v. EPA*, 786 F.3d 1169 (9th Cir. 2015) (“*Committee for a Better Arvin*”) (partially granting and partially denying petition for review).

⁸ The offset sanction applies to New Source Review (NSR) permits for new major stationary sources or major modifications proposed in a nonattainment area, and it increases the ratio of emissions reductions (*i.e.*, offsets) to increased emissions from the new or modified source, which must be obtained to receive an NSR permit, to 2 to 1. The highway sanction prohibits, with certain exceptions, the U.S. Department of Transportation from approving or funding transportation projects in a nonattainment area.

¹ The San Joaquin Valley PM_{2.5} nonattainment area is located in the southern half of California’s central valley and includes all of San Joaquin, Stanislaus, Merced, Madera, Fresno, Tulare, and Kings counties, and the valley portion of Kern County. *See* 40 CFR 81.305.

² The EPA promulgated the 1997 PM_{2.5} NAAQS at 62 FR 38652 (July 18, 1997).

revisions to the California SIP,⁹ and our approval of them as part of the SIP addresses the specific deficiency that formed the basis of our May 12, 2016 disapproval of the 2013 Contingency Measure SIP. Moreover, since the 2014 attainment year (for the 2008 PM_{2.5} Plan), the waiver measures and related vehicle fleet turnover have achieved post-attainment year emission reductions equivalent to approximately one year's worth of RFP as calculated for the 2008 PM_{2.5} Plan. The waiver measures have thus provided for sufficient progress towards attainment of the 1997 PM_{2.5} standards while a new attainment plan is being prepared.¹⁰ Therefore, in our proposed rule we found that the purposes of the contingency measure requirement, as applicable to the San Joaquin Valley based on the area's designation in 2005 for the 1997 PM_{2.5} NAAQS, have been fulfilled, and we proposed to determine that the deficiency that formed the basis for the disapproval of the 2013 Contingency Measure SIP has been corrected. We are finalizing this determination in today's action.

For a more detailed discussion of the regulatory context and rationale for our action, please see the proposed rule.

II. Public Comments and EPA Responses

The EPA's proposed action provided a 30-day public comment period which ended on November 22, 2017. During this period, we received no comments.

III. Final Action

For the reasons given in our proposed rule and summarized herein, the EPA is making a final determination that the deficiency that formed the basis of our disapproval of the 2013 Contingency Measure SIP for the San Joaquin Valley for the 1997 PM_{2.5} NAAQS has been corrected by the approval of the waiver measures as a revision to the California SIP and the finding that the waiver measures have achieved post-2014 attainment year emissions reductions sufficient to fulfill the purposes of the contingency measure requirement in CAA section 172(c)(9). This final determination permanently stops the sanctions clocks triggered by our disapproval of the 2013 Contingency Measure SIP. See CAA section 179(a) and 40 CFR 52.31(d)(5).

⁹ 81 FR 39424 (June 16, 2016) and 82 FR 14446 (March 21, 2017).

¹⁰ In response to the EPA's determination of failure to attain the 1997 PM_{2.5} NAAQS, 81 FR 84481 (November 23, 2016), the San Joaquin Valley Unified Air Pollution Control District and California Air Resources Board are preparing a new attainment plan with contingency measures for the 1997 PM_{2.5} NAAQS for the San Joaquin Valley.

In accordance with 5 U.S.C. 553(d), the EPA finds there is good cause for this action to become effective immediately upon publication. This is because a delayed effective date is unnecessary due to the nature of the determination made herein that a deficiency in a previous SIP approval has been corrected. The immediate effective date for this action is authorized under both 5 U.S.C. 553(d)(1), which provides that rulemaking actions may become effective less than 30 days after publication if the rule "grants or recognizes an exemption or relieves a restriction," and section 553(d)(3), which allows an effective date less than 30 days after publication "as otherwise provided by the agency for good cause found and published with the rule." The purpose of the 30-day waiting period prescribed in section 553(d) is to give affected parties a reasonable time to adjust their behavior and prepare before the final rule takes effect. This rulemaking, however, does not create any new regulatory requirement such that affected parties would need time to prepare before the rule takes effect. Rather, today's rule makes a determination that has the effect of permanently stopping sanctions clocks triggered by a previous SIP disapproval action. For these reasons, the EPA finds good cause under 5 U.S.C. 553(d)(3) for this action to become effective on the date of publication of this action.

IV. Statutory and Executive Order Reviews

This action is a determination that a deficiency that is the basis for sanctions has been corrected and imposes no additional requirements. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;
- 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 the EPA with the discretionary authority to address disproportionate human health or environmental effects with practical, appropriate, and legally permissible methods under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this action does not have Tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes, 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. The EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 12, 2018. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not

postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (*see* section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen oxides, Sulfur oxides, Particulate matter.

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

Dated: December 4, 2017.

Alexis Strauss,

Acting Regional Administrator, Region IX.

[FR Doc. 2017-26899 Filed 12-13-17; 8:45 am]

BILLING CODE 6560-50-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

46 CFR Part 67

[USCG-2016-0531]

Vessel Documentation Regulations— Technical Amendments

Correction

In rule document 2017-20023 beginning on page 43858 in the issue of Wednesday, September 20, 2017, make the following correction:

§ 67.3 [Corrected]

■ In § 67.3, on page 43863, in the third column, in the sixth through eighth lines, “redesignate paragraphs (a) and (b) as paragraphs (1) and (2);” should read “redesignate paragraphs (a) through (c) as paragraphs (1) through (3);”.

[FR Doc. C1-2017-20023 Filed 12-13-17; 8:45 am]

BILLING CODE 1301-00-D

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[WT Docket No. 17-79; FCC 17-153]

Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Federal Communications Commission (Commission) eliminates historic preservation review of replacement utility poles that support

communications equipment, subject to conditions that ensure no effects on historic properties. The Commission also consolidates historic preservation requirements in a single new rule.

DATES: Effective January 16, 2018.

FOR FURTHER INFORMATION CONTACT:

David Sieradzki, *David.Sieradzki@fcc.gov*, of the Wireless Telecommunications Bureau, Competition & Infrastructure Policy Division, 202-418-1368.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission’s Report and Order in WT Docket No. 17-79; FCC 17-153, adopted November 16, 2017, and released on November 17, 2017. 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).

I. Streamlining the Historic Preservation Review Process

1. Enhancing the nation’s wireless infrastructure is essential to meeting the exploding demand for robust mobile services and delivering the next generation of applications using transformative new network technologies. Review of deployment proposals pursuant to Section 106 of the National Historic Preservation Act (NHPA), 54 U.S.C. 306108, generally serves the public policy objective of preserving the nation’s historic heritage. Not all infrastructure deployments, however, have the potential to affect historic properties. Where such potential effects do not exist, requiring an individual historic preservation review can impose needless burdens and slow infrastructure deployment.

2. Section 106 of the NHPA, 54 U.S.C. 306108, requires federal agencies to take into account the effect (if any) of their proposed undertakings on historic properties before proceeding with such undertakings. Agencies are responsible for deciding whether or not particular types of activities qualify as undertakings under the definitions in the regulations of the Advisory Council on Historic Preservation (ACHP). *See* 36 CFR 800.3(a), 800.16(y). Where an agency determines that a type of activity

has no potential to affect historic properties under any circumstances, the agency may unilaterally eliminate the review process for such undertakings. 36 CFR 800.3(a)(1).

3. In 2004, the Commission, the ACHP, and the National Conference of State Historic Preservation Officers agreed to the establishment of the *Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings 2004 NPA*. 47 CFR part 1. Of particular relevance here, the 2004 NPA excludes the construction of replacement structures from historic preservation review under defined conditions, but only if the structure being replaced meets the definition of a “tower,” meaning that it was constructed for the sole or primary purpose of supporting Commission-authorized antennas. *See* 47 CFR part 1, Appendix C, section III.B. A structure that does not qualify as a tower, such as a pole that initially was erected to support electric utility lines, does not fall within the exclusion under the 2004 NPA even if it is later used to support Commission-authorized antennas. Consequently, if such a pole must be replaced to support a communications antenna and no other exclusion applies, the pole replacement is subject to review.

4. In the Notice of Proposed Rulemaking in the present proceeding, the Commission initiated a broad examination of the regulatory impediments to wireless network infrastructure investment and deployment, and how we may remove or reduce such impediments, consistent with the law and the public interest, in order to promote the rapid deployment of advanced wireless broadband service to all Americans. *See Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Deployment*, 32 FCC Rcd 3330 (2017) (2017 *Wireless Infrastructure NPRM*); *see also* Proposed Rule, 82 FR 21761 (May 10, 2017). The Commission specifically sought comment on whether to expand the categories of undertakings that are excluded from historic preservation review to include pole replacements, and whether such a step would facilitate wireless facility siting while creating no or foreseeably minimal potential for adverse impacts to historic properties. The Commission asked whether the construction of replacement poles should be excluded from Section 106 review, provided that the replacement pole is not substantially larger than the pole it is replacing, and solicited input on whether any additional conditions would be appropriate.

II. Exclusion for Pole Replacements That Have No Potential To Affect Historic Properties

5. Pursuant to 36 CFR 800.3(a)(1), the Commission concludes that, in the circumstances specified below, replacement of a pole that was constructed with a sole or primary purpose other than supporting communications antennas with a pole that will support such antennas would have no potential to affect historic properties. The Commission therefore revises its rules to provide that the construction of such replacement poles will be excluded from Section 106 review when all the following conditions are met. First, paragraph (b)(3)(i) of the new rule provides that this new exclusion applies only if the original structure is a pole that can hold utility, communications, or related transmission lines; was not originally erected for the sole or primary purpose of supporting antennas that operate pursuant to a spectrum license or authorization issued by the Commission; and is not itself a historic property.

6. In addition, paragraph (b)(3)(ii)(A) specifies that, to qualify for this new exclusion, the replacement pole must be located no more than 10 feet away from the original pole, based on the distance between the centerpoint of the replacement pole and the centerpoint of the original pole; provided that construction of the replacement pole in place of the original pole entails no new ground disturbance (either laterally or in depth) outside previously disturbed areas, including disturbance associated with temporary support of utility, communications, or related transmission lines. For purposes of paragraph (b)(3)(ii)(A), “ground disturbance” means any activity that moves, compacts, alters, displaces, or penetrates the ground surface of previously undisturbed soils.

7. Moreover, paragraph (b)(3)(ii)(B) of the new rule provides that a replacement pole qualifies for this exclusion only if its height does not exceed the height of the original pole by more than 5 feet or 10 percent of the height of the original pole, whichever is greater. Paragraph (c)(ii)(C) establishes that the appearance of such a replacement pole must be consistent with the quality and appearance of the original pole. Notably, antennas separately deployed on a replacement pole that is exempted under the rule adopted here remain subject to existing historic preservation rules about antenna deployments, including the exemptions for equipment that is

limited in size set forth in 47 CFR part 1, sections VI.A.5, VII.B.2 & 3.

8. The Commission concludes that, where all of these conditions are met, the construction of a replacement utility pole—*i.e.*, a new pole in place of a preexisting pole that is being removed—will have no potential to affect historic properties (even assuming such properties are present), regardless of whether the original pole was built for the purpose of supporting communications equipment. The Commission further concludes that excluding such replacements from historic preservation review advances the public interest. The Commission has authority to take this step pursuant to 36 CFR 800.3(a)(1), which authorizes agencies to exclude undertakings that have no potential to affect historic properties from historic preservation review. Notably, for present purposes, the Commission does not revisit its treatment of the construction of wireless communications structures, including replacement structures, as Commission undertakings.

9. The Commission anticipates that adoption of this exclusion will provide significant efficiencies in the deployment of replacement facilities. The record indicates that pole replacements are often required to support small cell facilities, which increasingly will be needed to support the rollout of next-generation services. Small cell antennas are much smaller and less obtrusive than traditional antennas mounted on macro cell towers, but a far larger number of them will be needed to accomplish the network densification that providers need, both in order to satisfy the exploding consumer demand for wireless data for existing services and in order to implement advanced technologies such as 5G. We find that excluding the pole replacements at issue here from review under section 106 of the NHPA will allow providers to complete these deployments more efficiently. In addition, creating an exclusion for replacement of utility poles will make more consistent the process that carriers and pole constructors must follow to comply with our historic preservation review requirements and those they must follow when building replacement poles that are subject to the requirements of other agencies applying the ACHP’s 2017 *Federal Lands Program Comment*. See *Advisory Council on Historic Preservation, Notice of Issuance of Program Comment for Communications Projects on Federal Lands and Property*, 82 FR 23818 (May 24, 2017) (*Federal Lands Program Comment*).

10. In implementing large-scale network densification projects that require deployment of large numbers of facilities within a relatively brief period of time, use of existing structures, where feasible, can both promote efficiency and avoid adverse impacts on the human environment. Utility poles may be an appealing option for such deployments, since they often are the appropriate height for small cell antennas and are ubiquitous in many metropolitan areas. When existing utility poles cannot support additional equipment, however, pole replacement is required. Wooden utility poles, in particular, frequently need to be replaced because of their age and condition. For example, over time, wooden poles typically begin to rot from the top, where additional antennas associated with small cell facilities are usually attached, and frequently need to be replaced to have sufficient strength to support additional attachments. A pole also may need to be replaced if it is not sturdy enough or if it lacks sufficient space to mount new small cell antennas above utility infrastructure already installed on the pole, such as electric cables, telephone lines, cable television wires, or other equipment.

11. Replacement poles placed in essentially the same previously disturbed locations as the original structures will be sturdier than the preexisting poles, but will not necessarily be substantially taller or occupy appreciably more space on or in the ground than the original poles. In those circumstances, there is no likelihood that such pole replacements could affect historic properties. Nonetheless, under current rules, only replacements for poles meeting the definition of a “tower” are excluded from Section 106 review while other types of pole replacements continue to require review. See 47 CFR part 1, section III.B. The Commission finds, consistent with some parties’ comments, that there is no valid reason to continue distinguishing between poles based on the purpose for which they were originally constructed, because the statutory test is whether a federal undertaking has a potential effect on historic properties, and is not based on the prior uses of a particular structure. The Commission also finds that adopting an exclusion for replacement utility poles will promote greater consistency by providing similar treatment for similar replacement structures. The Commission expects that creating an additional exclusion for pole replacements will encourage providers to replace existing poles in previously

disturbed areas rather than undertaking new construction activity that potentially could affect historic properties.

12. The Commission limits the replacement pole exclusion, as discussed below, to ensure that such pole replacements have no potential to affect historic properties. These limitations address the concerns raised by some parties about the potential effect of a broad, unlimited exclusion for replacement poles and ensure that the exclusion established in this rule satisfies the strict standard in the ACHP's rules. In adopting these conditions, we rely on, and incorporate, the Commission's and the ACHP's analyses in support of recent similar exclusions, including the exclusion of utility pole replacements in section VIII.B of the ACHP's 2017 *Federal Lands Program Comment*.

13. The new exclusion established here focuses only on utility pole replacements. Accordingly, paragraph (b)(3)(i)(A) of the rule describes the new exclusion using terminology consistent with that in section III.O of the *Federal Lands Program Comment* by referring to poles that "can hold utility, communications, or related transmission lines." Notably, section III.O of the *Federal Lands Program Comment* defines a "pole" as "a non-tower structure that can hold utility, communications, and related transmission lines;" paragraph (b)(3)(i)(A) of the Commission's new rule is similar, but uses the word "or" instead of the word "and," in order to clarify that this replacement pole exclusion extends to replacements where the original poles are capable of supporting any of the listed types of facilities, not necessarily all of them.

14. Paragraph (b)(3)(i)(B) makes clear that replacements for structures that section III.B of the 2004 *NPA* defines as "towers," since that program alternative already sets forth the conditions under which replacement of towers will be excluded from review. See 47 CFR part 1, section III.B. And paragraph (b)(3)(i)(C) of the new rule makes clear that the construction of new poles to replace existing poles that themselves qualify as historic structures are not excluded from review.

15. The new rule's limitations regarding location, size, quality, and appearance of replacement poles address the concerns raised by some Tribal Nations, State Historic Preservation Officers, and preservation advocates. Consistent with commenters' concerns, the Commission finds that excluding replacement poles that are substantially larger than or that differ in

other material ways from the poles being replaced might compromise the integrity of historic properties and districts. The Commission therefore excludes from historic preservation review only those replacement poles that are situated no more than ten feet away from the original hole; are no more than 10 percent or five feet taller than the original pole, whichever is greater; and are consistent with the quality and appearance of the original pole.

16. The provision limiting the exclusion to a new pole located no more than 10 feet from the original structure ensures that the new pole is truly a "replacement" and that the replacement will not substantially alter the setting of any historic properties that may be nearby. The Commission finds that the minimal change in location permitted here, which will make pole replacements easier to construct as a practical matter, creates no risk of effects on historic properties in light of the fact that no new ground disturbance will be permitted. Moreover, the Commission finds that the deployment of a replacement pole no more than 10 feet from the original pole has no potential to cause effects on historic properties that might be present, because of the close proximity to the original pole and the *de minimis* size increase permissible to fall into this exception. The Commission cannot reach the same conclusion, however, with regard to replacement poles placed a considerable distance (e.g., 30 feet) away from the originals.

17. For purposes of this new exclusion, we use a size definition that differs from the definition of "substantial increase in the size of the tower" in 47 CFR part 1, section 1.E.1 and in 47 CFR part 1, sections III.A and III.B, because that definition allows for increasing the height by either 10 percent or 20 feet plus the height of an antenna array, whichever is greater. Utility poles are typically 25 to 40 feet tall, and we find that an increase in height limited to 10 percent or five feet would be *de minimis* and thus would have no potential to affect historic properties. The flexibility of the five foot alternative addresses concerns expressed in the record that manufacturers typically offer standard utility poles in five-foot increments, and that a height increase of less than five feet often may be insufficient to accommodate new antennas or other equipment on a pole while maintaining the necessary separation from preexisting infrastructure on the pole.

18. The Commission cannot reach the same conclusion as to a height increase of 20 feet or more, however, because it

cannot conclude at this time that a replacement pole that is so much taller than the preexisting structure would have no potential for effects on any historic properties that may be nearby, as is required under 36 CFR 800.3(a)(1) for an agency to act unilaterally. On the other hand, the Commission disagrees with the contention raised by some parties that allowing even small increases in height without historic preservation review ultimately could have effects due to the possibility that multiple incremental replacements over time eventually would result in significantly larger poles. The Commission does not find this speculative concern persuasive: it is aware of no evidence of such repeated "stacked" replacements of utility poles occurring under existing program alternatives, and it believes the likelihood such activities will occur in the future is remote due to the substantial cost of removing and replacing poles.

19. The phrase "consistent with the quality and appearance of the originals" in paragraph (b)(3)(ii)(C) is imported from the corresponding exclusion in section VIII.B.3 of the *Federal Lands Program Comment*, to ensure that there can be no visual effects on any nearby historic properties. The Commission notes that a change in materials, such as replacing a wooden pole with a metal pole, is permissible so long as this standard is met.

20. The Commission adopts an additional limitation as part of paragraph (b)(3)(ii)(A) of the rule to ensure that the pole replacement project—including the removal of the original pole as well as construction of the replacement pole—will entail no new ground disturbance. This limitation recognizes that construction-related ground disturbance or excavation may affect properties that are historic due to the presence of archeological resources, including those of cultural or religious significance to a Tribal Nation or Native Hawaiian organization, which are included within the definition of historic property in 36 CFR 800.16(I)(1). The limitation on new ground disturbance outside previously disturbed areas, including disturbance associated with temporary support of lines, as well as the definition of "ground disturbance" as "any activity that moves, compacts, alters, displaces, or penetrates the ground surface of previously undisturbed soils," are taken directly from section III.I of the *Federal Lands Program Comment*. The rule also specifies that the limitation on ground disturbance in previously undisturbed

areas applies to increases in both depth and lateral disturbance.

21. The Commission continues to require that if, after construction commences, the party discovers any human or burial remains or other historic properties (despite the previous ground disturbance), construction must cease immediately, and the party must promptly notify and consult with the Commission, the State Historic Preservation Officer/Tribal Historic Preservation Officer, and any affected Tribal Nation or Native Hawaiian organization to evaluate the discovery and develop any appropriate measures to handle it. *See* 47 CFR part 1, section IX.A–D. Human or burial remains also must be handled in a manner consistent with any applicable State or Federal laws. *Id.*, section IX.D.

22. All the conditions described above must be satisfied in order for a replacement pole to be excluded from historic preservation review. The Commission concludes that, taken together, these provisions will ensure protection for historic properties and guard against replacements that would be out of scale with preexisting utility poles in a particular area. By adopting this new exclusion subject to these limitations, the Commission continues to fulfill its statutory responsibilities regarding historic preservation, while removing an unnecessary impediment to the rapid deployment of sorely needed small cell facilities and other wireless infrastructure across the country.

III. Conforming Amendments and Reorganization of Historic Preservation Rules

23. In this order, the Commission also reorganizes existing historic preservation regulations into a single rule section that will be clearer, more accessible, and easier to understand. Section 1.1307(a)(4) of the Commission's rules, 47 CFR 1.1307(a)(4), previously commingled detailed provisions implementing the historic preservation review process under section 106 of the NHPA with the provisions implementing the National Environmental Policy Act, 45 U.S.C. 4321–4355. To provide more clarity, the Commission is moving the historic preservation review provisions into a new rule, 47 CFR 1.1320, that more clearly sets forth the existing requirements governing that historic preservation review process; and within that rule, the Commission adopts a paragraph (b)(3) establishing the replacement utility pole exclusion described above.

24. The Commission finds that notice and comment are unnecessary and that it has good cause to make these clarifying revisions without expressly seeking comment on them. Except for paragraph (b)(3)'s addition of a pole replacement exclusion, new section 1.1320 makes no substantive changes to the existing requirements implementing the historic preservation review process under section 106 of the NHPA and adds no new obligations, but merely simplifies the way the Commission's regulations describe them by collecting existing requirements in one place and organizing them in a more straightforward fashion. Moreover, the delay engendered by a round of comment would be contrary to the public interest. The simpler presentation of our requirements in the new rule should make it easier for licensees and applicants to understand and comply with our historic preservation review requirements, and thus may expedite the completion of such review, thus facilitating more expeditious deployment of wireless infrastructure.

25. Paragraph (a) of the new rule incorporates into the Commission's rules the existing provisions in the ACHP's regulations (*see, e.g.*, 36 CFR 800.1(a), 800.2(a), and 800.16(b) & (y)) establishing that all federal agencies' undertakings with the potential to cause effects on historic properties are subject to review under Section 106 of the NHPA. There was no corresponding provision in the Commission's preexisting rules. At the same time, the Commission amends 47 CFR 1.1307(a)(4) to clarify that section 1.1320, as well as Section 106 of the NHPA, identify the historic preservation factors relevant to whether applicants must prepare environmental assessments of proposed actions.

26. Paragraphs (a)(1) and (a)(2) of the new section 1.1320 clarify the procedures that apply to historic preservation review of categories of undertakings. Paragraph (a)(1) clarifies that the ACHP's regulations (36 CFR 800.3–800.13) establish the default procedures that generally apply to Commission undertakings, unless the undertakings are subject to one of the Commission's program alternatives, such as those listed in paragraph (a)(2), in which case they are reviewed using the procedures described in the applicable program alternative.

27. Paragraph (b) of the new rule lists Commission undertakings that are not subject to any FCC historic preservation review process. Paragraph (b)(1) refers to undertakings for which an agency other than the Commission is the lead

Federal agency that is primarily responsible for historic preservation review. Paragraph (b)(2) recognizes that the Commission's program alternatives not only establish streamlined procedures but also exempt some categories of undertakings from review. Paragraph (b)(3) of the new rule sets forth the new utility pole replacement exclusion adopted in this order, and paragraph (b)(4) of the new rule is identical to paragraph (a)(4)(ii) of section 1.1307 of the preexisting rules, setting forth the exclusion for the collocation of antennas and related equipment on buildings other than towers or utility poles. Paragraph (c) of the new rule provides that Commission applicants and licensees are responsible for compliance with the historic preservation review procedures established in 47 CFR part 1, sections III–X. Paragraph (d) adopts definitions of the terms “antenna,” “applicant,” “collocation,” “tower,” and “undertaking” based on the preexisting definitions of these terms set forth, respectively, in 47 CFR part 1, section I.A; 47 CFR part 1, sections II.A.2, II.A.4, and II.A.14; and 36 CFR 800.16(y).

IV. Procedural Matters

A. Final Regulatory Flexibility Analysis

28. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking (NPRM). The Commission sought written public comment on the proposals in the NPRM, including comment on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

1. Need for and Objectives of the Rules

29. In the Order, the Commission adopts rules that streamline the process of deploying next-generation wireless broadband infrastructure by eliminating the need for historic preservation review pursuant to the National Historic Preservation Act (NHPA) in certain instances where there is no potential effect on historic properties. Specifically, the Commission finds that the construction of poles that can support antennas or other wireless communications equipment to replace pre-existing utility poles that are substantially identical, under specified conditions, has no potential to affect historic properties, and therefore, the historical preservation review process is unnecessary in this context. This order also reorganizes the rules governing the Commission's historic preservation

review procedures by bringing together provisions that previously were scattered across a variety of locations into a single new Rule 1.1320, which clearly sets forth the existing requirements but, with the exception of the new exclusion for replacement utility poles, does not modify them.

2. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

30. No parties filed comments that specifically addressed the rules and policies proposed in the IRFA. One party—the Smart Cities and Special Districts Coalition—filed comments arguing that some small local governments, special districts, property owners, or small developers might be harmed if the Commission were to adopt certain policy changes discussed in the NPRM relating to (i) batches of zoning applications filed with state or local governments, (ii) the maximum reasonable time for state or local governments to process zoning applications (“shot clock” rules and “deemed granted” remedies), or (iii) limitations on proprietary properties or regulation of their use. The present order does not deal with any of the issues in the NPRM that the Smart Cities and Special Districts Coalition addressed in the cited portions of its comments. The Commission will address these comments when it acts on the relevant issues in a future order.

3. Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration

31. Pursuant to the Small Business Jobs Act of 2010, the Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA), and to provide a detailed statement of any change made to the proposed rules as a result of those comments. The Chief Counsel did not file any comments in response to the proposed rules in this proceeding.

4. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

32. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein. 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 Small Business Administration (SBA). Below, the Commission provides a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

33. *Small Businesses, Small Organizations, Small Governmental Jurisdictions.* Our actions, over time, may affect small entities that are not easily categorized at present. The Commission therefore describes here, at the outset, three comprehensive small entity size standards that could be directly affected herein. First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the SBA’s Office of Advocacy, in general a small business is an independent business having fewer than 500 employees. These types of small businesses represent 99.9% of all businesses in the United States which translates to 28.8 million businesses. Next, the type of small entity described as a “small organization” is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.” Nationwide, as of 2007, there were approximately 1,621,215 small organizations. Finally, the small entity described as a “small governmental jurisdiction” is defined generally as “governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.” U.S. Census Bureau data published in 2012 indicate that there were 89,476 local governmental jurisdictions in the United States. The Commission estimates that, of this total, as many as 88,761 entities may qualify as “small governmental jurisdictions.” Thus, the Commission estimates that most governmental jurisdictions are small.

34. *Wireless Telecommunications Carriers (except Satellite).* This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular services, paging services, wireless internet access, and wireless video services. The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees. For this industry, U.S.

Census data for 2012 show that there were 967 firms that operated for the entire year. Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more. Thus, under this category and the associated size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities.

35. The Commission’s own data—available in its Universal Licensing System—indicate that, as of October 25, 2016, there are 280 Cellular licensees that will be affected by our actions today. The Commission does not know how many of these licensees are small, as the Commission does not collect that information for these types of entities. Similarly, according to Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) Telephony services. Of this total, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees. Thus, using available data, the Commission estimates that the majority of wireless firms can be considered small.

36. *Personal Radio Services.* Personal radio services provide short-range, low-power radio for personal communications, radio signaling, and business communications not provided for in other services. Personal radio services include services operating in spectrum licensed under part 95 of our rules. These services include Citizen Band Radio Service, General Mobile Radio Service, Radio Control Radio Service, Family Radio Service, Wireless Medical Telemetry Service, Medical Implant Communications Service, Low Power Radio Service, and Multi-Use Radio Service. There are a variety of methods used to license the spectrum in these rule parts, from licensing by rule, to conditioning operation on successful completion of a required test, to site-based licensing, to geographic area licensing. All such entities in this category are wireless, therefore the Commission applies the definition of Wireless Telecommunications Carriers (except Satellite), pursuant to which the SBA’s small entity size standard is defined as those entities employing 1,500 or fewer persons. For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year. Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more. Thus, under this category and the

associated size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities. The Commission notes that many of the licensees in this category are individuals and not small entities. In addition, due to the mostly unlicensed and shared nature of the spectrum utilized in many of these services, the Commission lacks direct information upon which to base an estimation of the number of small entities that may be affected by our actions in this proceeding.

37. Public Safety Radio Licensees. Public Safety Radio Pool licensees as a general matter, include police, fire, local government, forestry conservation, highway maintenance, and emergency medical services. Because of the vast array of public safety licensees, the Commission has not developed a small business size standard specifically applicable to public safety licensees. For this category the Commission applies the SBA's definition for Wireless Telecommunications Carriers (except Satellite) which encompasses business entities engaged in radiotelephone communications and for which the small entity size standard is defined as those entities employing 1,500 or fewer persons. For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year. Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more. Thus, under this category and the associated size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities. With respect to local governments, in particular, since many governmental entities comprise the licensees for these services, the Commission includes under public safety services the number of government entities affected. According to Commission records, there are a total of approximately 133,870 licenses within these services. There are 3,121 licenses in the 4.9 GHz band, based on an FCC Universal Licensing System search of March 29, 2017. The Commission estimates that fewer than 2,442 public safety radio licensees hold these licenses because certain entities may have multiple licenses.

38. Private Land Mobile Radio Licensees. Private land mobile radio (PLMR) systems serve an essential role in a vast range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories. Because of the vast array of PLMR users, the

Commission has not developed a small business size standard specifically applicable to PLMR users. The SBA's definition for Wireless Telecommunications Carriers (except Satellite) which encompasses business entities engaged in radiotelephone communications and for which the small entity size standard is defined as those entities employing 1,500 or fewer persons. For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year. Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more. Thus, under this category and the associated size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities. According to the Commission's records, there are a total of 3,374 licenses in the frequencies range 173.225 MHz to 173.375 MHz, which is the range affected by this Notice. The Commission does not require PLMR licensees to disclose information about number of employees, and does not have information that could be used to determine how many PLMR licensees constitute small entities under this definition. The Commission however believes that a substantial number of PLMR licensees may be small entities despite the lack of specific information.

39. Multiple Address Systems. Entities using Multiple Address Systems (MAS) spectrum, in general, fall into two categories: (1) Those using the spectrum for profit-based uses, and (2) those using the spectrum for private internal uses.

40. With respect to the first category, Profit-based Spectrum use, the size standards established by the Commission define "small entity" for MAS licensees as an entity that has average annual gross revenues of less than \$15 million over the three previous calendar years. A "Very small business" is defined as an entity that, together with its affiliates, has average annual gross revenues of not more than \$3 million over the preceding three calendar years. The SBA has approved these definitions. The majority of MAS operators are licensed in bands where the Commission has implemented a geographic area licensing approach that requires the use of competitive bidding procedures to resolve mutually exclusive applications. The Commission's licensing database indicates that, as of April 16, 2010, there were a total of 11,653 site-based MAS station authorizations. Of these, 58 authorizations were associated with common carrier service. In addition, the Commission's licensing database

indicates that, as of April 16, 2010, there were a total of 3,330 Economic Area market area MAS authorizations. The Commission's licensing database also indicates that, as of April 16, 2010, of the 11,653 total MAS station authorizations, 10,773 authorizations were for private radio service. In 2001, an auction for 5,104 MAS licenses in 176 EAs was conducted. Seven winning bidders claimed status as small or very small businesses and won 611 licenses. In 2005, the Commission completed an auction (Auction 59) of 4,226 MAS licenses in the Fixed Microwave Services from the 928/959 and 932/941 MHz bands. Twenty-six winning bidders won a total of 2,323 licenses. Of the 26 winning bidders in this auction, five claimed small business status and won 1,891 licenses.

41. With respect to the second category, Internal Private Spectrum use consists of entities that use, or seek to use, MAS spectrum to accommodate their own internal communications needs, MAS serves an essential role in a range of industrial, safety, business, and land transportation activities. MAS radios are used by companies of all sizes, operating in virtually all U.S. business categories, and by all types of public safety entities. For the majority of private internal users, the definition developed by the SBA would be more appropriate than the Commission's definition. The applicable definition of small entity is the "Wireless Telecommunications Carriers (except satellite)" definition under the SBA rules. Under that SBA category, a business is small if it has 1,500 or fewer employees. For this category, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year. Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more. Thus, under this category and the associated small business size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities that may be affected by our action.

42. Broadband Radio Service and Educational Broadband Service. Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and "wireless cable," transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the

Instructional Television Fixed Service (ITFS)).

43. *BRS*—In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than \$40 million in the previous three calendar years. The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, the Commission estimates that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities. After adding the number of small business auction licensees to the number of incumbent licensees not already counted, the Commission finds that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules.

44. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas. The Commission offered three levels of bidding credits: (i) A bidder with attributed average annual gross revenues that exceed \$15 million and do not exceed \$40 million for the preceding three years (small business) received a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed \$3 million and do not exceed \$15 million for the preceding three years (very small business) received a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed \$3 million for the preceding three years (entrepreneur) received a 35 percent discount on its winning bid. Auction 86 concluded in 2009 with the sale of 61 licenses. Of the ten winning bidders, two bidders that claimed small business status won 4 licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

45. *EBS*—The SBA's Cable Television Distribution Services small business size standard is applicable to EBS. There are presently 2,436 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities. Thus, the Commission estimates that at least 2,336 licensees

are small businesses. Since 2007, Cable Television Distribution Services have been defined within the broad economic census category of Wired Telecommunications Carriers. Wired Telecommunications Carriers are comprised of establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks.

Transmission facilities may be based on a single technology or a combination of technologies. The SBA's small business size standard for this category is all such firms having 1,500 or fewer employees. U.S. Census data for 2012 shows that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees. Thus, under this size standard, the majority of firms in this industry can be considered small. To gauge small business prevalence for these cable services, however, the Commission must use the most current census data for the previous category of Cable and Other Program Distribution and its associated size standard which was all such firms having \$13.5 million or less in annual receipts. According to U.S. Census Bureau data for 2007, there were a total of 996 firms in this category that operated for the entire year. Of this total, 948 firms had annual receipts of under \$10 million, and 48 firms had receipts of \$10 million or more but less than \$25 million. Thus, the majority of these firms can be considered small.

46. *Location and Monitoring Service (LMS)*. LMS systems use non-voice radio techniques to determine the location and status of mobile radio units. For purposes of auctioning LMS licenses, the Commission has defined a "small business" as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not to exceed \$15 million. A "very small business" is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not to exceed \$3 million. These definitions have been approved by the SBA. An auction for LMS licenses commenced on February 23, 1999 and closed on March 5, 1999. Of the 528 licenses auctioned, 289 licenses were sold to four small businesses.

47. *Television Broadcasting*. This Economic Census category "comprises establishments primarily engaged in broadcasting images together with sound." These establishments operate television broadcast studios and

facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studio, from an affiliated network, or from external sources. The SBA has created the following small business size standard for such businesses: those having \$38.5 million or less in annual receipts. The 2012 Economic Census reports that 751 firms in this category operated in that year. Of that number, 656 had annual receipts of \$25,000,000 or less, 25 had annual receipts between \$25,000,000 and \$49,999,999 and 70 had annual receipts of \$50,000,000 or more. Based on this data, the Commission therefore estimates that the majority of commercial television broadcasters are small entities under the applicable SBA size standard.

48. The Commission has estimated the number of licensed commercial television stations to be 1,384. Of this total, 1,264 stations (or about 91 percent) had revenues of \$38.5 million or less, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on February 24, 2017, and therefore these licensees qualify as small entities under the SBA definition. In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 394. Notwithstanding, the Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

49. The Commission notes, however, that in assessing whether a business concern qualifies as "small" under the above definition, business (control) affiliations must be included. Our estimate, therefore likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, another element of the definition of "small business" requires that an entity not be dominant in its field of operation. The Commission is unable at this time to define or quantify the criteria that would establish whether a specific television broadcast station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this

basis and is therefore possibly over-inclusive.

50. **Radio Stations.** This Economic Census category “comprises establishments primarily engaged in broadcasting aural programs by radio to the public. Programming may originate in their own studio, from an affiliated network, or from external sources.” The SBA has established a small business size standard for this category as firms having \$38.5 million or less in annual receipts. Economic Census data for 2012 shows that 2,849 radio station firms operated during that year. Of that number, 2,806 operated with annual receipts of less than \$25 million per year, 17 with annual receipts between \$25 million and \$49,999,999 million and 26 with annual receipts of \$50 million or more. Therefore, based on the SBA’s size standard the majority of such entities are small entities.

51. According to Commission staff review of the BIA Publications, Inc. Master Access Radio Analyzer Database as of June 2, 2016, about 11,386 (or about 99.9 percent) of 11,395 commercial radio stations had revenues of \$38.5 million or less and thus qualify as small entities under the SBA definition. The Commission has estimated the number of licensed commercial radio stations to be 11,415. The Commission notes that it has also estimated the number of licensed NCE radio stations to be 4,101. Nevertheless, the Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

52. The Commission also notes, that in assessing whether a business entity qualifies as small under the above definition, business control affiliations must be included. The Commission’s estimate therefore likely overstates the number of small entities that might be affected by its action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, to be determined a “small business,” an entity may not be dominant in its field of operation. The Commission further notes, that it is difficult at times to assess these criteria in the context of media entities, and the estimate of small businesses to which these rules may apply does not exclude any radio station from the definition of a small business on these basis, thus our estimate of small businesses may therefore be over-inclusive.

53. **FM Translator Stations and Low Power FM Stations.** FM translators and Low Power FM Stations are classified in

the category of Radio Stations and are assigned the same NAICS Code as licensees of radio stations. This U.S. industry, Radio Stations, comprises establishments primarily engaged in broadcasting aural programs by radio to the public. Programming may originate in their own studio, from an affiliated network, or from external sources. The SBA has established a small business size standard which consists of all radio stations whose annual receipts are \$38.5 million dollars or less. U.S. Census data for 2012 indicate that 2,849 radio station firms operated during that year. Of that number, 2,806 operated with annual receipts of less than \$25 million per year, 17 with annual receipts between \$25 million and \$49,999,999 million and 26 with annual receipts of \$50 million or more. Based on U.S. Census data, the Commission concludes that the majority of FM Translator Stations and Low Power FM Stations are small.

54. **Multichannel Video Distribution and Data Service (MVDDS).** MVDDS is a terrestrial fixed microwave service operating in the 12.2–12.7 GHz band. The Commission adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits. It defined a very small business as an entity with average annual gross revenues not exceeding \$3 million for the preceding three years; a small business as an entity with average annual gross revenues not exceeding \$15 million for the preceding three years; and an entrepreneur as an entity with average annual gross revenues not exceeding \$40 million for the preceding three years. These definitions were approved by the SBA. On January 27, 2004, the Commission completed an auction of 214 MVDDS licenses (Auction No. 53). In this auction, ten winning bidders won a total of 192 MVDDS licenses. Eight of the ten winning bidders claimed small business status and won 144 of the licenses. The Commission also held an auction of MVDDS licenses on December 7, 2005 (Auction 63). Of the three winning bidders who won 22 licenses, two winning bidders, winning 21 of the licenses, claimed small business status.

55. **Satellite Telecommunications.** This category comprises firms “primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.” The category has a small business size standard of \$32.5 million or less in average annual

receipts, under SBA rules. For this category, U.S. Census Bureau data for 2012 show that there were a total of 333 firms that operated for the entire year. Of this total, 299 firms had annual receipts of less than \$25 million. Consequently, the Commission estimates that the majority of satellite telecommunications providers are small entities.

56. **All Other Telecommunications.** The “All Other Telecommunications” category is comprised of establishments that are primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing internet services or voice over internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry. The SBA has developed a small business size standard for “All Other Telecommunications,” which consists of all such firms with gross annual receipts of \$32.5 million or less. For this category, U.S. Census data for 2012 show that there were 1,442 firms that operated for the entire year. Of these firms, a total of 1,400 had gross annual receipts of less than \$25 million. Thus, a majority of “All Other Telecommunications” firms potentially affected by our action can be considered small.

57. **Fixed Microwave Services.** Microwave services include common carrier, private-operational fixed, and broadcast auxiliary radio services. They also include the Local Multipoint Distribution Service (LMDS), the Digital Electronic Message Service (DEMS), the 39 GHz Service (39 GHz), the 24 GHz Service, and the Millimeter Wave Service where licensees can choose between common carrier and non-common carrier status. The SBA nor the Commission has defined a small business size standard for microwave services. For purposes of this IRFA, the Commission will use the SBA’s definition applicable to Wireless Telecommunications Carriers (except satellite)—*i.e.*, an entity with no more than 1,500 persons is considered small. Under that size standard, such a business is small if it has 1,500 or fewer employees. U. S. Census Bureau data for 2012, show that there were 967 firms in this category that operated for the entire

year. Of this total, 955 had employment of 999 or fewer, and 12 firms had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities that may be affected by our proposed action.

58. According to Commission data in the Universal Licensing System (ULS) as of September 22, 2015 there were approximately 61,970 common carrier fixed licensees, 62,909 private and public safety operational-fixed licensees, 20,349 broadcast auxiliary radio licensees, 412 LMDS licenses, 35 DEMS licenses, 870 39 GHz licenses, and five 24 GHz licenses, and 408 Millimeter Wave licenses in the microwave services. The Commission notes that the number of firms does not necessarily track the number of licensees. The Commission estimates that virtually all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition.

59. *Non-Licensee Owners of Towers and Other Infrastructure.* Although at one time most communications towers were owned by the licensee using the tower to provide communications service, many towers are now owned by third-party businesses that do not provide communications services themselves but lease space on their towers to other companies that provide communications services. The Commission's rules require that any entity, including a non-licensee, proposing to construct a tower over 200 feet in height or within the glide slope of an airport must register the tower with the Commission's Antenna Structure Registration ("ASR") system and comply with applicable rules regarding review for impact on the environment and historic properties.

60. As of March 1, 2017, the ASR database includes approximately 122,157 registration records reflecting a "Constructed" status and 13,987 registration records reflecting a "Granted, Not Constructed" status. These figures include both towers registered to licensees and towers registered to non-licensee tower owners. The Commission does not keep information from which it can easily determine how many of these towers are registered to non-licensees or how many non-licensees have registered towers. Regarding towers that do not require ASR registration, the Commission does not collect information as to the number of such towers in use and therefore cannot estimate the number of tower

owners that would be subject to the rules on which the Commission seeks comment. Moreover, the SBA has not developed a size standard for small businesses in the category "Tower Owners." Therefore, the Commission is unable to determine the number of non-licensee tower owners that are small entities. The Commission believes, however, that when all entities owning 10 or fewer towers and leasing space for collocation are included, non-licensee tower owners number in the thousands, and that nearly all of these qualify as small businesses under the SBA's definition for "All Other Telecommunications." The SBA has developed a small business size standard for "All Other Telecommunications," which consists of all such firms with gross annual receipts of \$32.5 million or less. For this category, U.S. Census data for 2012 show that there were 1,442 firms that operated for the entire year. Of these firms, a total of 1,400 had gross annual receipts of less than \$25 million. Thus, a majority of "All Other Telecommunications" firms potentially affected by our action can be considered small. In addition, there may be other non-licensee owners of other wireless infrastructure, including Distributed Antenna Systems (DAS) and small cells, that might be affected by the measures on which the Commission seeks comment. The Commission does not have any basis for estimating the number of such non-licensee owners that are small entities.

5. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

61. The Commission is not imposing any additional reporting or record keeping requirements. Rather, as discussed in the next section, the Commission is reducing National Historic Preservation Act compliance burdens, including those on small entities, by eliminating the historic preservation review requirement for construction of replacement utility poles that are capable of supporting antennas or other wireless communications equipment and are substantially similar to the preexisting poles, subject to certain conditions. The Commission is also reorganizing the rules governing its historic preservation review procedures by consolidating them into a single new Rule 1.1320. This should clarify the rules and make compliance easier for small entities.

6. Steps Taken To Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

62. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance 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."

63. This Order streamlines the process of deploying next-generation wireless broadband by eliminating the need for historic preservation review for construction of replacement utility poles in certain circumstances. The Commission anticipates that adoption of this replacement pole exclusion will provide significant efficiencies in the deployment of such facilities, particularly for small entities that may not have the compliance resources and economies of scale of larger entities, while still avoiding adverse impacts on historic properties. The exclusion will also make more consistent the process that carriers and pole construction companies must follow to comply with our historic preservation review requirements and those they must follow when building replacement poles that are subject to the requirements of other agencies pursuant to the Advisory Council on Historic Preservation's Program Comment for Communications Projects on Federal Lands and Property. By adopting this new exclusion, the Commission continues to fulfill our statutory responsibilities regarding historic preservation, while reducing the burden on small entities by removing unnecessary impediments to the rapid deployment of small cell facilities and other wireless infrastructure across the country.

64. Further, the Order incorporates the new exclusion for replacement poles into our rules in a manner that more clearly articulates licensees' and applicants' obligations not only as to this specific issue, but more generally as to the entire historic preservation review process. Thus, the Commission is reorganizing its existing regulations to clarify the general requirements regarding historic preservation review, as well as to specify the contours of the

new exclusion. This simpler presentation of our requirements in the new rule should make it easier for licensees and applicants to understand and comply with our historic preservation review requirements, and thus may expedite the completion of such review and facilitate more expeditious deployment of wireless infrastructure, further reducing the intrinsic cost and delay associated with such deployment.

65. As discussed above, the overall approach the Commission has taken is to remove regulatory requirements associated with NHPA compliance with respect to one specified category of undertakings and to simplify and clarify the existing requirements applicable in other contexts. In crafting this regulatory relief, the Commission has not identified any additional steps that it could take with respect to small entities that could not also be applied to all entities that construct or deploy wireless infrastructure. While the new exclusion for replacement utility poles is not specifically directed at small entities, the Commission recognizes that our actions in the Order can potentially decrease costs for all those subject to NHPA obligations, including small entities.

7. Report to Congress

66. The Commission will send a copy of the Report and Order, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act. In addition, the Commission will send a copy of the Report and Order, including this FRFA, to the Chief Counsel for Advocacy of the SBA. The Report and Order and FRFA (or summaries thereof) also will be published in the **Federal Register**.

B. Paperwork Reduction Act

67. The Report and Order does not contain new or revised information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any substantive new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198; see 44 U.S.C. 3506(c)(4).

C. Congressional Review Act

68. The Commission will send a copy of the Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act (CRA), see 5 U.S.C. 801(a)(1)(A).

V. Ordering Clauses

69. Accordingly, *it is ordered*, pursuant to Sections 1, 2, 4(i), 7, 201, 301, 303, and 332 of the Communications Act of 1934, as amended 47 U.S.C. 151, 152, 154(i), 157, 201, 301, 303, and 332, Section 102(C) of the National Environmental Policy Act of 1969, as amended, 42 U.S.C. 4332(C), and Section 106 of the National Historic Preservation Act of 1966, as amended, 54 U.S.C. 306108, that the Report and Order *is hereby adopted*.

70. *It is further ordered* that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, shall send a copy of the Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

71. *It is further ordered* that part 1 of the Commission's rules *is amended*, and that these changes *shall be effective* January 16, 2018.

List of Subjects in 47 CFR Part 1

Communications common carriers, Communications equipment, Environmental protection, Historic preservation, Radio, Telecommunications.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 1 as follows:

PART I—PRACTICE AND PROCEDURE

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

Authority: 47 U.S.C. 151, 154(i), 155, 157, 225, 303(r), 309, 1403, 1404, 1451, and 1452.

■ 2. Section 1.1307 is amended by revising paragraph (a)(4) to read as follows:

§ 1.1307 Actions that may have a significant environmental effect, for which Environmental Assessments (EAs) must be prepared.

(a) * * *

(4) Facilities that may affect districts, sites, buildings, structures or objects, significant in American history, architecture, archeology, engineering or culture, that are listed, or are eligible for listing, in the National Register of Historic Places (see 54 U.S.C. 300308; 36 CFR parts 60 and 800), and that are subject to review pursuant to section 1.1320 and have been determined through that review process to have

adverse effects on identified historic properties.

* * * * *

■ 3. Section 1.1320 is added to subpart I to read as follows:

§ 1.1320 Review of Commission undertakings that may affect historic properties.

(a) *Review of Commission undertakings.* Any Commission undertaking that has the potential to cause effects on historic properties, unless excluded from review pursuant to paragraph (b) of this section, shall be subject to review under section 106 of the National Historic Preservation Act, as amended, 54 U.S.C. 306108, by applying—

(1) The procedures set forth in regulations of the Advisory Council on Historic Preservation, 36 CFR 800.3–800.13, or

(2) If applicable, a program alternative established pursuant to 36 CFR 800.14, including but not limited to the following:

(i) The Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, as amended, Appendix B of this part.

(ii) The Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings, Appendix C of this part.

(iii) The Program Comment to Tailor the Federal Communications Commission's Section 106 Review for Undertakings Involving the Construction of Positive Train Control Wayside Poles and Infrastructure, 79 FR 30861 (May 29, 2014).

(b) *Exclusions.* The following categories of undertakings are excluded from review under this section:

(1) *Projects reviewed by other agencies.* Undertakings for which an agency other than the Commission is the lead Federal agency pursuant to 36 CFR 800.2(a)(2).

(2) *Projects subject to program alternatives.* Undertakings excluded from review under a program alternative established pursuant to 36 CFR 800.14, including those listed in paragraph (a)(2) of this section.

(3) *Replacement utility poles.* Construction of a replacement for an existing structure where all the following criteria are satisfied:

(i) The original structure—

(A) Is a pole that can hold utility, communications, or related transmission lines;

(B) Was not originally erected for the sole or primary purpose of supporting antennas that operate pursuant to the Commission's spectrum license or authorization; and

(C) Is not itself a historic property.

(ii) The replacement pole—

(A) Is located no more than 10 feet away from the original pole, based on the distance between the centerpoint of the replacement pole and the centerpoint of the original pole; *provided* that construction of the replacement pole in place of the original pole entails no new ground disturbance (either laterally or in depth) outside previously disturbed areas, including disturbance associated with temporary support of utility, communications, or related transmission lines. For purposes of this paragraph, “ground disturbance” means any activity that moves, compacts, alters, displaces, or penetrates the ground surface of previously undisturbed soils;

(B) Has a height that does not exceed the height of the original pole by more than 5 feet or 10 percent of the height of the original pole, whichever is greater; and

(C) Has an appearance consistent with the quality and appearance of the original pole.

(4) *Collocations on buildings and other non-tower structures.* The mounting of antennas (including associated equipment such as wiring, cabling, cabinets, or backup power) on buildings or other non-tower structures where the deployment meets the following conditions:

(i) There is an existing antenna on the building or structure;

(ii) One of the following criteria is met:

(A) *Non-Visible Antennas.* The new antenna is not visible from any adjacent streets or surrounding public spaces and is added in the same vicinity as a pre-existing antenna;

(B) *Visible Replacement Antennas.* The new antenna is visible from adjacent streets or surrounding public spaces, provided that

(1) It is a replacement for a pre-existing antenna,

(2) The new antenna will be located in the same vicinity as the pre-existing antenna,

(3) The new antenna will be visible only from adjacent streets and surrounding public spaces that also afford views of the pre-existing antenna,

(4) The new antenna is not more than 3 feet larger in height or width (including all protuberances) than the pre-existing antenna, and

(5) No new equipment cabinets are visible from the adjacent streets or surrounding public spaces; or

(C) *Other Visible Antennas.* The new antenna is visible from adjacent streets or surrounding public spaces, provided that

(1) It is located in the same vicinity as a pre-existing antenna,

(2) The new antenna will be visible only from adjacent streets and surrounding public spaces that also afford views of the pre-existing antenna,

(3) The pre-existing antenna was not deployed pursuant to the exclusion in this paragraph,

(4) The new antenna is not more than three feet larger in height or width (including all protuberances) than the pre-existing antenna, and

(5) No new equipment cabinets are visible from the adjacent streets or surrounding public spaces;

(iii) The new antenna complies with all zoning conditions and historic preservation conditions applicable to existing antennas in the same vicinity that directly mitigate or prevent effects, such as camouflage or concealment requirements;

(iv) The deployment of the new antenna involves no new ground disturbance; and

(v) The deployment would otherwise require the preparation of an Environmental Assessment under 1.1304(a)(4) solely because of the age of the structure.

Note 1 to Paragraph (b)(4): A non-visible new antenna is in the “same vicinity” as a pre-existing antenna if it will be collocated on the same rooftop, façade or other surface. A visible new antenna is in the “same vicinity” as a pre-existing antenna if it is on the same rooftop, façade, or other surface and the centerpoint of the new antenna is within ten feet of the centerpoint of the pre-existing antenna. A deployment causes no new ground disturbance when the depth and width of previous disturbance exceeds the proposed construction depth and width by at least two feet.

(c) *Responsibilities of applicants.* Applicants seeking Commission authorization for construction or modification of towers, collocation of antennas, or other undertakings shall take the steps mandated by, and comply with the requirements set forth in, Appendix C of this part, sections III–X, or any other applicable program alternative.

(d) *Definitions.* For purposes of this section, the following definitions apply:

Antenna means an apparatus designed for the purpose of emitting radiofrequency (RF) radiation, to be operated or operating from a fixed location pursuant to Commission authorization, for the transmission of writing, signs, signals, data, images, pictures, and sounds of all kinds, including the transmitting device and any on-site equipment, switches, wiring, cabling, power sources, shelters or cabinets associated with that antenna

and added to a tower, structure, or building as part of the original installation of the antenna. For most services, an antenna will be mounted on or in, and is distinct from, a supporting structure such as a tower, structure or building. However, in the case of AM broadcast stations, the entire tower or group of towers constitutes the antenna for that station. For purposes of this section, the term antenna does not include unintentional radiators, mobile stations, or devices authorized under part 15 of this title.

Applicant means a Commission licensee, permittee, or registration holder, or an applicant or prospective applicant for a wireless or broadcast license, authorization or antenna structure registration, and the duly authorized agents, employees, and contractors of any such person or entity.

Collocation means the mounting or installation of an antenna on an existing tower, building or structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes, whether or not there is an existing antenna on the structure.

Tower means any structure built for the sole or primary purpose of supporting Commission-licensed or authorized antennas, including the on-site fencing, equipment, switches, wiring, cabling, power sources, shelters, or cabinets associated with that tower but not installed as part of an antenna as defined herein.

Undertaking means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of the Commission, including those requiring a Commission permit, license or approval. Maintenance and servicing of towers, antennas, and associated equipment are not deemed to be undertakings subject to review under this section.

[FR Doc. 2017–26940 Filed 12–13–17; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 25

[IB Docket No. 13–213; FCC 16–181]

Terrestrial Use of the 2473–2495 MHz Bands for Low-Power Mobile Broadband Networks; Amendments to Rules for the Ancillary Terrestrial Component of Mobile Satellite Service Systems

AGENCY: Federal Communications Commission.

ACTION: Final rule; announcement of effective date.

SUMMARY: In this document, the Commission announces that the Office of Management and Budget (OMB) has approved, for a period of three years, the information collection associated with the Commission's Terrestrial Use of the 2473–2495 MHz bands for Low-Power Mobile Broadband Networks; Amendments to Rules for the Ancillary Terrestrial Component of Mobile Satellite Service Systems Report and Order's (Order) modified rules for the operation of an Ancillary Terrestrial Component. This document is consistent with the Order, which stated that the Commission would publish a document in the **Federal Register** announcing the effective date of those rules.

DATES: The amendments to 47 CFR 25.149 published at 82 FR 8814, January 31, 2017, are effective December 14, 2017.

FOR FURTHER INFORMATION CONTACT: Stephen Duall, Satellite Division, International Bureau, at 202–418–1103 or via email at Stephen.Duall@fcc.gov.

SUPPLEMENTARY INFORMATION: This document announces that, on June 28, 2017, OMB approved, for a period of three years, the information collection requirements relating to the access stimulation rules contained in the Commission's Order, FCC 16–181, published at 82 FR 8814, January 31, 2017. The OMB Control Number is 3060–0994. The Commission publishes this document as an announcement of the effective date of the rules. If you have any comments on the burden estimates listed below, or how the Commission can improve the collections and reduce any burdens caused thereby, please contact Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street SW, Washington, DC 20554. Please include the OMB Control Number, 3060–0298, in your correspondence. The Commission will also accept your comments via email at PRA@fcc.gov.

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 and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

SYNOPSIS

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), the FCC is notifying the public that it

received final OMB approval on June 28, 2017, for the information collection requirements contained in the modifications to the Commission's rules in 47 CFR part 25.

Under 5 CFR part 1320, an agency may not conduct or sponsor a collection of information unless it displays a current, valid OMB Control Number.

No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a current, valid OMB Control Number. The OMB Control Number is 3060–0994.

The foregoing notice is required by the Paperwork Reduction Act of 1995, Public Law 104–13, October 1, 1995, and 44 U.S.C. 3507.

The total annual reporting burdens and costs for the respondents are as follows:

OMB Control Number: 3060–0994.

OMB Approval Date: June 28, 2017.

OMB Expiration Date: June 30, 2020.

Title: Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L Band, and the 1.6/2.4 GHz Band.

Form Number: N/A.

Respondents: Business or other for-profit entities.

Number of Respondents and Responses: 126 respondents; 126 responses.

Estimated Time per Response: Between 0.5–50 hours.

Frequency of Response: One-time, annual, and on-occasion reporting requirements, third party disclosure and recordkeeping requirements.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this information collection is contained in sections 4(i), 7, 302, 303(c), 303(e), 303(f) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 157, 302, 303(c), 303(e), 303(f) and 303(r).

Total Annual Burden: 520 hours.

Total Annual Cost: \$530,340.

Nature and Extent of Confidentiality: An assurance of confidentiality is not offered because this information collection does not require the collection of personally identifiable information (PII) from individuals.

Privacy Act: No impact(s).

Needs and Uses: On December 23, 2016, the Commission released a Report and Order in IB Docket No. 13–213, FCC 16–181, titled “Terrestrial Use of the 2473–2495 MHz Band for Low-Power Mobile Broadband Networks; Amendments to Rules for the Ancillary Terrestrial Component of Mobile Satellite Service Systems.” The revisions to 47 CFR part 25 adopted in

the Report and Order remove a portion of the information collection requirements as it relates to a newly proposed low power broadband network, as described in document FCC 16–181. These revisions enable ATC licensees to operate low-power ATC using licensed spectrum in the 2483.5–2495 MHz band. Although the original low-power ATC proposal described the use of the adjacent 2473–2483.5 MHz band, low-power terrestrial operations at 2473–2483.5 MHz were not authorized by the Report and Order. The revisions provide an exception for low-power ATC from the requirements contained in § 25.149(b) of the Commission's rules, which require detailed showings concerning satellite system coverage and replacement satellites. The revisions also provide an exception from a rule requiring integrated service, which generally requires that service handsets be capable of communication with both satellites and terrestrial base stations. Accordingly, the provider of low-power ATC would be relieved from certain burdens that are currently in place in the existing information collection. To qualify for authority to deploy a low-power terrestrial network in the 2483.5–2495 MHz band, an ATC licensee would need to certify that it will utilize a Network Operating System to manage its terrestrial low-power network. Although the Report and Order also created new technical requirements for equipment designed to communicate with a low-power ATC network, satisfaction of these technical requirements relieves ATC licensees from meeting other technical requirements that apply to ATC systems generally. We also had a revision to this information collection to reflect the elimination of the elements of this information collection for 2 GHz MSS. See 78 FR 48621–22.

The purposes of the existing information collection are to obtain information necessary for licensing operators of Mobile-Satellite Service (MSS) networks to provide ancillary services in the U.S. via terrestrial base stations (Ancillary Terrestrial Components, or ATCs); obtain the legal and technical information required to facilitate the integration of ATCs into MSS networks in the L-Band and the 1.6/2.4 GHz Bands; and to ensure that ATC licensees meet the Commission's legal and technical requirements to develop and maintain their MSS networks and operate their ATC systems without causing harmful interference to other radio systems.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2017-26943 Filed 12-13-17; 8:45 am]

BILLING CODE 6712-01-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[Docket No. 120627194-3657-02]

RIN 0648-XF817

Atlantic Highly Migratory Species; North Atlantic Swordfish Fishery

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

ACTION: Temporary rule; Swordfish General Commercial permit retention limit inseason adjustment for the Northwest Atlantic, Gulf of Mexico, and U.S. Caribbean regions.

SUMMARY: NMFS is adjusting the Swordfish (SWO) General Commercial permit retention limits for the Northwest Atlantic, Gulf of Mexico, and U.S. Caribbean regions for January through June of the 2018 fishing year, unless otherwise later noticed. The SWO General Commercial permit retention limit in each of these regions is increased from the regulatory default limits (either two or three fish) to six swordfish per vessel per trip. The SWO General Commercial permit retention limit in the Florida SWO Management Area will remain unchanged at the default limit of zero swordfish per vessel per trip. These adjustments apply to SWO General Commercial permitted vessels and Highly Migratory Species (HMS) Charter/Headboat permitted vessels when on a non-for-hire trip. This action is based upon consideration of the applicable inseason regional retention limit adjustment criteria.

DATES: The adjusted SWO General Commercial permit retention limits in the Northwest Atlantic, Gulf of Mexico, and U.S. Caribbean regions are effective from January 1, 2018, through June 30, 2018.

FOR FURTHER INFORMATION CONTACT: Rick Pearson or Randy Blankinship, 727-824-5399.

SUPPLEMENTARY INFORMATION: Regulations implemented under the authority of the Atlantic Tunas Convention Act (ATCA; 16 U.S.C. 971 *et seq.*) and the Magnuson-Stevens Fishery

Conservation and Management Act (Magnuson-Stevens Act; 16 U.S.C. 1801 *et seq.*) governing the harvest of North Atlantic swordfish by persons and vessels subject to U.S. jurisdiction are found at 50 CFR part 635. Section 635.27 subdivides the U.S. North Atlantic swordfish quota recommended by the International Commission for the Conservation of Atlantic Tunas (ICCAT) and implemented by the United States into two equal semi-annual directed fishery quotas—an annual incidental catch quota for fishermen targeting other species or catching swordfish recreationally, and a reserve category, according to the allocations established in the 2006 Consolidated Highly Migratory Species Fishery Management Plan (2006 Consolidated HMS FMP) (71 FR 58058, October 2, 2006), as amended, and in accordance with implementing regulations. NMFS is required under ATCA and the Magnuson-Stevens Act to provide U.S. fishing vessels with a reasonable opportunity to harvest the ICCAT-recommended quota.

In 2017, ICCAT recommended that the overall North Atlantic swordfish total allowable catch (TAC) be set at 9,925 metric tons (mt) dressed weight (dw) (13,200 mt whole weight (ww)) through 2021. Consistent with scientific advice, this was a reduction of 500 mt ww (375.9 mt dw) from previous ICCAT-recommended TACs. However, of this TAC, the United States' baseline quota remained at 2,937.6 mt dw (3,907 mt ww) per year. The Recommendation also continued to limit underharvest carryover to 15 percent of a contracting party's baseline quota. Thus, the United States could carry over a maximum of 440.6 mt dw (586.0 mt ww) of underharvest. Absent adjustments, the codified baseline quota is 2,937.6 mt dw for 2018. At this time, given the extent of underharvest in 2017, we anticipate carrying over the maximum allowable 15 percent (440.6 mt dw), which would result in a final adjusted North Atlantic swordfish quota for the 2018 fishing year equal to 3,378.2 mt dw (2,937.6 + 440.6 = 3,378.2 mt dw). Also as in past years, we anticipate allocating from the adjusted quota, 50 mt dw to the Reserve category for inseason adjustments and research, and 300 mt dw to the Incidental category, which includes recreational landings and landings by incidental swordfish permit holders, per § 635.27(c)(1)(i). This would result in an allocation of 3,028.2 mt dw for the directed fishery, which would be split equally (1,514.1 mt dw) between the two semi-annual periods in 2018

(January through June, and July through December).

Adjustment of SWO General Commercial Permit Vessel Retention Limits

The 2018 North Atlantic swordfish fishing year, which is managed on a calendar-year basis and divided into two equal semi-annual quotas, begins on January 1, 2018. Landings attributable to the SWO General Commercial permit are counted against the applicable semi-annual directed fishery quota. Regional default retention limits for this permit have been established and are automatically effective from January 1 through December 31 each year, unless changed based on the inseason regional retention limit adjustment criteria at § 635.24(b)(4)(iv). The default retention limits established for the SWO General Commercial permit are: (1) Northwest Atlantic region—three swordfish per vessel per trip; (2) Gulf of Mexico region—three swordfish per vessel per trip; (3) U.S. Caribbean region—two swordfish per vessel per trip; and, (4) Florida SWO Management Area—zero swordfish per vessel per trip. The default retention limits apply to SWO General Commercial permitted vessels and to HMS Charter/Headboat permitted vessels when fishing on non-for-hire trips. As a condition of these permits, vessels may not possess, retain, or land any more swordfish than is specified for the region in which the vessel is located.

Under § 635.24(b)(4)(iii), NMFS may increase or decrease the SWO General Commercial permit vessel retention limit in any region within a range from zero to a maximum of six swordfish per vessel per trip. Any adjustments to the retention limits must be based upon a consideration of the relevant criteria provided in § 635.24(b)(4)(iv), which include: The usefulness of information obtained from biological sampling and monitoring of the North Atlantic swordfish stock; the estimated ability of vessels participating in the fishery to land the amount of swordfish quota available before the end of the fishing year; the estimated amounts by which quotas for other categories of the fishery might be exceeded; effects of the adjustment on accomplishing the objectives of the fishery management plan and its amendments; variations in seasonal distribution, abundance, or migration patterns of swordfish; effects of catch rates in one region precluding vessels in another region from having a reasonable opportunity to harvest a portion of the overall swordfish quota; and, review of dealer reports, landing

trends, and the availability of swordfish on the fishing grounds.

NMFS has considered these criteria as discussed below and their applicability to the SWO General Commercial permit retention limit in all regions for January through June of the 2018 North Atlantic swordfish fishing year and has determined that the SWO General Commercial permit retention limits in the Northwest Atlantic, Gulf of Mexico, and U.S. Caribbean regions applicable to persons issued a SWO General Commercial permit or HMS Charter/Headboat permit (when on a non for-hire trip) should be increased from the default levels that would otherwise automatically become effective on January 1, 2018, to six swordfish per vessel per trip from January 1 through June 30, 2018, unless otherwise later noticed.

Among the regulatory criteria for inseason adjustments to retention limits, and given the rebuilt status of the stock and availability of quota, is the requirement that NMFS consider the “effects of the adjustment on accomplishing the objectives of the fishery management plan and its amendments.” One consideration in deciding whether to increase the retention limit, in this case, is the objective of providing opportunities to harvest the full North Atlantic directed swordfish quota without exceeding it based upon the 2006 Consolidated HMS FMP goal to, consistent with other objectives of this FMP, “manage Atlantic HMS fisheries for continuing optimum yield so as to provide the greatest overall benefit to the Nation, particularly with respect to food production, providing recreational opportunities, preserving traditional fisheries, and taking into account the protection of marine ecosystems.” Another consideration, consistent with the FMP and its amendments, is to continue to provide protection to important swordfish juvenile areas and migratory corridors.

The regulatory criteria also require NMFS to consider the estimated ability of vessels participating in the fishery to land the amount of swordfish quota available before the end of the fishing year. In considering these criteria and their application here, NMFS examined electronic dealer reports, which provide accurate and timely monitoring of landings, and considered recent landing trends and information obtained from biological sampling and monitoring of the North Atlantic swordfish stock. A six swordfish per vessel per trip limit for SWO General Commercial permit holders was in effect in the Northwest Atlantic, Gulf of Mexico, and U.S.

Caribbean regions for the entire 2016 fishing season as a result of actions adjusting those limits upwards in January and July (80 FR 81770 and 81 FR 38966). Even with these higher retention limits, 2016 total annual directed swordfish landings through December 31, 2016, were approximately 1,079.0 mt dw, or 32.6 percent of the 3,009.4 mt dw annual adjusted directed swordfish quota. Similarly, with higher retention limits during both semi-annual quota periods in 2017, preliminary total directed swordfish landings through October 31, 2017, are approximately 744.2 mt dw, or 24.7 percent of the 3,009.4 mt dw annual adjusted directed swordfish quota established for 2017.

The total available directed swordfish quota has not been harvested for several years and, based upon current landing trends, is not likely to be harvested or exceeded during 2018. This information indicates that sufficient directed swordfish quota should be available from January 1 through June 30, 2018, at the higher retention levels, within the limits of the scientifically-supported TAC and consistent with the goals of the FMP.

The regulatory criteria for inseason adjustments also require NMFS to consider the estimated amounts by which quotas for other categories of the fishery might be exceeded. Based upon recent landings rates from dealer reports, an increase in the vessel retention limit for SWO General Commercial permit holders is not likely to cause quotas for other categories of the fishery to be exceeded as the directed category quota has been significantly underharvested in recent years and landings trends are not expected to vary significantly in 2018. Similarly, regarding the criteria that NMFS consider the effects of catch rates in one region precluding vessels in another region from having a reasonable opportunity to harvest a portion of the overall swordfish quota, NMFS expects there to be sufficient swordfish quota for 2018, and thus increased catch rates in these three regions as a result of this action would not be expected to preclude vessels in the other region (e.g., the buoy gear fishery in the Florida SWO Management Area) from having a reasonable opportunity to harvest a portion of the overall swordfish quota.

Finally, in making adjustments to the retention limits NMFS must consider variations in seasonal distribution, abundance, or migration patterns of swordfish, and the availability of swordfish on the fishing grounds. With regard to swordfish abundance, the 2017 report by ICCAT’s Standing Committee

on Research and Statistics indicated that the North Atlantic swordfish stock is not overfished ($B_{2015}/B_{msy} = 1.04$), and overfishing is not occurring ($F_{2015}/F_{msy} = 0.78$). Increasing the retention limits for this U.S. handgear fishery is not expected to affect the swordfish stock status determination because any additional landings would be within the established overall U.S. North Atlantic swordfish quota allocation recommended by ICCAT. Increasing opportunity beginning on January 1, 2018, is also important because of the migratory nature and seasonal distribution of swordfish. In a particular geographic region, or waters accessible from a particular port, the amount of fishing opportunity for swordfish may be constrained by the short amount of time the swordfish are present as they migrate.

NMFS also has determined that the retention limit for the SWO General Commercial permit will remain at zero swordfish per vessel per trip in the Florida SWO Management Area at this time. As discussed above, NMFS considered consistency with the 2006 Consolidated HMS FMP and its amendments, and the importance for NMFS to continue to provide protection to important swordfish juvenile areas and migratory corridors. As described in Amendment 8 to the 2006 Consolidated HMS FMP (78 FR 52012), the area off the southeastern coast of Florida, particularly the Florida Straits, contains oceanographic features that make the area biologically unique. It provides important juvenile swordfish habitat, and is essentially a narrow migratory corridor containing high concentrations of swordfish located in close proximity to high concentrations of people who may fish for them. Public comment on Amendment 8, including from the Florida Fish and Wildlife Conservation Commission, indicated concern about the resultant high potential for the improper rapid growth of a commercial fishery, increased catches of undersized swordfish, the potential for larger numbers of fishermen in the area, and the potential for crowding of fishermen, which could lead to gear and user conflicts. These concerns remain valid. NMFS will continue to collect information to evaluate the appropriateness of the retention limit in the Florida SWO Management Area and other regional retention limits. This action therefore maintains a zero-fish retention limit in the Florida Swordfish Management Area.

These adjustments are consistent with the 2006 Consolidated HMS FMP as amended, ATCA, and the Magnuson-

Stevens Act, and are not expected to negatively impact stock health.

Monitoring and Reporting

NMFS will continue to monitor the swordfish fishery closely during 2018 through mandatory landings and catch reports. Dealers are required to submit landing reports and negative reports (if no swordfish were purchased) on a weekly basis.

Depending upon the level of fishing effort and catch rates of swordfish, NMFS may determine that additional retention limit adjustments or closures are necessary to ensure that available quota is not exceeded or to enhance fishing opportunities. Subsequent actions, if any, will be published in the **Federal Register**. In addition, fishermen may access <http://www.nmfs.noaa.gov/sfa/hms/species/swordfish/landings/index.html> for updates on quota monitoring.

Classification

The Assistant Administrator for NMFS (AA) finds that it is impracticable and contrary to the public interest to provide prior notice of, and an opportunity for public comment on, this action for the following reasons:

The regulations implementing the 2006 Consolidated HMS FMP, as amended, provide for inseason retention limit adjustments to respond to changes in swordfish landings, the availability of swordfish on the fishing grounds, the migratory nature of this species, and regional variations in the fishery. Based

on available swordfish quota, stock abundance, fishery performance in recent years, and the availability of swordfish on the fishing grounds, among other considerations, adjustment to the SWO General Commercial permit retention limits from the default levels of two or three fish to six SWO per vessel per trip as discussed above is warranted, while maintaining a zero-fish retention limit in the Florida SWO Management Area. Analysis of available data shows that adjustment to the swordfish retention limit from the default levels would result in minimal risk of exceeding the ICCAT-allocated quota. NMFS provides notification of retention limit adjustments by publishing the notification in the **Federal Register**, emailing individuals who have subscribed to the Atlantic HMS News electronic newsletter, and updating the information posted on the "Atlantic HMS Breaking News" website at http://www.nmfs.noaa.gov/sfa/hms/news/breaking_news.html. Delays in temporarily increasing these retention limits caused by the time required to publish a proposed rule and accept public comment would adversely and unnecessarily affect those SWO General Commercial permit holders and HMS Charter/Headboat permit holders that would otherwise have an opportunity to harvest more than the otherwise applicable lower default retention limits of three swordfish per vessel per trip in the Northwest Atlantic and Gulf of Mexico regions, and two swordfish per vessel per trip in the U.S. Caribbean

region. Further, any delay beyond January 1, 2018, the start of the first semi-annual directed fishing period, could result in even lower swordfish landings because of the lower default retention limits. Limited opportunities to harvest the directed swordfish quota may have negative social and economic impacts for U.S. fishermen. Adjustment of the retention limits needs to be effective on January 1, 2018, to allow SWO General Commercial permit holders and HMS Charter/Headboat permit holders to benefit from the adjustment during the relevant time period, which could pass by for some fishermen, particularly in the Gulf of Mexico and U.S. Caribbean regions who have access to the fishery during a short time period because of seasonal fish migration, if the action is delayed for notice and public comment. Therefore, the AA finds good cause under 5 U.S.C. 553(b)(B) to waive prior notice and the opportunity for public comment. For all of the above reasons, there is also good cause under 5 U.S.C. 553(d) to waive the 30-day delay in effectiveness.

This action is being taken under 50 CFR 635.24(b)(4) and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 971 *et seq.* and 1801 *et seq.*

Dated: December 8, 2017.

Emily H. Menashes,
Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2017-26901 Filed 12-13-17; 8:45 am]

BILLING CODE 3510-22-P

Proposed Rules

Federal Register

Vol. 82, No. 239

Thursday, December 14, 2017

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.

FEDERAL RESERVE SYSTEM

12 CFR Chapter II

[Docket No. OP–1589]

Federal Reserve Policy on Payment System Risk; U.S. Branches and Agencies of Foreign Banking Organizations

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Policy statement; request for comment.

SUMMARY: The Board of Governors of the Federal Reserve System (“Board”) is requesting comment on proposed changes to part II of the Federal Reserve Policy on Payment System Risk (“PSR policy”) related to procedures for determining the net debit cap and maximum daylight overdraft capacity of a U.S. branch or agency of a foreign banking organization (“FBO”). Under the PSR policy, an FBO’s strength of support assessment (“SOSA”) ranking can affect its eligibility for a positive net debit cap, the size of its net debit cap, and its eligibility to request a streamlined procedure to obtain maximum daylight overdraft capacity. Additionally, an FBO that is a financial holding company (“FHC”) can generally receive a higher net debit cap than an FBO that is not an FHC, and is generally eligible to request a streamlined procedure to obtain maximum daylight overdraft capacity. The proposed changes to the PSR policy would remove references to the SOSA ranking; remove references to FBOs’ FHC status; and adopt alternative methods for determining an FBO’s eligibility for a positive net debit cap, the size of its net debit cap, and its eligibility to request a streamlined procedure to obtain maximum daylight overdraft capacity. The Board recognizes that the proposed changes would reduce net debit caps for some FBOs, but the Board believes that the adjusted FBO net debit caps would be better tailored to FBOs’ actual usage

of intraday credit and would not constrain FBOs’ U.S. operations.

DATES: Comments on the proposed changes must be received on or before February 12, 2018.

ADDRESSES: You may submit comments, identified by Docket No. OP–1589, by any of the following methods:

- *Agency website:* <http://www.federalreserve.gov>. Follow the instructions for submitting comments at <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm>.
- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Email:* regs.comments@federalreserve.gov. Include docket number in the subject line of the message.
- *FAX:* 202/452–3819 or 202/452–3102.
- *Mail:* Ann E. Misback, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

All public comments are available from the Board’s website at www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm as submitted, except as necessary for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room 3515, 1801 K Street NW (between 18th and 19th Streets NW), Washington, DC 20006 between 9:00 a.m. and 5:00 p.m. on weekdays.

FOR FURTHER INFORMATION CONTACT: Jeffrey Walker, Assistant Director (202–721–4559), Jason Hinkle, Manager (202–912–7805), or Alex So, Senior Financial Services Analyst (202–452–2300), Division of Reserve Bank Operations and Payment Systems; or Evan Winerman, Counsel (202–872–7578), Legal Division, Board of Governors of the Federal Reserve System. For users of Telecommunications Device for the Deaf (TDD) only, please call 202–263–4869.

SUPPLEMENTARY INFORMATION:

I. Current Use of SOSA Ranking and FHC Status in the PSR Policy

Part II of the PSR policy establishes the maximum levels of daylight overdrafts that depository institutions (“institutions”) may incur in their

Federal Reserve accounts.²⁰ As described further below, an FBO’s SOSA ranking—which assesses an FBO’s ability to provide financial, liquidity, and management support to its U.S. operations—can affect the FBO’s daylight overdraft capacity. Similarly, an FBO’s status as an FHC can affect its daylight overdraft capacity.²¹

A. Net Debit Caps

An institution’s net debit cap is the maximum amount of uncollateralized daylight overdrafts that the institution can incur in its Federal Reserve account. The PSR policy generally requires that an institution be “financially healthy” to be eligible for a positive net debit cap.²² To that end, the *Guide to the Federal Reserve’s Payment System Risk Policy* (“Guide”) clarifies that most FBOs with a SOSA ranking of 3 or a U.S. Operations Supervisory Composite Rating of marginal or unsatisfactory generally do not qualify for a positive net debit cap.²³

Assuming that an institution qualifies for a positive net debit cap, the size of its net debit cap equals the institution’s “capital measure” multiplied by its “cap multiple.”²⁴ As described further

²⁰ See https://www.federalreserve.gov/payment-systems/files/psr_policy.pdf.

²¹ The Gramm-Leach-Bliley Act defines a “financial holding company” as a bank holding company that meets certain eligibility requirements. In order for a bank holding company to become a financial holding company and be eligible to engage in the new activities authorized under the Gramm-Leach-Bliley Act, the Act requires that all depository institutions controlled by the bank holding company be well capitalized and well managed (12 U.S.C. 1841(p)). With regard to a foreign bank that operates a branch or agency or owns or controls a commercial lending company in the United States, the Act requires the Board to apply comparable capital and management standards that give due regard to the principle of national treatment and equality of competitive opportunity (12 U.S.C. 1843(l)).

²² See Part II.D.1 of the PSR Policy.

²³ Section VI.A.1 of the Guide states that “[m]ost SOSA 3-ranked institutions do not qualify for a positive net debit cap,” though it clarifies that “[i]n limited circumstances, a Reserve Bank may grant a net debit cap or extend intraday credit to a financially healthy SOSA 3-ranked FBO.” Separately, Table VII–2 of the Guide states that SOSA–3 ranked FBOs and FBOs that receive a U.S. Operations Supervisory Composite Rating of marginal or unsatisfactory have “below standard” creditworthiness, and Table VII–3 of the Guide states that institutions with below standard creditworthiness cannot incur daylight overdrafts.

²⁴ See Part II.D.1 of the PSR Policy. All net debit caps are granted at the discretion of the institution’s Administrative Reserve Bank, which is the Reserve Bank that is responsible for managing an

below, an institution's capital measure is a number derived (under most circumstances) from the size of its capital base. An institution's cap multiple is determined by the institution's "cap category," which generally reflects, among other things, the institution's creditworthiness. An institution with a higher capital measure or a higher cap category (and thus a higher cap multiple) will qualify for a higher net debit cap than an institution with a lower capital measure or lower cap category.

An FBO's SOSA ranking can affect both its cap category and its capital measure. An FBO's status as an FHC can affect its capital measure.²⁵

1. Cap categories and cap multiples.

Under Section II.D.2 of the PSR policy, an institution's "cap category" is one of six classifications—high, above average, average, de minimis, exempt-from-filing, and zero. In order to establish a cap category of high, above average, or average, an institution must perform a self-assessment of its own creditworthiness, intraday funds management and control, customer credit policies and controls, and operating controls and contingency procedures. Other cap categories do not require a self-assessment.²⁶ Each cap category corresponds to a "cap multiple."²⁷ As noted above, an institution's net debit cap generally equals its capital measure multiplied by its cap multiple.

An FBO's SOSA ranking can affect its cap category (and thus its cap multiple). As noted above, an institution that wishes to establish a net debit cap category of high, above average, or average must perform a self-assessment of, among other things, its own creditworthiness. Under Part II.D.2.a of

institution's account relationship with the Federal Reserve.

²⁵ In contrast, the FHC status of a domestic bank holding company does not affect its capital measure.

²⁶ An institution that meets reasonable safety and soundness standards can request a de minimis cap category, without performing a self-assessment, by submitting a board of directors resolution to its Administrative Reserve Bank. An institution that only rarely incurs daylight overdrafts in its Federal Reserve account that exceed the lesser of \$10 million or 20 percent of its capital measure can be assigned an "exempt-from-filing" cap category without performing a self-assessment or filing a board of directors resolution with its Administrative Reserve Bank.

²⁷ Under Section II.D.1 of the PSR policy, the cap multiple for the "high" category is 2.25, for the "above average" category is 1.875, for the "average" category is 1.125, for the "de minimis" category is 0.4, for the "exempt-from-filing" category is 0.2 or \$10 million, and for the "zero" category is 0. Note that the net debit cap for the exempt-from-filing category is equal to the lesser of \$10 million or 0.2 multiplied by the capital measure.

the PSR policy, "[t]he assessment of creditworthiness is based on the institution's supervisory rating and Prompt Corrective Action (PCA) designation." Part VII.A of the Guide includes a matrix for assessing domestic institutions' creditworthiness that incorporates an institution's supervisory rating and PCA designation. Because FBOs do not receive PCA designations, however, Part VII.A of the Guide includes a separate matrix for assessing FBO creditworthiness that incorporates an FBO's U.S. Operations Supervisory Composite Rating and—in lieu of a PCA designation—SOSA ranking.²⁸

Similarly, while an FBO is not required to perform a self-assessment if it requests a cap category of de minimis or wishes to be assigned a cap category of exempt-from-filing by the Reserve Bank, the Reserve Banks rely on the minimum standards set by the creditworthiness matrix when they evaluate FBO requests for any cap category greater than zero. Accordingly, the Reserve Banks generally do not allow FBOs to qualify for a positive net debit cap, including the de minimis or exempt-from-filing cap category, if the FBO has a SOSA ranking of 3 or a U.S. Operations Supervisory Composite Rating of marginal or unsatisfactory.²⁹

In certain situations, the Reserve Banks require institutions to perform a full assessment of their creditworthiness instead of using the relevant self-assessment matrix (e.g., when the institution has experienced a significant development that may materially affect its financial condition). The Guide includes procedures for full assessments of creditworthiness.

2. Capital measures.

Under Section II.D.3 of the PSR policy, an institution's "capital measure" is a number derived (under most circumstances) from the size of its capital base. The determination of the capital measure, however, differs between domestic institutions and FBOs. A domestic institution's capital measure equals 100 percent of the institution's risk-based capital. Conversely, an FBO's capital measure (also called "U.S. capital equivalency")³⁰ equals a percentage of (under most circumstances) the FBO's worldwide capital base³¹ ranging from

²⁸ Under Section 38 of the Federal Deposit Insurance Act, 12 U.S.C. 1831o, PCA designations apply only to insured depository institutions.

²⁹ See n. 4, *supra*, and accompanying text.

³⁰ The term "U.S. capital equivalency" is used in this context to refer to the particular capital measure used to calculate net debit caps and does not necessarily represent an appropriate capital measure for supervisory or other purposes.

³¹ FBOs that wish to establish a non-zero net debit cap must report their worldwide capital on the

5 percent to 35 percent, with the exact percentage depending on (1) the FBO's SOSA ranking and (2) whether the FBO is an FHC. Specifically, the capital measure of an FBO that is an FHC is 35 percent of its capital; an FBO that is not an FHC and has a SOSA ranking of 1 is 25 percent of its capital; and an FBO that is not an FHC and has a SOSA ranking of 2 is 10 percent of its capital. The capital measure of an FBO that is not an FHC and has a SOSA ranking of 3 equals 5 percent of its "net due to related depository institutions" (although, as noted above, FBOs with a SOSA ranking of 3 generally do not qualify for a positive net debit cap).³²

B. Maximum Daylight Overdraft Capacity

Section II.E of the PSR policy allows certain institutions with self-assessed net debit caps to pledge collateral to their Administrative Reserve Bank to secure daylight overdraft capacity in excess of their net debit caps. An institution's maximum daylight overdraft capacity ("max cap") equals its net debit cap plus its additional collateralized capacity. The max cap policy is "intended to provide extra liquidity through the pledge of collateral by the few institutions that might otherwise be constrained from participating in risk-reducing payment system initiatives."

Institutions that wish to obtain a max cap must generally provide (1) documentation of the business need for collateralized capacity and (2) an annual board of directors' resolution approving any collateralized capacity. Under Section II.E.2 of the PSR policy, however, an FBO that has a SOSA ranking of 1 or is an FHC may request a streamlined procedure for obtaining a max cap.³³ Such an FBO is not required to document its business need for collateralized capacity, nor is it required to obtain a board of directors' resolution approving collateralized capacity, as long as the FBO requests a max cap that is 100 percent or less of the FBO's

Annual Daylight Overdraft Capital Report for U.S. Branches and Agencies of Foreign Banks (FR 2225). The instructions for FR 2225 explain how FBOs should calculate their worldwide capital. See <https://www.federalreserve.gov/apps/reportforms/reportdetail.aspx?sOoYJ+5BzDZ1kLYTc+ZpEQ==>.

³² An FBO reports its "net due to related depository institutions" on the Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks (FFIEC 002).

³³ Even under the streamlined procedure, the Administrative Reserve Bank retains the right to assess an FBO's financial and supervisory information, including the FBO's ability to manage intraday credit.

worldwide capital times its self-assessed cap multiple.³⁴

II. Discussion of Proposed Changes; Request for Comment

The SOSA ranking was originally established to provide input to the development and maintenance of a comprehensive supervisory strategy for the U.S. activities of an FBO, but Federal Reserve supervisors no longer use SOSA rankings for this purpose.³⁵ As a result, the only current use of SOSA rankings by the Federal Reserve is in setting guidelines related to FBO access to Reserve Bank intraday credit and the discount window.³⁶ Federal Reserve supervisors currently provide SOSA rankings to many FBOs, including FBOs that have not requested positive net debit caps. The Board believes that this is an inefficient use of the Federal Reserve's supervisory resources, and that it should streamline the Federal Reserve's FBO supervision program by discontinuing the SOSA ranking. As described further below, the Board proposes to remove references to the SOSA ranking in the PSR policy. The Federal Reserve will continue to provide SOSA rankings until the Board removes such references in the PSR Policy.

Additionally, for reasons discussed below, the Board no longer believes that an FBO should receive greater daylight overdraft capacity because it is an FHC. The Board therefore proposes to remove references to FBOs' FHC status in the PSR policy.

The Board proposes to adopt alternative methods for determining an

FBO's eligibility for a positive net debit cap, the size of its net debit cap, and its eligibility to request a streamlined procedure to obtain a max cap. As described more fully below:

- Many undercapitalized FBOs, and all significantly or critically undercapitalized FBOs, would have "below standard" creditworthiness and would generally be ineligible for a positive net debit cap.
- An FBO's creditworthiness self-assessment would generally be based on the FBO's U.S. Operations Supervisory Composite Rating and the PCA designation that would apply to the FBO if it were subject to the Board's Regulation H.³⁷ An FBO that is not based in a country that adheres to the Basel Capital Accords ("BCA") would be required to perform a full assessment of its creditworthiness in lieu of the matrix approach to assessing creditworthiness.

- The capital measure of an FBO would equal 10 percent of its worldwide capital.

- An FBO that is well capitalized could request the streamlined procedure for obtaining a max cap.

The Board requests comment on all aspects of the proposal, including whether FBOs would require a transition period to adjust to the proposed changes.

A. Eligibility of SOSA-3 Ranked FBOs for a Positive Net Debit Cap

As discussed above, SOSA-3 ranked FBOs are presumptively ineligible for a positive net debit cap. Because the proposal would remove all references to the SOSA ranking in the PSR policy, FBOs that currently hold a SOSA-3 ranking would not be—on that basis—presumptively ineligible for a positive net debit cap. Some of those FBOs would be ineligible for positive net debit caps for other reasons, however. First, the revised creditworthiness self-assessment matrix in the Guide (discussed further below) would continue to assume that FBOs that have U.S. Operations Supervisory Composite Ratings of "marginal" or "unsatisfactory" have "below standard" creditworthiness and are generally ineligible for a positive net debit cap.³⁸ Second, the revised creditworthiness self-assessment matrix would—as described further below—assume that

many undercapitalized FBOs, and all significantly or critically undercapitalized FBOs, have "below standard" creditworthiness and are generally ineligible for a positive net debit cap. Finally, an Administrative Reserve Bank might decline to provide a positive net debit cap to an FBO if the Reserve Bank has supervisory concerns regarding that FBO.

B. FBO Creditworthiness

As discussed above, an institution that wishes to establish a net debit cap category of high, above average, or average must perform a self-assessment of, among other things, its own creditworthiness. The Board is proposing to revise the PSR policy to provide that, if an FBO is based in a jurisdiction that adheres to the BCA, the FBO's creditworthiness self-assessment will be based on (1) the FBO's U.S. Operations Supervisory Composite Rating and (2) the PCA designation that would apply to the FBO if it were subject to the Board's Regulation H.³⁹ To determine its equivalent PCA designation, the FBO would compare the Regulation H ratios for total risk-based capital, tier 1 risk-based capital, common equity tier 1 risk-based capital, and leverage to the equivalent ratios that the FBO has calculated under its home country standards or on a pro forma basis.

The Board believes that an FBO's equivalent PCA designation would serve the same purpose as the SOSA ranking in the creditworthiness self-assessment matrix. The SOSA ranking has been useful for assessing FBO creditworthiness because it provides insight into whether an FBO's home office has the ability to support its U.S. branch or agency. Similarly, an equivalent PCA designation would provide insight into an FBO's worldwide financial profile and its ability to support its U.S. branch or agency.

Replacing the SOSA ranking with an equivalent PCA designation would also align the creditworthiness self-assessment for FBOs with the existing creditworthiness self-assessment for domestic institutions.⁴⁰ The Board

³⁴ As described above, for example, the capital measure of an FBO that is not an FHC and has a SOSA ranking of 1 is 25 percent of worldwide capital. The net debit cap of such an FBO equals its capital measure times the cap multiple that corresponds to its cap category. The streamlined max cap procedure therefore allows the FBO to request additional collateralized capacity of 75 percent of worldwide capital times its cap multiple. If the FBO requests a max cap in excess of 100 percent of worldwide capital times its cap multiple, the FBO would be ineligible for the streamlined max cap procedure.

³⁵ See SR Letter 00-14, "Enhancements to the Interagency Program for Supervising the U.S. Operations of Foreign Banking Organizations" (Oct. 23, 2000), <https://www.federalreserve.gov/boarddocs/srletters/2000/sr0014.htm> (letter adopting the SOSA ranking in its current form). See also Section II.C.1.a, *infra*, explaining that Federal Reserve supervisory staff now have access to better supervisory information that allows supervisors to monitor FBOs on an ongoing basis.

³⁶ In addition to the PSR policy's use of SOSA rankings, the Reserve Banks use SOSA rankings to determine whether an FBO can receive discount window loans. See <https://www.frbdiscountwindow.org/en/Pages/General-Information/The-Discount-Window.aspx>. Eliminating SOSA rankings will require adjustments to the Reserve Banks' standards for determining FBO access to primary credit.

³⁷ See 12 CFR 208.43(b).

³⁸ See n. 4, *supra*. Based on data from third-quarter 2017, one SOSA-3 ranked FBO currently has a U.S. Operations Supervisory Composite Rating of "marginal" or "unsatisfactory," while nineteen SOSA-3 ranked FBOs currently have U.S. Operations Supervisory Composite Ratings higher than "marginal" or "unsatisfactory."

³⁹ See 12 CFR 208.43(b).

⁴⁰ Until April 2002, the Guide included a single creditworthiness self-assessment matrix for domestic institutions and FBOs, with PCA categories on one axis and supervisory composite ratings on the other axis. The Guide instructed FBOs to calculate an equivalent PCA designation using tier 1 and total risk-based capital ratios, but did not require FBOs to use leverage ratios. In April 2002, the Guide was revised to its present form, with a separate FBO creditworthiness matrix that lists SOSA rankings on one axis and U.S. supervisory composite ratings on the other axis.

would implement these changes by incorporating FBO creditworthiness self-assessments into the Guide's existing matrix for assessing domestic institutions' creditworthiness.⁴¹ The revised matrix would assume that many undercapitalized FBOs,⁴² and all significantly or critically undercapitalized FBOs, have "below standard" creditworthiness and are (like SOSA-3 ranked FBOs under the current PSR policy) generally ineligible for a positive net debit cap.

The Board does not expect that the proposed changes to the creditworthiness self-assessment matrix would significantly affect FBOs' access to Reserve Bank intraday credit. If the proposed changes were to take effect, only four of the eleven FBOs that currently maintain a self-assessed cap category might qualify for a higher creditworthiness self-assessment rating and thus a higher cap category. These four entities would also need to satisfy the other criteria of the cap category self-assessment (intraday funds management and control, customer credit policies and controls, and operating controls and contingency procedures) to qualify for a higher cap category.⁴³ Similarly, if the proposed changes were to take effect, the Board estimates that only one of the eleven FBOs that currently maintain a self-assessed cap category could potentially lose its self-assessed cap and/or be required to complete a full creditworthiness self-assessment.

The Board does not believe that it will be burdensome for FBOs to calculate an equivalent PCA designation. The Board's FR Y-7Q report currently requires that FBOs with total consolidated assets of \$50 billion or more report the numerators and denominators of all four ratios in the PCA determination. The FR Y-7Q report also requires that FBOs with total consolidated assets below \$50 billion report the numerators and denominators of all ratios in the PCA determination except the common equity tier 1 capital ratio. FBOs with total consolidated assets below \$50 billion that are based in BCA-adhering jurisdictions already calculate their common equity tier 1 capital ratios under home country standards.

As discussed above, while an FBO is not required to perform a self-

assessment if it requests a cap category of *de minimis* or wishes to be assigned a cap category of exempt-from-filing by the Reserve Bank, the Reserve Banks currently rely on the minimum standards set by the creditworthiness matrix when they evaluate an FBO's eligibility for *any* positive net debit cap, including the *de minimis* and exempt-from-filing cap categories. The Board proposes that the Reserve Banks will rely on the minimum standards of the revised creditworthiness matrix when they evaluate whether FBOs from BCA-adhering jurisdictions are eligible for a positive net debit cap, including a *de minimis* or exempt-from-filing cap category. Under the revised creditworthiness matrix, the Reserve Banks generally would not allow significantly or critically undercapitalized FBOs, many undercapitalized FBOs, and FBOs with a U.S. Operations Supervisory Composite Rating of marginal or unsatisfactory to qualify for a positive net debit cap, including a *de minimis* or exempt-from-filing cap category. The Reserve Banks would use publicly available data to determine the equivalent PCA designation of FBOs that request a cap category of *de minimis* or wish to be assigned a cap category of exempt-from-filing.

The Board is also proposing to revise the PSR policy to provide that, if an FBO is *not* based in a country that adheres to the BCA, the FBO must perform a full assessment of its creditworthiness in lieu of the matrix approach to assessing creditworthiness. As noted above, the Guide includes procedures for full assessments of creditworthiness. The requirement to perform a full assessment of creditworthiness would apply to FBOs from non-BCA jurisdictions that request *any* net debit cap greater than the exempt-from-filing category, including FBOs that request a *de minimis* cap category. Additionally, Reserve Banks may request that FBOs from non-BCA jurisdictions perform a full assessment of creditworthiness before assigning the FBO an exempt-from-filing cap category.

C. FBO Capital Measure

As discussed above, under the PSR policy, the determination of an FBO's capital measure is based on the FBO's capital base, SOSA ranking, and FHC status. The Board is proposing to (1) eliminate references to SOSA rankings and FHC status in calculating an FBO's capital measure and (2) replace the existing four-tier structure for calculating an FBO's capital measure with a simplified fixed-rate calculation that depends solely on the FBO's capital

base. Specifically, the proposed change would provide that the capital measure of an FBO equals 10 percent of its worldwide capital.

For the reasons described below, the Board believes that it is unnecessary to replace the SOSA ranking with an alternative supervisory rating for purposes of calculating an FBO's capital measure. The Board also believes that an FBO's status as an FHC should not allow the FBO to qualify for a higher capital measure. While the proposed fixed-rate FBO capital measure calculation would reduce net debit caps for many FBOs, the Board believes that the adjusted FBO net debit caps would be better tailored to FBOs' actual usage of intraday credit and generally would not constrain FBOs' U.S. operations. Finally, while FBOs operating in the United States should be, generally, treated no less favorably than similarly-situated U.S. banking organizations, the Board continues to believe that it is reasonable to calculate an FBO's capital measure as a fraction of its worldwide capital, notwithstanding that the capital measure of a domestic institution generally equals 100 percent of the institution's risk-based capital.

1. It is unnecessary to replace the SOSA ranking with an alternative supervisory rating for purposes of calculating an FBO's capital measure.

a. The Board and the Reserve Banks now have better supervisory information regarding FBOs.

Before the Board adopted the current capital measure calculation process in 2002, an FBO's capital measure depended solely on whether the FBO was based in a country that adhered to the BCA.⁴⁴ The Board adopted the current capital measure calculation in 2002 because it believed that SOSA rankings offered a superior basis for calculating an FBO's capital measure compared to home-country BCA status, explaining that "SOSA rankings provide[d] broader information about the condition of the FBO, its supervision, and the home country, whereas the BCA distinction provide[d] information only about the home country treatment of bank capital adequacy."⁴⁵ The Board also noted that "the BCA designation reflect[ed] the one-time adoption of BCA standards by

⁴⁴ FBOs from countries that adhered to the BCA were eligible to use as their capital measure the greater of 10 percent of their capital or 5 percent of their liabilities to nonrelated parties. FBOs from countries that did not adhere to the BCA were eligible to use as their capital measure the greater of 5 percent of their liabilities to nonrelated parties or the amount of capital that would be required of a national bank being organized at each location.

⁴⁵ 66 FR 64419, 64424 (Dec. 13, 2001).

⁴¹ See Table VII-1 of the Guide.

⁴² An undercapitalized FBO with a U.S. Operations Supervisory Composite Rating of "strong" or "satisfactory" would (like a similarly situated domestic institution) be permitted to perform a full assessment of its creditworthiness to determine its eligibility for a positive net debit cap.

⁴³ See Table VII-3 of the Guide.

a country's supervisory authority, while U.S. bank supervisors update[d] the SOSA rankings regularly."⁴⁶

Since the Board adopted the current FBO capital measure calculation in February 2002, Federal Reserve staff have gained access to new internal and external resources that allow the Federal Reserve to better monitor FBOs on an ongoing basis.⁴⁷ These new resources offer Federal Reserve staff additional information regarding the financial and managerial conditions of FBOs' U.S. and global operations. These resources also provide information regarding home-country accounting practices, financial systems, as well as international supervisory and regulatory developments. Additionally, Federal Reserve staff now enjoy better ongoing communication with many FBOs' home country supervisors.⁴⁸ Collectively, this improved information allows Administrative Reserve Banks to make better decisions, on an ongoing basis, regarding FBO's level of access to intraday credit. The Board therefore believes that it is unnecessary to include a point-in-time supervisory rating when determining an FBO's capital measure.

b. Other elements of the net debit cap calculation consider an FBO's overall financial condition.

As discussed above, an FBO's net debit cap is determined by its capital measure and cap category. Under the Board's proposed changes to the FBO creditworthiness self-assessment procedures (described above), an FBO's worldwide capital ratios would affect its creditworthiness (and thus its cap category). Additionally, the FBO creditworthiness self-assessment procedures would continue to consider FBOs' U.S. Operations Supervisory Composite ratings. Given that other elements of the net debit cap calculation

already consider an FBO's supervisory ratings (and will consider an FBO's overall financial condition if the proposed changes take effect), the Board believes that it is unnecessary to replace the SOSA ranking with an alternative supervisory rating in the FBO capital measure calculation.

2. An FBO should not qualify for a higher capital measure because it is an FHC.

When the Board adopted the current FBO capital measure calculation in 2002, it believed that an FBO's status as an FHC indicated that the FBO was financially and managerially strong, and that the FBO should accordingly qualify for a higher capital measure than a non-FHC FBO. Since 2002, however, the Board has recognized the limitations of FHC status in measuring an FBO's health. In particular, FBOs can maintain nominal FHC status (though with reduced ability to use their FHC powers) even when they are out of compliance with the requirement that they remain well capitalized. Accordingly, the Board no longer believes that an FBO should qualify for a higher capital measure because it is an FHC.

3. The adjusted FBO net debit caps would be better tailored to FBOs' actual usage of intraday credit and generally would not constrain FBOs' U.S. operations.

While the Board's proposed fixed-rate capital measure calculation would reduce net debit caps for twenty of the 49 FBOs that currently maintain a positive net debit cap,⁴⁹ the Board believes that the adjusted FBO net debit caps would be better tailored to FBOs' actual usage of intraday credit: Since 2015, only 25 of 62 FBOs with a positive net debit cap have used any daylight overdraft capacity, the highest average cap utilization by an FBO was 28.5 percent, and only two FBOs had an average cap utilization greater than 25 percent.⁵⁰ Even during the 2007–09 financial crisis, when the use of intraday credit spiked amid the market turmoil near the end of 2008, 51 of 58 FBOs with a positive net debit cap used capacity, the highest average cap utilization was 65 percent, and only seven FBOs had an average cap utilization greater than 25 percent.

The Board recognizes that daylight overdrafts may currently occur less frequently because many institutions hold excess reserves and thus have

higher opening balances in their Federal Reserve accounts. The Board believes, however, that FBOs' adjusted net debit caps would not constrain most FBOs' U.S. operations even if FBOs hold lower reserves in the future. The Board has reached this conclusion by comparing FBOs' projected net debit caps under the proposed fixed-rate capital measure calculation to FBOs' actual daylight overdrafts between 2003 and 2007, when FBOs generally maintained lower reserves.⁵¹ The Board's comparison indicates that, between 2003 and 2007, only four of the 29 FBOs that currently maintain a cap category higher than exempt-from-filing regularly incurred daylight overdrafts that exceeded their projected net debit caps, while five of the 29 FBOs incurred daylight overdrafts that exceeded their projected net debit caps in limited instances. Twenty of the 29 FBOs never incurred daylight overdrafts that exceeded their projected net debit caps.

The Board also notes that FBO net debit caps are large when compared to the net debit caps of peer domestic institutions. For example, the average net debit cap of an FBO with between \$10 billion and \$50 billion in U.S.-based assets is \$2.6 billion, while the average net debit cap of a domestic institution with between \$10 billion and \$50 billion in assets is \$1.4 billion; similarly, the average net debit cap of an FBO with between \$50 billion and \$150 billion in U.S.-based assets is \$28.2 billion, while the average net debit cap of a domestic institution with between \$50 billion and \$150 billion in assets is \$10.5 billion.⁵² FBOs currently hold seven of the twenty largest net debit caps, but only three FBOs hold U.S. assets that rank among the twenty largest institutions by asset size.

The Board recognizes that its proposed changes to the capital measure calculation may increase the instances in which FBOs need additional daylight overdraft capacity. An FBO with a de minimis cap could request a higher net debit cap by applying for a self-assessed cap.⁵³ Similarly, an FBO with a self-assessed cap could apply for a max cap

⁵¹ For this purpose, the Board projected FBOs' net debit caps using an FBO's worldwide capital at the time of past overdrafts, multiplied by the proposed 10 percent FBO capital measure multiplier, multiplied by the relevant cap multiple that corresponds to the FBO's cap category.

⁵² The Board excluded institutions with a cap category of exempt-from-filing from these comparisons because these institutions are limited to a \$10 million net debit cap. No FBO has U.S.-based assets above \$150 billion.

⁵³ Most FBOs with a cap category of exempt-from-filing receive the maximum net debit cap of \$10 million and would not be affected by the proposed changes to the FBO capital measure calculation.

⁴⁶ *Id.*

⁴⁷ For example, the Board began requiring in December 2002 and March 2014 that a top-tier FBO file capital and asset information quarterly (rather than annually) if the FBO is (respectively) an FHC or has total consolidated assets of \$50 billion or more. See FR Y–7Q (Capital and Asset Report for Foreign Banking Organizations); 67 FR 72953 (Dec. 9, 2002) and 79 FR 9900 (Feb. 21, 2014). Additionally, improved commercial databases now offer Federal Reserve supervisors more detailed and timely information regarding FBOs and their home countries.

⁴⁸ For example, Federal Reserve supervisors participate in "supervisory colleges," which are "multilateral working groups of relevant supervisors that are formed to promote effective, ongoing consolidated supervision of the overall operations of an international banking group." These supervisory colleges "enhance [] the Federal Reserve's communication and collaboration with foreign supervisors and supplement [] bilateral working relationships with foreign supervisors." *Federal Reserve System Purposes & Functions*, 94–96. https://www.federalreserve.gov/aboutthefed/files/pf_complete.pdf.

⁴⁹ Aggregate FBO net debit caps would be reduced by 57%, seventeen FBOs would have their net debit caps reduced by 71%, and three FBOs would have their net debit caps reduced by 60%.

⁵⁰ In this context, average cap utilization equals an institution's average daily peak daylight overdraft divided by the FBO's net debit cap.

in order to obtain additional collateralized capacity.

4. National treatment considerations.

Under the principle of national treatment, FBOs operating in the United States should be, generally, treated no less favorably than similarly-situated U.S. banking organizations.⁵⁴ When FBOs incur daylight overdrafts, however, they present special legal risks to the Federal Reserve because of differences in insolvency laws in the various FBOs' home countries. As the Board explained in 2001,

In international financial transactions, the overall risk borne by each party is affected not only by the governing law set out in the contract, but also by the law governing the possible insolvency of its counterparty. The insolvency of an international bank presents significant legal issues in enforcing particular provisions of a financial contract (such as close-out netting or irrevocability provisions) against third parties (such as the liquidator or supervisor of the failed bank). The insolvent party's national law also may permit the liquidator to subordinate other parties' claims (such as by permitting the home country tax authorities to have first priority in bankruptcy), may reclassify or impose a stay on the right the nondefaulting party has to collateral pledged by the defaulting party in support of a particular transaction, or may require a separate proceeding to be initiated against the head office in addition to any proceeding against the branch.

It is not practicable for the Federal Reserve to undertake and keep current extensive analysis of the legal risks presented by the insolvency law(s) applicable to each FBO with a Federal Reserve account in order to quantify precisely the legal risk that the Federal Reserve incurs by providing intraday credit to that institution. It is reasonable, however, for the Federal Reserve to recognize that FBOs generally present additional legal risks to the payments system and, accordingly, limit its exposure to these institutions.⁵⁵

The Board continues to believe that FBOs present legal risks to the Federal Reserve that are above and beyond the risks posed by domestic institutions when FBOs incur daylight overdrafts. Accordingly, the Board continues to believe that it is reasonable to calculate an FBO's capital measure as a fraction of its worldwide capital, notwithstanding that the capital measure of a domestic institution generally equals 100 percent of the institution's risk-based capital.

⁵⁴ See, e.g., International Banking Act of 1978, Public Law 95-369, 12 U.S.C. 3101 *et seq.*; S. Rep. No. 95-1073 (Aug. 8, 1978) (legislative history of the International Banking Act of 1978); Gramm-Leach-Bliley Act of 1999, Public Law 106-102, section 141, 12 U.S.C. 3106(c); Dodd-Frank Act, Public Law 111-203, section 165(b)(2), 12 U.S.C. 5365(b)(2).

⁵⁵ 66 FR 30205, 30206 (Aug. 6, 2001).

Nevertheless, as discussed above, the proposed fixed-rate capital measure calculation would allow FBOs to obtain net debit caps that would be well tailored to FBOs' actual usage of intraday credit and generally would not constrain FBOs' U.S. operations.

D. FBO Requests for Additional Collateralized Credit Under the Max Cap Policy

As discussed above, an FBO that has a SOSA-1 ranking or is an FHC may request a streamlined procedure for obtaining a max cap. The Board is proposing to remove the SOSA-1 ranking and FHC status as factors in determining whether FBOs can request the streamlined procedure. The Board instead proposes to allow FBOs that are well capitalized to request the streamlined procedure for obtaining a max cap.⁵⁶

The Board believes that allowing well-capitalized FBOs to request the streamlined max cap procedure would serve a similar purpose as allowing SOSA-1 ranked FBOs and FBOs with FHC status to request the streamlined procedure. The Board originally allowed SOSA-1 ranked FBOs and FBOs with FHC status to request the streamlined max cap procedure because the Board believed that such FBOs raised fewer supervisory concerns.⁵⁷ As noted above, however, the Board now believes that (1) creating the SOSA ranking is an inefficient use of Federal Reserve resources and (2) FHC status does not necessarily indicate that FBO status provides a strong indication of financial health, since an FBO can retain nominal FHC status when it is not well capitalized. The Board believes instead that well-capitalized FBOs should be able to request the streamlined max cap procedure, because well-capitalized FBOs are (generally) better positioned than other FBOs to support their U.S. branches and agencies. The Board does not believe that it would be appropriate to substitute another supervisory rating for the SOSA-1 ranking in determining FBO eligibility for the streamlined max cap procedure, because non-SOSA supervisory ratings focus only on the U.S. operations of FBOs.

⁵⁶ For these purposes, an FBO would determine whether it is well capitalized using the same methodology by which it would determine its equivalent PCA designation for the creditworthiness self-assessment matrix, *i.e.*, the FBO would compare the Regulation H ratios for total risk-based capital, tier 1 risk-based capital, common equity tier 1 risk-based capital, and leverage to the equivalent ratios that the FBO has calculated under its home country standards or on a pro forma basis.

⁵⁷ 73 FR 12417, 12430 (Mar. 7, 2008).

The streamlined max cap procedure would provide well-capitalized FBOs with a straightforward process for obtaining collateralized intraday overdraft capacity, which could offset the reduction to FBO net debit caps that would result from the proposed changes to the FBO capital measure calculation. Any FBO that is not well capitalized and wishes to establish a max cap could continue to use the general procedure for requesting a max cap.

III. Regulatory Flexibility Act

Congress enacted the Regulatory Flexibility Act ("RFA") (5 U.S.C. 601 *et seq.*) to address concerns related to the effects of agency rules on small entities, and the Board is sensitive to the impact its rules may impose on small entities. The RFA requires agencies either to provide an initial regulatory flexibility analysis with a proposed rule or to certify that the proposed rule will not have a significant economic impact on a substantial number of small entities. In this case, the relevant provisions of the PSR policy apply to all FBOs that maintain accounts at Federal Reserve Banks. While the Board does not believe that the proposed changes would have a significant impact on small entities, and regardless of whether the RFA applies to the PSR Policy per se, the Board has nevertheless prepared the following Initial Regulatory Flexibility analysis in accordance with 5 U.S.C. 603. The Board requests public comments on all aspects of this analysis.

1. *Statement of the need for, objectives of, and legal basis for, the proposed rule.* Section 11(j) of the Federal Reserve Act⁵⁸ authorizes the Board to oversee the Reserve Banks' provision of intraday credit to Reserve Bank account holders.

As discussed above, the Board is issuing this proposal to remove references to the SOSA ranking and FBOs' FHC status in the PSR policy. Discontinuing the SOSA ranking would streamline the Federal Reserve's FBO supervision program by eliminating the need for Federal Reserve supervisors to provide supervisory rankings that only serve a purpose for Reserve Bank credit decisions for many FBOs—including FBOs that have not requested positive net debit caps. Removing references to FHC status in the PSR policy would align the policy with the Board's view that an FBO's status as an FHC is not a suitable factor for determining the FBO's eligibility for intraday credit.

2. *Small entities affected by the proposed rule.* Pursuant to regulations issued by the Small Business

⁵⁸ 12 U.S.C. 248(j).

Administration (“SBA”) (13 CFR 121.201), a “small entity” includes an entity that engages in commercial banking and has assets of \$550 million or less (NAICS code 522110). Thirty-nine FBOs that maintain Federal Reserve accounts are small entities. Six of those FBOs maintain positive net debit caps.

3. *Projected reporting, recordkeeping, and other compliance requirements.* The proposed changes would alter the procedures by which FBOs obtain intraday credit from the Reserve Banks. The most important new requirement is that an FBO would need to determine an equivalent PCA designation, based on its worldwide capital ratios, to establish its creditworthiness under the PSR policy. Additionally, an FBO would need to determine that it is well capitalized, based on worldwide capital ratios, in order to qualify for a streamlined procedure for requesting collateralized intraday credit.

As noted above, the Board does not believe that it will be burdensome for an FBO to calculate an equivalent PCA designation or determine whether it is well capitalized. The Board’s FR Y–7Q report currently requires that FBOs with total consolidated assets of \$50 billion or more report the numerators and denominators of all four ratios in the PCA determination. The FR Y–7Q report also requires that FBOs with total consolidated assets below \$50 billion report the numerators and denominators of all ratios in the PCA determination except the common equity tier 1 capital ratio. FBOs with total consolidated assets below \$50 billion that are based in BCA-adhering jurisdictions already calculate their common equity tier 1 capital ratios under home country standards.

4. *Identification of duplicative, overlapping, or conflicting Federal rules.* The Board has not identified any Federal rules that duplicate, overlap with, or conflict with the proposed changes to the PSR policy.

5. *Significant alternatives.* The Board does not believe that alternatives to the proposed changes would better accomplish the objectives of limiting credit risk to the Reserve Banks while minimizing any economic impact on small entities. While one alternative would be to continue providing SOSA rankings to FBOs and leave the PSR policy in its present form, the Board believes that Federal Reserve supervisory resources should be allocated to other matters. Similarly, the Board could continue to allow FBOs that are FHCs to qualify for higher levels of intraday credit than FBOs that are not FHCs, but (as described above) the

Board does not believe that an FBO’s status as an FHC should determine the FBO’s eligibility for intraday credit.

In two places—specifically, in the capital measure calculation process and in the eligibility criteria for a streamlined max cap procedure—the proposed changes would delete references to SOSA without replacing those references with an alternative supervisory rating. For the reasons described above, the Board believes that it is unnecessary to substitute another supervisory rating.

Finally, the proposed changes would replace SOSA rankings in the creditworthiness self-assessment matrix with an equivalent PCA designation. This change would require an FBO to calculate its equivalent PCA designation using worldwide capital ratios. Alternatively, the Board could simply delete the SOSA ranking and judge an FBO’s creditworthiness solely on the basis of its U.S. operations supervisory composite rating. The Board believes, however, that using equivalent PCA designations in conjunction with supervisory ratings will better protect the Reserve Banks from credit risk, because an equivalent PCA designation would provide insight into an FBO’s worldwide financial profile and its ability to support its U.S. branches and agencies.

IV. Competitive Impact Analysis

The Board conducts a competitive impact analysis when it considers a rule or policy change that may have a substantial effect on payment system participants. Specifically, the Board determines whether there would be a direct or material adverse effect on the ability of other service providers to compete with the Federal Reserve due to differing legal powers or due to the Federal Reserve’s dominant market position deriving from such legal differences.⁵⁹

The Board believes that the proposed modifications to the PSR policy will have no adverse effect on the ability of other service providers to compete with the Reserve Banks in providing similar services. While the Board expects that the proposed modifications would reduce net debit caps for many FBOs, the Board does not believe this will have a significant effect on FBOs because (as explained above) the adjusted FBO net debit caps would still provide ample levels of intraday credit. The Board therefore believes that most FBOs would retain sufficient access to Reserve Bank intraday credit if the proposed modifications take effect, and

accordingly does not expect the proposed modifications would have a significant effect on FBOs’ use of Federal Reserve Bank services. Additionally, the proposed modifications will have no effect on intraday credit access for domestic institutions, which comprise the vast majority of Reserve Bank account holders.

V. Paperwork Reduction Act

In accordance with section 3512 of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521) (“PRA”), the Board may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (“OMB”) control number. The OMB control number is 7100–0217. The Board reviewed the PSR policy changes it is considering under the authority delegated to the Board by the OMB.

Comments are invited on:

(a) Whether the collections of information are necessary for the proper performance of the agencies’ functions, including whether the information has practical utility;

(b) The accuracy of the estimates of the burden of the information collections, including the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the information collections on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

All comments will become a matter of public record. Comments on aspects of this notice that may affect reporting, recordkeeping, or disclosure requirements and burden estimates should be sent to the addresses listed in the **ADDRESSES** section of this document. A copy of the comments may also be submitted to the OMB desk officer: By mail to U.S. Office of Management and Budget, 725 17th Street NW, #10235, Washington, DC 20503; by facsimile to (202) 395–5806; or by email to: oir_submission@omb.eop.gov, Attention, Federal Banking Agency Desk Officer.

Proposed Revisions, With Extension for Three Years, of the Following Information Collection: (1) Title of Information Collection: Annual Report of Net Debit Cap.

Agency Form Number: FR 2226.

⁵⁹ Federal Reserve Regulatory Service, 9–1558.

OMB Control Number: 7100–0217.
Frequency of Response: Annually.
Respondents: Depository institutions' board of directors.

Abstract: Federal Reserve Banks collect these data annually to provide information that is essential for their administration of the PSR policy. The reporting panel includes all financially healthy depository institutions with access to the discount window. The Report of Net Debit Cap comprises three resolutions, which are filed by a depository institution's board of directors depending on its needs. The first resolution is used to establish a de minimis net debit cap and the second resolution is used to establish a self-assessed net debit cap.⁶⁰ The third resolution is used to establish simultaneously a self-assessed net debit cap and maximum daylight overdraft capacity.

Current Actions: Under the PSR policy, an FBO's SOSA ranking can affect its eligibility for a positive net debit cap, the size of its net debit cap, and its eligibility to request a streamlined procedure to obtain maximum daylight overdraft capacity. Additionally, an FBO's status as an FHC can affect the size of its net debit cap and its eligibility to request a streamlined procedure to obtain maximum daylight overdraft capacity. The proposed changes to the PSR policy would (1) remove references to the SOSA ranking, (2) remove references to FBOs' FHC status, and (3) adopt alternative methods for determining an FBO's eligibility for a positive net debit cap, the size of its net debit cap, and its eligibility to request a streamlined procedure to obtain maximum daylight overdraft capacity. The proposed revisions would increase the estimated average hours per response for FR 2226 self-assessment and de minimis respondents that are FBOs by half an hour.

Estimated number of respondents: De Minimis Cap: Non-FBOs, 915 respondents and FBOs, 18 respondents; Self-Assessment Cap: Non-FBOs, 110 respondents and FBOs, 11 respondents; and Maximum Daylight Overdraft Capacity, 4 respondents.

Estimated average hours per response: De Minimis Cap—Non-FBOs, 1 hour and FBOs, 1.5 hour; Self-Assessment

Cap—Non-FBOs, 1 hour and FBOs, 1.5 hours, and Maximum Daylight Overdraft Capacity, 1 hour.

Estimated annual burden hours: De Minimis Cap: Non-FBOs, 915 hours and FBOs, 27 hours; Self-Assessment Cap: Non-FBOs, 110 hours and FBOs, 16.5 hours; and Maximum Daylight Overdraft Capacity, 4 hours.

VI. Federal Reserve Policy on Payment System Risk

Revisions to Section II.D of the PSR Policy

The Board proposes to revise Section II.D of the "Federal Reserve Policy on Payment System Risk" as follows:

D. Net Debit Caps

* * * * *

2. Cap Categories

* * *

a. Self-Assessed

In order to establish a net debit cap category of high, above average, or average, an institution must perform a self-assessment of its own creditworthiness, intraday funds management and control, customer credit policies and controls, and operating controls and contingency procedures.⁶¹ For domestic institutions, the assessment of creditworthiness is based on the institution's supervisory rating and Prompt Corrective Action (PCA) designation.⁶² For U.S. branches and agencies of FBOs that are based in jurisdictions that adhere to the Basel Capital Accord, the assessment of creditworthiness is based on the institution's supervisory rating and the PCA designation that would apply to the FBO if it were subject to the Board's Regulation H.⁶³ An institution may perform a full assessment of its creditworthiness in certain limited circumstances—for example, if its condition

⁶¹ This assessment should be done on an individual-institution basis, treating as separate entities each commercial bank, each Edge corporation (and its branches), each thrift institution, and so on. An exception is made in the case of U.S. branches and agencies of FBOs. Because these entities have no existence separate from the FBO, all the U.S. offices of FBOs (excluding U.S.-chartered bank subsidiaries and U.S.-chartered Edge subsidiaries) should be treated as a consolidated family relying on the FBO's capital.

⁶² An insured depository institution is (1) "well capitalized" if it significantly exceeds the required minimum level for each relevant capital measure, (2) "adequately capitalized" if it meets the required minimum level for each relevant capital measure, (3) "undercapitalized" if it fails to meet the required minimum level for any relevant capital measure, or (4) "critically undercapitalized" if it fails to meet any leverage limit (the ratio of tangible equity to total assets) specified by the appropriate federal banking agency, in consultation with the FDIC, or any other relevant capital measure established by the agency to determine when an institution is critically undercapitalized (12 U.S.C. 1831o).

⁶³ See 12 CFR 208.43(b).

has changed significantly since its last examination or if it possesses additional substantive information regarding its financial condition. Additionally, U.S. branches and agencies of FBOs based in jurisdictions that do not adhere to the Basel Capital Accord are required to perform a full assessment of creditworthiness to determine their ratings for the creditworthiness component. An institution performing a self-assessment must also evaluate its intraday funds-management procedures and its procedures for evaluating the financial condition of and establishing intraday credit limits for its customers. Finally, the institution must evaluate its operating controls and contingency procedures to determine if they are sufficient to prevent losses due to fraud or system failures. The Guide includes a detailed explanation of the self-assessment process.

* * * * *

b. De Minimis

Many institutions incur relatively small overdrafts and thus pose little risk to the Federal Reserve. To ease the burden on these small overdrafters of engaging in the self-assessment process and to ease the burden on the Federal Reserve of administering caps, the Board allows institutions that meet reasonable safety and soundness standards to incur de minimis amounts of daylight overdrafts without performing a self-assessment.⁶⁷ An institution may incur daylight overdrafts of up to 40 percent of its capital measure if the institution submits a board of directors resolution.

* * * * *

c. Exempt-From-Filing

Institutions that only rarely incur daylight overdrafts in their Federal Reserve accounts that exceed the lesser of \$10 million or 20 percent of their capital measure are excused from performing self-assessments and filing board of directors resolutions with their Reserve Banks.⁶⁸ This dual test of dollar

⁶⁷ U.S. branches and agencies of FBOs that are based in jurisdictions that do not adhere to the Basel Capital Accord are required to perform a full assessment of creditworthiness to determine whether they meet reasonable safety and soundness standards. These FBOs must submit an assessment of creditworthiness with their board of directors resolution requesting a de minimis cap category. U.S. branches and agencies of FBOs that are based in jurisdictions that adhere to the Basel Capital Accord are not required to complete an assessment of creditworthiness, but Reserve Banks will assess such an FBO's creditworthiness based on the FBO's supervisory rating and the PCA designation that would apply to the FBO if it were subject to the Board's Regulation H.

⁶⁸ The Reserve Bank may require U.S. branches and agencies of FBOs that are based in jurisdictions that do not adhere to the Basel Capital Accord to perform a full assessment of creditworthiness to determine whether the FBO meets reasonable safety and soundness standards. U.S. branches and agencies of FBOs that are based in jurisdictions that adhere to the Basel Capital Accord will not be required to complete an assessment of creditworthiness, but Reserve Banks will assess such an FBO's creditworthiness based on the FBO's supervisory rating and the PCA designation that would apply to the FBO if it were subject to the Board's Regulation H.

⁶⁰ Institutions use these two resolutions to establish a capacity for daylight overdrafts above the lesser of \$10 million or 20 percent of the institution's capital measure. Financially healthy U.S. chartered institutions that rarely incur daylight overdrafts in excess of the lesser of \$10 million or 20 percent of the institution's capital measure do not need to file board of directors' resolutions or self-assessments with their Reserve Bank.

amount and percent of capital measure is designed to limit the filing exemption to institutions that create only low-dollar risks to the Reserve Banks and that incur small overdrafts relative to their capital measure.

* * * * *

3. Capital Measure

* * * * *

b. U.S. Branches and Agencies for Foreign Banks

For U.S. branches and agencies of foreign banks, net debit caps on daylight overdrafts in Federal Reserve accounts are calculated by applying the cap multiples for each cap category to the FBO's U.S. capital equivalency measure.⁶⁹ U.S. capital equivalency is equal to 10 percent of worldwide capital for FBOs.⁷⁰

An FBO that is well capitalized (calculated as if the FBO were subject to the Board's Regulation H⁷¹) may be eligible for a streamlined procedure (see section II.E.) for obtaining additional collateralized intraday credit under the maximum daylight overdraft capacity provision.

* * * * *

Revisions to Section II.E of the PSR Policy

The Board proposes to revise Section II.E of the "Federal Reserve Policy on Payment System Risk" as follows:

E. Maximum Daylight Overdraft Capacity

* * * * *

1. General Procedure

An institution with a self-assessed net debit cap that wishes to expand its daylight overdraft capacity by pledging collateral should consult with its administrative Reserve Bank. The Reserve Bank will work with an institution that requests additional daylight overdraft capacity to determine the appropriate maximum daylight overdraft capacity level. In considering the institution's request, the Reserve Bank will evaluate the institution's rationale for requesting additional daylight overdraft capacity as well as its financial and supervisory information. The financial and supervisory information considered may include, but is not limited to, capital and liquidity ratios, the composition of balance sheet assets, and CAMELS or other supervisory ratings and assessments. An institution approved for a maximum daylight overdraft capacity level must submit at least once in each twelve-month period a board of

directors resolution indicating its board's approval of that level. * * *

2. Streamlined Procedure for Certain FBOs

An FBO that is well capitalized (calculated as if the FBO were subject to the Board's Regulation H⁷⁵) and has a self-assessed net debit cap may request from its Reserve Bank a streamlined procedure to obtain a maximum daylight overdraft capacity. These FBOs are not required to provide documentation of the business need or obtain the board of directors' resolution for collateralized capacity in an amount that exceeds its current net debit cap (which is based on 10 percent worldwide capital times its cap multiple), as long as the requested total capacity is 100 percent or less of worldwide capital times a self-assessed cap multiple.⁷⁶ In order to ensure that intraday liquidity risk is managed appropriately and that the FBO will be able to repay daylight overdrafts, eligible FBOs under the streamlined procedure will be subject to initial and periodic reviews of liquidity plans that are analogous to the liquidity reviews undergone by U.S. institutions.⁷⁷ If an eligible FBO requests capacity in excess of 100 percent of worldwide capital times the self-assessed cap multiple, it would be subject to the general procedure.

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By order of the Board of Governors of the Federal Reserve System, December 8, 2017.

Ann E. Misback,

Secretary of the Board.

[FR Doc. 2017-26923 Filed 12-13-17; 8:45 am]

BILLING CODE 6210-01-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA-2017-1100; Product Identifier 2017-NM-077-AD]

RIN 2120-AA64

Airworthiness Directives; Airbus Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

⁷⁵ See 12 CFR 208.43(b).

⁷⁶ For example, an FBO that is well capitalized is eligible for uncollateralized capacity of 10 percent of worldwide capital times the cap multiple. The streamlined max cap procedure would provide such an institution with additional collateralized capacity of 90 percent of worldwide capital times the cap multiple. As noted above, FBOs report their worldwide capital on the Annual Daylight Overdraft Capital Report for U.S. Branches and Agencies of Foreign Banks (FR 2225).

⁷⁷ The liquidity reviews will be conducted by the administrative Reserve Bank, in consultation with each FBO's home country supervisor.

SUMMARY: We propose to supersede Airworthiness Directive (AD) 2015-15-13, which applies to certain Airbus Model A319 series airplanes; Model A320-211, -212, -214, -231, -232, and -233 airplanes; and Model A321-111, -112, -131, -211, -212, -213, -231, and -232 airplanes. AD 2015-15-13 requires modification of the potable water service panel and waste water service panel, including doing applicable related investigative and corrective actions. Since we issued AD 2015-15-13, further investigations linked to widespread fatigue damage (WFD) analysis highlighted that, to meet the WFD requirements, it is necessary that the affected modification not be accomplished before reaching a certain threshold. This proposed AD would require modification of the waste water and potable water service panels with new compliance times. This proposed AD would also remove certain airplanes from the applicability and add Model A320-216 airplanes to the applicability. We are proposing this AD to address the unsafe condition on these products.

DATES: We must receive comments on this proposed AD by January 29, 2018.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- Federal eRulemaking Portal: Go to <http://www.regulations.gov>. Follow the instructions for submitting comments.

- Fax: 202-493-2251.

- Mail: U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590.

- Hand Delivery: Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this NPRM, contact Airbus, Airworthiness Office—ELIAS, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email account.airworth-eas@airbus.com; internet <http://www.airbus.com>. You may view this referenced service information at the FAA, Transport Standards Branch, 1601 Lind Avenue SW, Renton, WA. For information on the availability of this material at the FAA, call 425-227-1221.

Examining the AD Docket

You may examine the AD docket on the internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2017-1100; or in person at the Docket

⁶⁹ The term "U.S. capital equivalency" is used in this context to refer the particular measure calculate net debit caps and does not necessarily represent an appropriate for supervisory or other purposes.

⁷⁰ FBOs that wish to establish a non-zero net debit cap must report their worldwide capital on the Annual Daylight Overdraft Capital Report for U.S. Branches and Agencies of Foreign Banks (FR 2225). The instructions for FR explain how FBOs should calculate their worldwide capital. See <https://www.federalreserve.gov/apps/reportforms/reportdetail.aspx?sOoYJ+5BzDZ1kLYTc+ZpEQ==>.

⁷¹ See 12 CFR 208.43(b).

Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone 800-647-5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Sanjay Ralhan, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 1601 Lind Avenue SW, Renton, WA 98057-3356; telephone 425-227-1405; fax 425-227-1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include “Docket No. FAA-2017-1100; Product Identifier 2017-NM-077-AD” at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to <http://www.regulations.gov>, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

Fatigue damage can occur locally, in small areas or structural design details, or globally, in widespread areas. Multiple-site damage is widespread damage that occurs in a large structural element such as a single rivet line of a lap splice joining two large skin panels. Widespread damage can also occur in multiple elements such as adjacent frames or stringers. Multiple-site damage and multiple-element damage cracks are typically too small initially to be reliably detected with normal inspection methods. Without intervention, these cracks will grow, and eventually compromise the structural integrity of the airplane. This condition is known as WFD. It is associated with general degradation of large areas of structure with similar structural details and stress levels. As an airplane ages, WFD will likely occur, and will certainly occur if the airplane is operated long enough without any intervention.

The FAA’s WFD final rule (75 FR 69746, November 15, 2010) became effective on January 14, 2011. The WFD rule requires certain actions to prevent structural failure due to WFD throughout the operational life of certain existing transport category airplanes and all of these airplanes that will be certificated in the future. For existing and future airplanes subject to the WFD rule, the rule requires that DAHs establish a limit of validity (LOV) of the engineering data that support the structural maintenance program. Operators affected by the WFD rule may not fly an airplane beyond its LOV, unless an extended LOV is approved.

The WFD rule (75 FR 69746, November 15, 2010) does not require identifying and developing maintenance actions if the DAHs can show that such actions are not necessary to prevent WFD before the airplane reaches the LOV. Many LOVs, however, do depend on accomplishment of future maintenance actions. As stated in the WFD rule, any maintenance actions necessary to reach the LOV will be mandated by airworthiness directives through separate rulemaking actions.

In the context of WFD, this action is necessary to enable DAHs to propose LOVs that allow operators the longest operational lives for their airplanes, and still ensure that WFD will not occur. This approach allows for an implementation strategy that provides flexibility to DAHs in determining the timing of service information development (with FAA approval), while providing operators with certainty regarding the LOV applicable to their airplanes.

We issued AD 2015-15-13, Amendment 39-18223 (80 FR 45857, August 3, 2015) (“AD 2015-15-13”), for certain Airbus Model A319 series airplanes; Model A320-211, -212, -214, -231, -232, and -233 airplanes; and Model A321 series airplanes. AD 2015-15-13 was prompted by reports of cracks that could be initiated at the waste water service panel area and the potable water service panel area. AD 2015-15-13 requires modification of the potable water service panel and waste water service panel, including doing applicable related investigative and corrective actions. We issued AD 2015-15-13 to prevent any cracking at the waste water service panel area and the potable water service panel area, which could affect the structural integrity of the airplane.

Since we issued AD 2015-15-13, further investigations linked to WFD analysis highlighted that, to meet the WFD requirements, it is necessary that the affected modification is not

accomplished before reaching a certain threshold by imposing a “window of embodiment.”

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA Airworthiness Directive 2017-0098, dated June 7, 2017 (referred to after this as the Mandatory Continuing Airworthiness Information, or “the MCAI”), to correct an unsafe condition for certain Airbus Model A319 series airplanes; Airbus Model A320-211, -212, -214, -216, -231, -232, and -233 airplanes; and Airbus Model A321-111, -112, -131, -211, -212, -213, -231, and -232 airplanes. The MCAI states:

During the full scale fatigue test on A320-200, it was noticed that, due to fatigue, cracks could initiate at the potable water and waste water service panel areas.

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

Prompted by these findings, Airworthiness Limitation Section (ALS) Part 2 tasks were introduced for the affected aeroplanes. Since those actions were taken, Airbus developed production mod 160055 and mod 160056 to embody reinforcements (cold working on certain rivet rows) of the potable water and waste water service panels, and published associated Airbus Service Bulletin (SB) A320-53-1272 and Airbus SB A320-53-1267 for in-service embodiment. Complementary design office studies highlighted that the “Sharklets” installation on certain aeroplanes has a significant impact on the aeroplane structure (particularly, A319 and A320 post-mod 160001, A320 post-SB A320-57-1193 (mod 160080), and A321 post-mod 160021), leading to different compliance times, depending on aeroplane configuration.

Consequently, EASA issued AD 2014-0081 [which corresponds to FAA AD 2015-15-13] to require reinforcement of the potable water and waste water service panels. Accomplishment of these modifications cancelled the need for the related ALS Part 2 Tasks.

Since that AD was issued, further investigations linked to the Widespread Fatigue Damage (WFD) analysis highlighted that, to meet the WFD requirements, it is necessary that the affected modification is not accomplished before reaching a certain threshold, by imposing a so-called “window of embodiment”. Consequently, Airbus revised SB A320-53-1272 (now at revision (Rev.) 04) and SB A320-53-1267 (now at Rev. 05).

For the reasons described above, this [EASA] AD retains the requirements of EASA AD 2014-0081, which is superseded, and introduces additional compliance times for those actions.

This proposed AD would also remove Model A319 series airplanes on which modification 28162, 28238, and 28342 have been embodied (“Corporate Jet” modifications) from the applicability because production modifications

mitigated the risk associated with the unsafe condition. This proposed AD would also add Model A320–216 airplanes to the applicability because those airplanes are affected by the identified unsafe condition.

You may examine the MCAI in the AD docket on the internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA–2017–1100.

Related Service Information Under 14 CFR Part 51

Airbus has issued Service Bulletin A320–53–1267, Revision 05, dated November 29, 2016, which describes procedures for modifying the waste water service panel. Airbus has also issued Service Bulletin A320–53–1272, Revision 04, dated November 29, 2016, which describes procedures for modifying the potable water service panel. Both modifications include a check of the diameter of the holes of removed fasteners, a related investigative action (rotating probe inspection for cracking on the holes of the removed fasteners) and a corrective action (repair). This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the ADDRESSES section.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Explanation of Compliance Time

The compliance time for the replacement specified in this proposed AD for addressing WFD was established to ensure that discrepant structure is replaced before WFD develops in airplanes. Standard inspection techniques cannot be relied on to detect WFD before it becomes a hazard to flight. We will not grant any extensions of the compliance time to complete any AD-mandated service bulletin related to WFD without extensive new data that would substantiate and clearly warrant such an extension.

Costs of Compliance

We estimate that this proposed AD affects 851 airplanes of U.S. registry.

We also estimate that it would take about 27 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is \$85 per work-hour. Required parts would cost about \$700 per product. Based on these figures, we estimate the cost of this proposed AD on U.S. operators to be \$2,548,745, or \$2,995 per product.

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

Authority for This Rulemaking

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

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

This AD is issued in accordance with authority delegated by the Executive Director, Aircraft Certification Service, as authorized by FAA Order 8000.51C. In accordance with that order, issuance of ADs is normally a function of the Compliance and Airworthiness Division, but during this transition period, the Executive Director has delegated the authority to issue ADs applicable to transport category airplanes to the Director of the System Oversight Division.

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

- 2. The FAA amends § 39.13 by removing Airworthiness Directive (AD) 2015–15–13, Amendment 39–18223 (80 FR 45857, August 3, 2015), and adding the following new AD:

Airbus: Docket No. FAA–2017–1100; Product Identifier 2017–NM–077–AD.

(a) Comments Due Date

We must receive comments by January 29, 2018.

(b) Affected ADs

This AD replaces AD 2015–15–13, Amendment 39–18223 (80 FR 45857, August 3, 2015) ("AD 2015–15–13").

(c) Applicability

This AD applies to the airplanes identified in paragraphs (c)(1), (c)(2), and (c)(3) of this AD, certificated in any category, except for those airplanes on which Airbus modification 160055 or modification 160056 has been embodied in production, and except for Model A319 series airplanes on which modification 28162, 28238, and 28342 have been embodied ("Corporate Jet").

- (1) Airbus Model A319–111, –112, –113, –114, –115, –131, –132, and –133 airplanes.
- (2) Airbus Model A320–211, –212, –214, –216, –231, –232, and –233 airplanes.
- (3) Airbus Model A321–111, –112, –131, –211, –212, –213, –231, and –232 airplanes.

(d) Subject

Air Transport Association (ATA) of America Code 53, Fuselage.

(e) Reason

This AD was prompted by an evaluation by the design approval holder (DAH) indicating

that the potable water and waste water service panel areas are subject to widespread fatigue damage (WFD). We are issuing this AD to prevent cracking of the potable water and waste water service panel areas, which could result in reduced structural integrity of the airplane.

(f) Compliance

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

(g) Modification of the Potable Water Service Panel

(1) Within the compliance times specified in Table 1 to paragraphs (g)(1) and (i) of this AD, as applicable, modify the potable water

service panel, including doing a check of the diameter of the holes of removed fasteners, and do all applicable related investigative and corrective actions, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A320-53-1272, Revision 04, dated November 29, 2016, except as required by paragraph (g)(2) of this AD. Do all applicable related investigative and corrective actions before further flight.

TABLE 1 TO PARAGRAPHS (g)(1) AND (i) OF THIS AD—COMPLIANCE TIMES FOR THE PORTABLE WATER SERVICE PANEL REINFORCEMENT

Affected airplanes *	Compliance time minimum **	Compliance time maximum (before the accumulation of the specified total flight cycles since the airplane's first flight)
A319, pre-modification 160001 and pre-service bulletin A320-57-1193	33,100 total flight cycles	48,500 total flight cycles.
A319, post-modification 160001 or post-service bulletin A320-57-1193	None	46,000 total flight cycles.
A320, pre-modification 160001 and pre-service bulletin A320-57-1193	25,100 total flight cycles	54,200 total flight cycles.
A320, post-modification 160001 or post-service bulletin A320-57-1193	None	48,300 total flight cycles.
A321-100	25,100 total flight cycles	60,000 total flight cycles.
A321-200 pre-modification 160021	22,100 total flight cycles	60,000 total flight cycles.
A321-200 post-modification 160021	None	60,000 total flight cycles.

* A321-111, A321-112 and A321-131 airplanes are collectively referred to as "A321-100." Similarly, A321-211, A321-212, A321-213, A321-231 and A321-232 airplanes are collectively referred to as "A321-200".

** Not before accumulating the specified total flight cycles since the airplane's first flight.

(2) Where Airbus Service Bulletin A320-53-1272, Revision 04, dated November 29, 2016, specifies to contact Airbus for appropriate action, and specifies that action as "RC" (Required for Compliance): Before further flight, accomplish corrective actions in accordance with the procedures specified in paragraph (m)(2) of this AD.

(h) Modification of the Waste Water Service Panel

(1) Within the compliance times specified in Table 2 to paragraphs (h)(1) and (i) of this AD, as applicable, modify the waste water service panel, including doing a check of the diameter of the holes of removed fasteners,

and do all applicable related investigative and corrective actions in accordance with the Accomplishment Instructions of Airbus Service Bulletin A320-53-1267, Revision 05, dated November 29, 2016, except as required by paragraph (h)(2) of this AD. Do all applicable related investigative and corrective actions before further flight.

TABLE 2 TO PARAGRAPHS (h)(1) AND (i) OF THIS AD—COMPLIANCE TIMES FOR THE WASTE WATER SERVICE PANEL REINFORCEMENT

Affected airplanes *	Compliance time minimum **	Compliance time maximum
A319, pre-modification 160001 and pre-service bulletin A320-57-1193.	28,600 total flight cycles	Before the accumulation of 44,400 total flight cycles since the airplane's first flight.
A319, post-modification 160001 or post-service bulletin A320-57-1193.	None	Before the accumulation of 43,600 total flight cycles since the airplane's first flight.
A320, pre-modification 160001 and pre-service bulletin A320-57-1193.	35,800 total flight cycles	Before the accumulation of 46,000 total flight cycles since the airplane's first flight; or within 2,300 flight cycles since the last accomplishment of Airworthiness Limitation Section (ALS) Part 2 Task 534126-01-3 without exceeding 48,000 total flight cycles since the airplane's first flight; whichever occurs later.
A320, post-modification 160001 or post-service bulletin A320-57-1193.	5,400 total flight cycles	Before the accumulation of 39,200 total flight cycles since the airplane's first flight.
A321-100	36,900 total flight cycles	Before the accumulation of 52,500 total flight cycles since the airplane's first flight.
A321-200 pre-modification 160021.	35,700 total flight cycles	Before the accumulation of 53,500 total flight cycles since the airplane's first flight.
A321-200 post-modification 160021.	None	Before the accumulation of 51,200 total flight cycles since the airplane's first flight.

* A321-111, A321-112 and A321-131 airplanes are collectively referred to as "A321-100." Similarly, A321-211, A321-212, A321-213, A321-231 and A321-232 airplanes are collectively referred to as "A321-200".

** Not before accumulating the specified total flight cycles since the airplane's first flight.

(2) Where Airbus Service Bulletin A320-53-1267, Revision 05, dated November 29, 2016, specifies to contact Airbus for appropriate action, and specifies that action

as "RC" (Required for Compliance): Before further flight, accomplish corrective actions in accordance with the procedures specified in paragraph (m)(2) of this AD.

(i) Corrective Action for Airplanes With Certain Modifications

For airplanes on which the modification, as required by paragraph (g) or (h) of this AD,

as applicable, was accomplished before reaching the applicable minimum compliance time as defined in Table 1 to paragraphs (g)(1) and (i) of this AD or Table 2 to paragraphs (h)(1) and (i) of this AD: Before exceeding 60,000 flight cycles since the airplane's first flight, contact the Manager, International Section, Transport

Standards Branch, FAA; or the European Aviation Safety Agency (EASA); or Airbus's EASA Design Organization Approval (DOA) for approved corrective action instructions and accomplish those instructions accordingly.

(j) Terminating Action for Airplanes on Which the Potable Water Service Panel Modification Is Done

Modification of an airplane as required by paragraph (g) of this AD terminates the requirement for accomplishing the ALS Part 2 task for that airplane as specified in Table 3 to paragraph (j) of this AD, as applicable.

TABLE 3 TO PARAGRAPH (j) OF THIS AD—ALS PART 2 TASK TERMINATED AFTER POTABLE WATER SERVICE PANEL MODIFICATION

Affected airplanes	ALS Part 2 task No.
A319, pre-modification 160001 and pre-service bulletin A320-57-1193	534125-01-2
A319, post-modification 160001 or post-service bulletin A320-57-1193	534125-01-5
A320, pre-modification 160001 and pre-service bulletin A320-57-1193	534125-01-3
A320, post-modification 160001 or post-service bulletin A320-57-1193	534125-01-6
A321 pre-modification 160021	534125-01-4
A321 post-modification 160021	534125-01-7

(k) Terminating Action for Airplanes on Which the Waste Water Service Panel Modification Is Done

Modification of an airplane as required by paragraph (h) of this AD terminates the

requirement for accomplishing the ALS Part 2 task for that airplane as specified in Table 4 to paragraph (k) of this AD, as applicable.

TABLE 4 TO PARAGRAPH (k) OF THIS AD—ALS PART 2 TASK TERMINATED AFTER WASTE WATER SERVICE PANEL MODIFICATION

Affected airplanes	ALS Part 2 task No.
A319, pre-modification 160001 and pre-service bulletin A320-57-1193	534126-01-2
A319, post-modification 160001 or post-service bulletin A320-57-1193	534126-01-5
A320, pre-modification 160001 and pre-service bulletin A320-57-1193	534126-01-3
A320, post-modification 160001 or post-service bulletin A320-57-1193	534126-01-6
A321 pre-modification 160021	534126-01-4
A321 post-modification 160021	534126-01-7

(l) Credit for Previous Actions

(1) This paragraph provides credit for actions required by paragraph (g) of this AD if those actions were performed before the effective date of this AD using the service information in paragraphs (l)(1)(i) through (l)(1)(iv) of this AD.

(i) Airbus Service Bulletin A320-53-1272, Revision 00, dated January 10, 2013, which is not incorporated by reference in this AD.

(ii) Airbus Service Bulletin A320-53-1272, Revision 01, dated August 6, 2013, which is not incorporated by reference in this AD.

(iii) Airbus Service Bulletin A320-53-1272, Revision 02, dated May 19, 2014, which was incorporated by reference in AD 2015-15-13.

(iv) Airbus Service Bulletin A320-53-1272, Revision 03, dated November 26, 2015, which is not incorporated by reference in this AD.

(2) This paragraph provides credit for actions required by paragraph (h) of this AD if those actions were performed before the effective date of this AD using the service information in paragraphs (l)(2)(i) through (l)(2)(v) of this AD.

(i) Airbus Service Bulletin A320-53-1267, Revision 00, dated June 24, 2013, which is not incorporated by reference in this AD.

(ii) Airbus Service Bulletin A320-53-1267, Revision 01, dated October 2, 2013, which is not incorporated by reference in this AD.

(iii) Airbus Service Bulletin A320-53-1267, Revision 02, dated May 19, 2014, which was incorporated by reference in AD 2015-15-13.

(iv) Airbus Service Bulletin A320-53-1267, Revision 03, dated November 26, 2015, which is not incorporated by reference in this AD.

(v) Airbus Service Bulletin A320-53-1267, Revision 04, dated February 1, 2016, which is not incorporated by reference in this AD.

(m) Other FAA AD Provisions

(1) *Alternative Methods of Compliance (AMOCs)*: The Manager, International Section, Transport Standards Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Section, send it to the attention of the person identified in paragraph (n)(2) of this AD. Information may be emailed to: 9-ANM-116-AMOC-REQUESTS@faa.gov. Before using any approved AMOC, notify your appropriate

principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

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

(3) *Required for Compliance (RC)*: Except as required by paragraphs (g)(2) and (h)(2) of this AD: If any service information contains procedures or tests that are identified as RC, those procedures and tests must be done to comply with this AD; any procedures or tests that are not identified as RC are recommended. Those procedures and tests that are not identified as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the procedures and tests identified as RC can be done and the airplane can be put back in an airworthy condition. Any substitutions or

changes to procedures or tests identified as RC require approval of an AMOC.

(n) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA Airworthiness Directive 2017-0098, dated June 7, 2017, for related information. This MCAI may be found in the AD docket on the internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2017-1100.

(2) For more information about this AD, contact Sanjay Ralhan, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 1601 Lind Avenue SW, Renton, WA 98057-3356; telephone 425-227-1405; fax 425-227-1149.

(3) For service information identified in this AD, contact Airbus, Airworthiness Office—ELAS, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email account.airworth-eas@airbus.com; Internet <http://www.airbus.com>. You may view this service information at the FAA, Transport Standards Branch, 1601 Lind Avenue SW, Renton, WA. For information on the availability of this material at the FAA, call 425-227-1221.

Issued in Renton, Washington, on November 29, 2017.

Jeffrey E. Duven,

Director, System Oversight Division, Aircraft Certification Service.

[FR Doc. 2017-26362 Filed 12-13-17; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

14 CFR Part 241

[Docket No. RITA-2011-0001]

RIN 2105-AE31

Ancillary Airline Passenger Revenues

AGENCY: Office of the Secretary, Department of Transportation.

ACTION: Proposed rule; withdrawal.

SUMMARY: The Department of Transportation (the Department) is withdrawing a notice of proposed rulemaking (NPRM) published on July 15, 2011 that proposed to collect detailed revenue information regarding airline imposed fees from those air carriers meeting the definition of a large certificated air carrier. We are withdrawing this rulemaking in light of the comments we received. The withdrawal of this rulemaking corresponds with the Department's and Administration's priorities and is consistent with the Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs, January 30, 2017.

DATES: Amendatory instructions 3 through 6 of the proposed rule published July 15, 2011 (76 FR 41726), are withdrawn as of December 14, 2017.

ADDRESSES: *Electronic Access:* You can view and download related documents and public comments by going to the website <http://www.regulations.gov>. Enter the docket number DOT-RITA-2011-0001 in the search field.

FOR FURTHER INFORMATION CONTACT: Zeenat Iqbal and Blane A. Workie, Office of Aviation Enforcement and Proceedings, 1200 New Jersey SE, Room W96-414, Washington, DC 20590, (202) 366-9893, zeenat.iqbal@dot.gov (email).

SUPPLEMENTARY INFORMATION:

Background

On July 7, 2011, the Office of the Secretary issued a notice of proposed rulemaking (NPRM) proposing to collect detailed information about ancillary fees paid by airline consumers to determine the total amount of fees carriers collect through the *a la carte* pricing approach for optional services related to air transportation. The Department also proposed to alter its matrix for collecting and publishing data on mishandled baggage and to collect information regarding damage, delay or loss of wheelchairs and scooters transported in the aircraft cargo compartment. The final rule relating to reporting of data for mishandled baggage and wheelchairs (2104-AE41) was issued on November 2, 2016 (81 FR 76300). We are withdrawing the other topic covered in the proposed rule, the reporting of airline fee revenue.

The NPRM

In the NPRM, the Department proposed to create two stand-alone reporting forms, designated P-9 and P-9.1, to capture ancillary revenues. Specifically, air carriers with annual reporting revenue of \$20 million or more would be required to submit the P-9 form quarterly and air carriers with annual reporting revenue below \$20 million would be required to submit the form P-9.1 on a semiannual basis. The information required by the two proposed schedules was identical; they differed only in the required reporting frequency. The NPRM also proposed to define ancillary revenues as those charges paid by airline passengers that are not included in the standard ticket fare. The Department solicited comments on which items should be specifically identified as ancillary revenues, and proposed to collect data on 19 separate charges for optional services. The categories included: (1) Booking fees, (2) priority check-in and

security screening, (3) baggage, (4) in-flight medical equipment, (5) in-flight entertainment/internet access, (6) sleep sets, (7) in-flight food/non-alcoholic drinks, (8) alcoholic drinks, (9) pets, (10) seating assignments, (11) reservation cancellation and change fees; (12) charges for lost ticket; (13) unaccompanied minor/passenger assistance fee; (14) frequent flyer points/points acceleration; (15) commissions on travel packages; (16) travel insurance; (17) duty-free and retail sales; (18) one-time access to lounges and (19) other.

Comments Received

In response to the 2011 NPRM, the Department received approximately 280 comments from airlines, airports, trade associations, unions, consumer groups and private citizens who use this data. There was wide support among consumers and consumer rights groups for the proposed rule's reporting requirements. Consumers and consumer rights groups, as well as ACI-NA and Southwest Airlines, commented that the reporting requirement would bring the benefits of both increased transparency and improved data corroboration regarding the impact of ancillary fees on the Airport and Airway Trust Fund.

On the other hand, most airlines and industry organizations commented that the proposed rule will not benefit the public because the Department has not demonstrated a need for this information. They asserted that the rule will not increase the transparency of pricing for airline revenues. Airlines also commented that if the justification for this rule is to tax ancillary revenues, the Department must state that justification. In addition, several airlines and industry groups suggested that the Department underestimated the proposed rule's economic burden on industry.

With regard to the proposed 19 categories, industry groups, consumer groups and airlines commented that the Department failed to justify the proposed categories and suggested various changes to the list of 19 charges for which air carriers would have to report revenues under the proposed rule. Carriers also expressed concern that the proposed reporting requirements would require carriers to reveal proprietary information to their competitors. Some carriers suggested that there is no correlation between a carrier's disclosure of itemized aggregate revenue data and consumer concerns regarding fare transparency. Southwest Airlines, which supported the Department's stated goal of making ticket pricing more transparent for

consumers, also urged the Department to reduce the number of categories by half.

Reason for Withdrawal

The purpose of this rulemaking was to make airline pricing more transparent to consumers and airline analysts. Although we believe there would be benefits of collecting and publishing the proposed aviation data, the Department also takes seriously industry concerns about the potential burden of this rule. The Department is withdrawing this rulemaking proposal. The withdrawal of this rulemaking corresponds with the Department's and Administration's priorities and is consistent with the Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs, January 30, 2017.

Issued in Washington, DC, on December 5, 2017.

Elaine L. Chao,

Secretary of Transportation.

[FR Doc. 2017-26708 Filed 12-13-17; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

14 CFR Part 399

[Docket No. DOT-OST-2017-0007]

RIN 2105-AE56

Transparency of Airline Ancillary Service Fees

AGENCY: Office of the Secretary (OST), U.S. Department of Transportation (DOT).

ACTION: Notice of withdrawal of proposed rulemaking.

SUMMARY: The Department is withdrawing the supplemental notice of proposed rulemaking (SNPRM) on Transparency of Airline Ancillary Service Fees issued on January 9, 2017. The SNPRM proposed to require air carriers, foreign air carriers, and ticket agents to clearly disclose to consumers at all points of sale customer-specific fee information, or itinerary-specific information if a customer elects not to provide customer-specific information, for a first checked bag, a second checked bag, and one carry-on bag wherever fare and schedule information is provided to consumers. The withdrawal of this rulemaking corresponds with the Department's and Administration's priorities and is consistent with Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs, January 30, 2017.

DATES: December 14, 2017.

ADDRESSES: You may send comments by sending an email to Kimberly Graber (kimberly.graber@dot.gov) or Blane A. Workie (blane.workie@dot.gov). Please include RIN 2105-AE56 in the subject line of the message.

FOR FURTHER INFORMATION CONTACT: Kimberly Graber or Blane A. Workie, Office of the Assistant General Counsel for Aviation Enforcement and Proceedings, U.S. Department of Transportation, 1200 New Jersey Ave. SE, Washington, DC 20590, 202-366-9342 (phone), kimberly.graber@dot.gov or blane.workie@dot.gov (email).

Electronic Access: Docket: For access to the docket to read background documents and comments received, go to the street address listed above or visit <http://www.regulations.gov>. Enter the docket number DOT-OST-2017-0007 in the search field.

SUPPLEMENTARY INFORMATION: On January 9, 2017, the Department issued an SNPRM that proposed to require air carriers, foreign air carriers, and ticket agents to clearly disclose to consumers at all points of sale customer-specific fee information, or itinerary-specific information if a customer elects not to provide customer-specific information, for a first checked bag, a second checked bag, and one carry-on bag wherever fare and schedule information is provided to consumers (see 82 FR 7536, Jan. 19, 2017). The SNPRM further proposed to require airlines to provide useable, current, and accurate (but not transactable) baggage fee information to all ticket agents that receive and distribute the airline's fare and schedule information, including Global Distribution Systems and metasearch entities. If an airline or ticket agent has a website that markets to U.S.

consumers, the SNPRM proposed to require the baggage fee information to be disclosed at the first point in a search process where a fare is listed in connection with a specific flight itinerary, adjacent to the fare. The SNPRM also proposed to permit airlines and ticket agents to allow customers to opt-out of receiving the baggage fee information when using their websites.

On March 2, 2017, the Department suspended the comment period, which had been scheduled to close on March 20, 2017. The suspension of the comment period was to allow the President's appointees the opportunity to review and consider this action. After a careful review, the Department has determined to withdraw the SNPRM. The Department is committed to protecting consumers from hidden fees and to ensuring transparency. However,

we do not believe that Departmental action is necessary to meet this objective at this time. The Department's existing regulations already provide consumers some information regarding fees for ancillary services. The withdrawal corresponds with the Department's and Administration's priorities and is consistent with the Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs, January 30, 2017.

Issued on 5th day of December 2017 in Washington, DC.

Elaine L. Chao,

Secretary of Transportation.

[FR Doc. 2017-26707 Filed 12-13-17; 8:45 am]

BILLING CODE 4910-9X-P

DEPARTMENT OF STATE

22 CFR Parts 50 and 51

[Public Notice 9804]

RIN 1400-AD54

Passports

AGENCY: Department of State.

ACTION: Proposed rule.

SUMMARY: This proposed rule provides various changes and updates to the Department of State passport rules. The proposed rule incorporates statutory passport denial and revocation requirements for certain convicted sex offenders. It notes that, notwithstanding the legal bases for denial or revocation of a passport, the Department may issue a passport for direct return to the United States. It sets out the Department's procedures for denying and cancelling Consular Reports of Birth Abroad. Finally, the proposed rule provides additional information relating to the conduct of review hearings.

DATES: The Department will accept comments on the proposed regulation up to February 12, 2018.

ADDRESSES: Submit comments by any of the following methods:

- *Internet:* At www.regulations.gov, search for this notice by searching for Docket No. DOS-2016-0080 or RIN 1400-AD54.

- *By mail:* Director, Office of Legal Affairs and Law Enforcement Liaison, Passport Services, U.S. Department of State, 44132 Mercure Circle, P.O. Box 1227, Sterling, VA 20166-1227

- *By email:* Submit comments to: PassportRules@state.gov.

FOR FURTHER INFORMATION CONTACT: Anita Mody, Office of Legal Affairs, Passport Services, (202) 485-6500. Hearing- or speech-impaired persons

may use the Telecommunications Devices for the Deaf (TDD) by contacting the Federal Information Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION: The Department is proposing to amend various sections of Subparts A, E, and F within Part 51 and Subpart A within Part 50 of Title 22 of the CFR.

Consistent with 22 U.S.C. 211a, the proposed rule in § 51.4(g)(1) revises the previous rule to now state that a passport is invalid when the passport revocation notification is approved. This revision leaves unchanged the Department's obligation, set forth at § 51.65(a), to send notification of the revocation, and the reasons therefor, in writing.

The proposed new provision in § 51.4(g)(8) provides that a passport is invalid when a Certificate of Loss of Nationality is approved. This provision, consistent with 8 U.S.C. 1481(a), specifies that a passport is not valid once the Department approves the bearer's formal renunciation of nationality.

The proposed rule incorporates statutory passport denial and revocation requirements for certain convicted sex offenders as codified at 22 U.S.C. 212a.

Proposed § 51.60(h) requires denial of a passport to an individual convicted under 18 U.S.C. 2423 and who used a passport or otherwise crossed an international border in committing the underlying offense. In accordance with 22 U.S.C. 212a, upon timely notification by the Attorney General, such an individual's passport application will be denied during the period covering the date of conviction and ending on the later of (1) the date on which the individual is released from a sentence of imprisonment relating to the offense; or (2) the end of a period of parole or other supervised release of the covered individual relating to the offense. However the Department may issue a passport in emergency circumstances or for humanitarian reasons, or may issue a limited passport valid only for direct return to the United States.

Proposed § 51.60(i) notes the Department's authority, consistent with 22 U.S.C. 217a, to, as appropriate, issue limited validity passports good only for direct return to the United States, notwithstanding any prior revocation or denial.

Proposed § 51.62(d) requires revocation of a passport previously issued to an individual convicted under 18 U.S.C. 2423 and who used a passport or otherwise crossed an international border in committing the underlying offense. In accordance with 22 U.S.C.

212a, upon timely notification by the Attorney General, such an individual's passport will be revoked once convicted and until the later of (1) the date on which the individual is released from a sentence of imprisonment relating to the offense; or (2) the end of a period of parole or other supervised release of the covered individual relating to the offense.

Proposed § 51.62(c), deriving from the Department's existing statutory authority including under 8 U.S.C. 1504, sets out that the Department may cancel Consular Reports of Birth Abroad that were obtained illegally, fraudulently or erroneously; were created through illegality or fraud; have been fraudulently altered or misused; or where the bearer of the document is not a U.S. national. Specific reference to cancellation of Consular Reports of Birth Abroad has been added to the provisions on revocation or limitation of passports at § 51.62, notification of such action at § 51.65, the surrendering of passports at § 51.66, and the right to a hearing in certain circumstances at § 51.70(a).

The proposed rule in § 51.62(a)(1) also removes the reference to § 51.28 concerning passports for minors, thereby removing the Department's discretion to revoke in circumstances where a U.S. passport may be denied under § 51.28. Once parental consent is properly given and a passport issued, the Department has consistently taken the position that such a properly issued passport may not be revoked upon a subsequent withdrawal of parental consent.

The proposed rule in § 51.70(b) revises the non-exhaustive list of provisions under which a hearing will not be provided if the Department denies, restricts, revokes, cancels or invalidates a passport or Consular Report of Birth Abroad under §§ 51.60(a), 51.60(f), 51.60(g), 51.61(a), 51.62(b), 51.62(c)(3), 51.62(d), or 51.64, such that it is consistent with other revisions made as a part of this notice. Section 51.60(a) refers to instances where the Department may not issue a passport because the applicant is in default on a repatriation loan or certified to be in arrears of child support. In accordance with § 51.60(f), the Department may deny an application if the individual has failed to provide his or her social security number on a passport application, or purposefully provides an incorrect number. In accordance with § 51.60(g), the Department shall not issue a passport to a covered sex offender as defined by 22 U.S.C. 212b(c)(1). Section 51.61(a) specifies that the Department

may not issue a passport to an applicant subject to imprisonment or supervised release as a result of a federal or state felony drug offense, if the individual used the passport or crossed an international border in committing the offense. Sections 51.62(b) and 51.62(c)(3) address where the Department revokes a passport, or cancels a Consular Report of Birth Abroad, after determining the individual is not a U.S. national, or revokes the passport after being on notice that an individual's certificate of citizenship or naturalization has been cancelled. Under § 51.62(d), the Department revokes a U.S. passport for individuals convicted of illicit sexual conduct under 18 U.S.C. 2423, during the covered period defined by 22 U.S.C. 212a, and who used a passport or crossed an international border in committing the offense. Section 51.64 refers to specially validated passports for travel to restricted areas.

The proposed rule amends § 50.7(d), which currently includes procedures for cancellation of Consular Reports of Birth Abroad and hearings for such cancellations, to include a reference to § 51.60 through § 51.74.

The proposed rule in § 51.65(a)-(c) notes that the procedures for providing notification of denials, revocation, or cancellation of passports also applies to Consular Reports of Birth Abroad, and specifies in proposed § 51.65(c) that the Department may exercise its discretion to administratively re-open a previously filed passport or Consular Report of Birth Abroad application in order to issue the passport or Consular Report of Birth Abroad.

In order to provide the public with additional information regarding the denial/revocation review hearing process, the proposed rule also provides further details and requirements for the conduct of review hearings and specifies that the set of circumstances for which hearings may be held include certain cancellations of Consular Reports of Birth Abroad. The proposed rule provides at § 51.70(e) that the individual requesting the hearing may obtain one continuance of up to ninety days upon written request; and advises at § 51.71 that the Department will provide copies of the evidence relied upon in denying, revoking, or cancelling the passport or Consular Report of Birth Abroad prior to the hearing. It specifies in § 51.71(a) that the hearing officer will generally be a Department employee from the Bureau of Consular Affairs and that the hearing officer makes only preliminary findings of fact and recommendations and submits them to the Deputy Assistant Secretary for

Passport Services, or his or her designee in the Bureau of Consular Affairs. The proposed rule in § 51.71(b)–(g) specifies the location of the hearing, and that failure to appear—either in person or through an attorney—at the hearing constitutes an abandonment of the request for the hearing; that there is no right to subpoena witnesses or to conduct discovery under the Federal Rules of Civil Procedure; and that passport hearings are not formal administrative hearings under the Administrative Procedure Act (APA). The Department is aware of no statute requiring that the provisions of 5 U.S.C. 554 apply to the hearing, and the Department has determined that such procedures will not be used. In addition, the proposed rule provides that individuals requesting hearings are responsible for the costs of any interpreters, who must be duly certified; and confirms that written briefs may be submitted prior to the hearing, but are not required. Proposed § 51.71(h) specifies that the purpose of the hearing is to provide the affected individual with an opportunity to challenge the Department's decision; that the burden of production at the hearing is on the Department; and that the affected individual bears the burden of persuasion at the hearing to prove by a preponderance of the evidence that the Department improperly revoked the passport, denied the passport application, or cancelled the Consular Report of Birth Abroad based on the facts at the time such action was taken. The proposed rule in § 51.72 notes that the hearing officer's preliminary findings and recommendation shall not be considered part of the record unless adopted by the Deputy Assistant Secretary for Passport Services or his or her designee. The proposed rule in § 51.73 adds "interpreter" to the list of individuals able to be present at the hearing, and changes "official reporters" to "the reporter transcribing the hearing." Under the proposed rule in § 51.74, the final decision is made by the Deputy Assistant Secretary for Passport Services, or his or her designee, based on his or her review of the record of the hearing, findings of fact and recommendations of the hearing officer, and legal and policy considerations he or she deems relevant.

The proposed rule also amends § 50.11 to include further instruction on where to submit an appeal arising out of a denial of an application for a certificate of identity.

Regulatory Findings

Administrative Procedure Act

The Department is publishing this rule as a proposed rule, with 60 days for public comments.

Regulatory Flexibility Act/Executive Order 13272: Small Business

The Department certifies that this proposed rule is not expected to have a significant impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, and Executive Order 13272, section 3(b), as the rule being amended covers only individuals.

The Small Business Regulatory Enforcement Fairness Act of 1996

This proposed rule is not a major rule, as defined by 5 U.S.C. 804, for purposes of congressional review of agency rulemaking. This rule would not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

The Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532 generally requires agencies to prepare a statement before proposing any rule that may result in an annual expenditure of \$100 million or more by State, local, or tribal governments, or by the private sector. This proposed rule does not result in any such expenditure nor will it significantly or uniquely affect small governments.

Executive Orders 12372 and 13132: Federalism

This proposed rule does not have substantial direct effects on the States, on the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. Nor will the rule have federalism implications warranting the application of Executive Orders 12372 and 13132.

Executive Orders 12866 and 13563

The Department has reviewed this proposed rule to ensure its consistency with the regulatory philosophy and principles set forth in Executive Order 12866, and determined that the benefits of the proposed rule justify its costs. The Department does not consider the proposed rule to be an economically

significant regulatory action within the scope of section 3(f)(1) of the Executive Order. The Department has considered this proposed rule in light of Executive Order 13563 and affirms that this proposed rule is consistent with the guidance therein.

The proposed rule revises the Department's determination of when a passport is considered invalid when a passport is revoked or a Certificate of Loss of Nationality is approved. Further, the proposed rule presents the public with additional information regarding passport and Consular Report of Birth Abroad denial, cancellation and revocation hearings. These changes supply the public with more details regarding the place, requirements, procedures and purpose of such hearings. The proposed rule also provides the public with further instruction on where to submit an appeal arising out of a denial of an application for a certificate of identity.

The proposed rule provides further information to the public about the procedures for cancelling a Consular Reports of Birth Abroad. The proposed rule also notifies the public of the Department's statutory obligation to deny or revoke U.S. passports for certain convicted sex offenders as codified at 22 U.S.C. 212a. The Department finds that this proposed rulemaking implements Congressional intent as reflected in the Immigration and Naturalization Act, and that the benefits of the proposed rulemaking outweigh any costs to the public. The Office of Information and Regulatory Affairs has designated this proposed rule as non-significant within the meaning of Executive Order 12866. Consequently, no actions are required pursuant to Executive Order 13771.

Executive Order 12988: Civil Justice Reform

The Department has reviewed the proposed rule in light of sections 3(a) and 3(b)(2) of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments.

The Department has determined that this proposed rule will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not pre-empt tribal law. Accordingly, the requirements of Section 5 of Executive Order 13175 do not apply to this rulemaking.

Paperwork Reduction Act of 1995

This proposed rule does not revise or impose any collections of information requirements subject to the PRA.

List of Subjects*22 CFR Part 50*

Citizenship and naturalization.

22 CFR Part 51

Administrative practice and procedure; Drug traffic control; Passports and visas; Reporting and recordkeeping requirements.

Accordingly, for the reasons set forth in the preamble, the Department proposes to amend 22 CFR parts 50 and 51 as follows:

PART 50—NATIONALITY PROCEDURES

- 1. The authority section of part 50 continues to read as follows:

Authority: 22 U.S.C. 2651a; 8 U.S.C. 1104 and 1401 through 1504.

- 2. Amend § 50.7 by revising paragraph (d) to read as follows:

§ 50.7 Consular Report of Birth Abroad of a Citizen of the United States of America.

* * * * *

(d) A Consular Report of Birth Abroad may be cancelled in accordance with applicable provisions in 22 CFR 51.60 through 51.74.

- 3. Amend § 50.11 by revising paragraph (b) to read as follows:

§ 50.11 Certificate of identity for travel to the United States to apply for admission.

* * * * *

(b) When a diplomatic or consular officer denies an application for a certificate of identity under this section, the applicant may submit a written appeal to the Secretary through the U.S. embassy or consulate where the individual applied for the certificate of identity, stating the pertinent facts, the grounds upon which U.S. nationality is claimed, and his or her reasons for considering that the denial was not justified.

PART 51—PASSPORTS

- 4. The authority section of part 51 is revised to read as follows:

Authority: 8 U.S.C. 1504; 18 U.S.C. 1621, 2423; 22 U.S.C. 211a, 212, 212a, 212b, 213, 213n (Pub. L. 106–113 Div. B, Sec. 1000(a)(7) [Div. A, Title II, Sec. 236], 113 Stat. 1536, 1501A–430); 214, 214a, 217a, 218, 2651a, 2671(d)(3), 2705, 2714, 2721, 3926; 26 U.S.C. 6039E; 31 U.S.C. 9701; 42 U.S.C. 652(k) [Div. B, Title V of P. L. 103–317, 108 Stat. 1760]; E.O. 11295, FR 10603; Pub. L. 114–119, 130 Stat. 15; Sec. 1 of P. L. 109–210, 120 Stat. 319; Sec. 2 of P. L. 109–167, 119 Stat. 3578;

Sec. 5 of P. L. 109–472, 120 Stat. 3554; P. L. 108–447, Div. B, Title IV 118 Stat. 2896; P. L. 108–458, 118 Stat. 3638, 3823.

- 5. Amend § 51.4 by revising paragraph (g)(1) and adding paragraph (g)(8) to read as follows:

§ 51.4 Validity of passports.

* * * * *

(g) * * *

(1) The Department approves the revocation notification pursuant to § 51.65(a); or

* * * * *

(8) The Department approves a Certificate of Loss of Nationality for the passport holder pursuant to § 50.40 and 8 U.S.C. 1481.

- 6. Revise the heading to Subpart E to read as follows:

Denial, Revocation, and Restriction of Passports and Cancellation of Consular Reports of Birth Abroad

- 7. Amend § 51.60 by adding paragraphs (h) and (i) to read as follows:

§ 51.60 Denial and restriction of passports.

* * * * *

(h) The Department may not issue a passport, except a limited validity passport for direct return to the United States or in instances where the Department finds that emergency circumstances or humanitarian reasons exist, in any case in which the Department is notified by the Attorney General that, during the covered period as defined by 22 U.S.C. 212a:

(1) The applicant was convicted of a violation of 18 U.S.C. 2423, and

(2) The individual used a passport or passport card or otherwise crossed an international border in committing the underlying offense.

(i) In appropriate circumstances, where an individual's passport application is denied or passport revoked consistent with this part, the Department may issue a limited validity passport good only for direct return to the United States.

- 8. Section 51.62 is revised to read as follows:

§ 51.62 Revocation or limitation of passports and cancellation of Consular Reports of Birth Abroad.

(a) The Department may revoke or limit a passport when:

(1) The bearer of the passport may be denied a passport under 22 CFR 51.60 or 51.61 or any other applicable provision contained in this part;

(2) The passport was illegally, fraudulently or erroneously obtained from the Department; or was created through illegality or fraud practiced upon the Department; or

(3) The passport has been fraudulently altered or misused.

(b) The Department may revoke a passport when the Department has determined that the bearer of the passport is not a U.S. national, or the Department is on notice that the bearer's certificate of citizenship or certificate of naturalization has been cancelled.

(c) The Department may cancel a Consular Report of Birth Abroad when:

(1) The Consular Report of Birth Abroad was illegally, fraudulently or erroneously obtained from the Department, or was created through illegality or fraud practiced upon the Department;

(2) The Consular Report of Birth Abroad has been fraudulently altered or misused; or

(3) The Department has determined that the bearer of the Consular Report of Birth Abroad is not a U.S. national, or the Department is on notice that the bearer's certificate of citizenship has been cancelled.

(d) The Department shall revoke a U.S. passport in any case in which the Department is notified by the Attorney General, that during the covered period as defined by 22 U.S.C. 212a:

(1) The applicant was convicted of a violation of 18 U.S.C. 2423, and

(2) The individual used a passport or otherwise crossed an international border in committing the underlying offense.

(3) Notwithstanding paragraph (d)(1) and (d)(2), the Department may issue a limited validity passport for direct return to the United States.

- 9. Revise § 51.65 as follows:

§ 51.65 Notification of denial, revocation or cancellation of passports and Consular Reports of Birth Abroad.

(a) The Department will send notice in writing to any person whose application for issuance of a passport or Consular Report of Birth Abroad has been denied, whose passport has been revoked, or whose Consular Report of Birth Abroad has been cancelled. The notification will set forth the specific reasons for the denial, revocation or cancellation and, if applicable, the procedures for review available under 22 CFR 51.70 through 51.74.

(b) An application for a passport or Consular Report of Birth Abroad will be denied if an applicant fails to meet his or her burden of proof under the applicable regulations or otherwise does not provide documentation sufficient to establish entitlement to a passport or a Consular Report of Birth Abroad, or does not provide additional information as requested by the Department within the time provided in the notification by the Department that additional information is required. Thereafter, if an

applicant wishes the Department to adjudicate his or her claim of entitlement to a passport or Consular Report of Birth Abroad, he or she must submit a new application, supporting documents, and photograph, along with all applicable fees.

(c) The Department may, in its sole discretion, administratively re-open a previously filed passport or Consular Report of Birth Abroad application in order to issue a passport or Consular Report of Birth Abroad.

■ 10. Revise § 51.66 to read as follows:

§ 51.66 Surrender of passport and/or Consular Report of Birth Abroad.

The bearer of a passport that is revoked or of a Consular Report of Birth Abroad that is cancelled must surrender it to the Department or its authorized representative upon demand.

■ 11. Revise § 51.70 to read as follows:

§ 51.70 Request for hearing to review certain denials and revocations.

(a) A person whose passport has been denied or revoked under 22 CFR 51.60(b)(1) through (10), 51.60(c), 51.60(d), 51.61(b), 51.62(a)(1), or 51.62(a)(2), or whose Consular Report of Birth Abroad is cancelled under § 51.62(c)(1) or 51.62(c)(2), may request a hearing to review the basis for the denial, revocation, or cancellation, provided that the Department receives such a request, in writing, from such person or his or her attorney within 60 days of his or her receipt of the notice of the denial, revocation, or cancellation. Failure to timely request a hearing means the denial, revocation, or cancellation is the Department's final action.

(b) The provisions of §§ 51.70 through 51.74 do not apply to any action of the Department denying, restricting, revoking, cancelling or invalidating a passport or Consular Report of Birth Abroad, or in any other way adversely affecting the ability of a person to receive or use a passport or Consular Report of Birth Abroad, for reasons not set forth in § 51.70(a), including, as applicable, those listed at:

(1) Section 51.60(a) (instances where the Department may not issue a passport, except for direct return to the United States);

(2) Section 51.60(f) (failure to provide a social security number, or purposefully providing an incorrect number);

(3) Section 51.60(g) (denial of passports to certain convicted sex offenders);

(4) Section 51.61(a) (denial of passports to certain convicted drug traffickers);

(5) Section 51.62(b) (revocation of passports for non-U.S. nationals or where a certificate of citizenship or naturalization has been cancelled);

(6) Section 51.62(c)(3) (cancellation of a Consular Report of Birth Abroad upon the Department's determination that the bearer is not a U.S. national or where a certificate of citizenship has been cancelled);

(7) Section 51.62(d) (revocation of passports issued to certain convicted sex offenders);

(8) Section 51.64 (specially validated passports);

(9) Any other provision not listed at § 51.70(a).

(c) If a timely request for a hearing is made by a person seeking a hearing in accordance with these regulations, the Department will make reasonable efforts to hold the hearing within 90 days of the date the Department receives the request.

(d) Within a reasonable period of time prior to the hearing, the Department will give the person requesting the hearing written notice of the date, time and place of the hearing and copies of the evidence relied on in denying, revoking, or cancelling the passport or Consular Report of Birth Abroad.

(e) The person requesting the hearing may obtain one continuance, not to exceed an additional 90 days, upon written request. The request for a continuance must be received by the Department as soon as practicable and in no case less than five business days prior to the scheduled hearing date. Any further continuances are within the sole discretion of the Department.

■ 12. Revise § 51.71 to read as follows:

§ 51.71 The hearing.

(a) The Department will name a hearing officer, who will generally be a Department employee from the Bureau of Consular Affairs. The hearing officer will make only preliminary findings of fact and submit recommendations based on the record of the hearing, as defined in 22 CFR 51.72, to the Deputy Assistant Secretary for Passport Services, or his or her designee, in the Bureau of Consular Affairs.

(b) The hearing shall take place in Washington, DC or, if the person requesting the hearing is overseas, at the appropriate U.S. diplomatic or consular post. The person requesting the hearing must appear in person or with or through his or her attorney. Failure to appear at the scheduled hearing will constitute an abandonment of the request for a hearing, and the Department's revocation, cancellation or denial will be considered the Department's final action.

(c) Any attorney appearing at a hearing must be admitted to practice in any state of the United States, the District of Columbia, or any territory or possession of the United States, or be admitted to practice before the courts of the country in which the hearing is to be held.

(d) There is no right to subpoena witnesses or to conduct discovery. However, the person requesting the hearing may testify in person, offer evidence in his or her own behalf, present witnesses, and make arguments at the hearing. The person requesting the hearing is responsible for all costs associated with the presentation of his or her case, including the cost of interpreters, who must be certified in accordance with standards established for federal courts under 18 U.S.C. 1827. The Department may present witnesses, offer evidence, and make arguments in its behalf. The Department is responsible for all costs associated with the presentation of its case.

(e) The hearing is informal and permissive. As such, the provisions of 5 U.S.C. 554 *et seq.* do not apply to the hearing. Formal rules of evidence also do not apply; however, the hearing officer may impose reasonable restrictions on relevancy, materiality, and competency of evidence presented. Testimony will be under oath or by affirmation under penalty of perjury. The hearing officer may not consider any information that is not also made available to the person requesting the hearing, the Department, and made a part of the record of the proceeding.

(f) If any witness is unable to appear, the hearing officer may, in his or her discretion, accept an affidavit or sworn deposition testimony of the witness, the cost for which will be the responsibility of the requesting party, subject to such limits as the hearing officer deems appropriate.

(g) The person requesting the hearing and the Department of State may submit written briefs or argument prior to the hearing, but it is not required. The hearing officer will specify the date and schedule for the parties to submit written briefs, should they choose to do so.

(h) The purpose of the hearing is to provide the person requesting the hearing an opportunity to challenge the basis for the Department's decision to deny or revoke the passport, or cancel the Consular Report of Birth Abroad. The burden of production is on the Department, and the Department shall provide the evidence it relied upon in revoking or denying the passport, or cancelling the Consular Report of Birth Abroad, prior to the hearing. The

burden of persuasion is on the person requesting the hearing, to prove by a preponderance of the evidence that the Department improperly revoked the passport or denied the passport application, or cancelled the Consular Report of Birth Abroad, based on the facts and law in effect at the time such action was taken.

■ 13. Revise § 51.72 to read as follows:

§ 51.72 Transcript and record of the hearing.

A qualified reporter, provided by the Department, will make a complete verbatim transcript of the hearing. The person requesting the hearing or his or her attorney may review and purchase a copy of the transcript directly from the reporter. The hearing transcript and all the information and documents received by the hearing officer, whether or not deemed relevant, will constitute the record of the hearing. The hearing officer's preliminary findings and recommendations are deliberative, and shall not be considered part of the record unless adopted by the Deputy Assistant Secretary for Passport Services, or his or her designee.

■ 14. Revise § 51.73 to read as follows:

§ 51.73 Privacy of hearing.

Only the person requesting the hearing, his or her attorney, an interpreter, the hearing officer, the reporter transcribing the hearing, and employees of the Department concerned with the presentation of the case may be present at the hearing. Witnesses may be present only while actually giving testimony or as otherwise directed by the hearing officer.

■ 15. Revise § 51.74 to read as follows:

§ 51.74 Final decision.

After reviewing the record of the hearing and the preliminary findings of fact and recommendations of the hearing officer, and considering legal and policy considerations he or she deems relevant, the Deputy Assistant Secretary for Passport Services, or his or her designee, will decide whether to uphold the denial or revocation of the passport or cancellation of the Consular Report of Birth Abroad. The Department will promptly notify the person requesting the hearing of the decision in writing. If the decision is to uphold the denial, revocation, or cancellation, the notice will contain the reason(s) for the decision. The decision is final and is not subject to further administrative review.

Carl C. Risch,

Assistant Secretary of State for Consular Affairs, Department of State.

[FR Doc. 2017-26751 Filed 12-13-17; 8:45 am]

BILLING CODE 4710-13-P

NATIONAL LABOR RELATIONS BOARD

29 CFR Parts 101 and 102

RIN 3142-AA12

Representation-Case Procedures

AGENCY: National Labor Relations Board.

ACTION: Request for information.

SUMMARY: The National Labor Relations Board (the Board) is seeking information from the public regarding its representation election regulations (the Election Regulations), with a specific focus on amendments to the Board's representation case procedures adopted by the Board's final rule published on December 15, 2014 (the Election Rule or Rule). As part of its ongoing efforts to more effectively administer the National Labor Relations Act (the Act or the NLRA) and to further the purposes of the Act, the Board has an interest in reviewing the Election Rule to evaluate whether the Rule should be: Retained without change, retained with modifications, or rescinded, possibly while making changes to the prior Election Regulations that were in place before the Rule's adoption. Regarding these questions, the Board believes it will be helpful to solicit and consider public responses to this request for information.

DATES: Responses to this request for information must be received by the Board on or before February 12, 2018. No late responses will be accepted. Responses are limited to 25 pages.

ADDRESSES: You may submit responses by the following methods: *Internet*—Electronic responses may be submitted by going to www.nlr.gov and following the link to submit responses to this request for information. The Board encourages electronic filing. *Delivery*—If you do not have the ability to submit your response electronically, responses may be submitted by mail to: Roxanne Rothschild, Deputy Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570. Because of security precautions, the Board experiences delays in U.S. mail delivery. You should take this into consideration when preparing to meet the deadline for submitting responses. It is not necessary to submit responses by mail if they have been filed electronically on www.nlr.gov. If you submit responses by mail, the Board recommends that you confirm receipt of your delivered responses by checking www.nlr.gov to confirm that your response is posted there (allowing time

for receipt by mail). Only responses submitted as described above will be accepted; *ex parte* communications received by the Board will be made part of the record and will be treated as responses only insofar as appropriate.

The Board requests that responses include full citations or internet links to any authority relied upon. All responses submitted to www.nlr.gov will be posted on the Agency's public website as soon after receipt as practicable without making any changes to the responses, including changes to personal information provided. The Board cautions responders not to include in the body of their responses personal information such as Social Security numbers, personal addresses, personal telephone numbers, and personal email addresses, as such submitted information will become viewable by the public when the responses are posted online. It is the responders' responsibility to safeguard their information. The responders' email addresses will not be posted on the Agency website unless they choose to include that information as part of their responses.

FOR FURTHER INFORMATION CONTACT: Roxanne Rothschild, Deputy Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570, (202) 273-2917 (this is not a toll-free number), 1-866-315-6572 (TTY/TDD).

SUPPLEMENTARY INFORMATION:

I. Background

On December 15, 2014, the Board published the Election Rule, which amended the Board's prior Election Regulations. 79 FR 74308 (December 15, 2014). The Election Rule was adopted after public comment periods in which tens of thousands of public comments were received. The Rule was approved by a three-member Board majority, with two Board members expressing dissenting views. Thereafter, the Rule was submitted for review by Congress pursuant to the Congressional Review Act. In March 2015, majorities in both houses of Congress voted in favor of a joint resolution disapproving the Board's rule and declaring that it should have no force or effect. President Obama vetoed this resolution on March 31, 2015. The amendments adopted by the final rule became effective on April 14, 2015, and have been applicable to all representation cases filed on or after that date. Multiple parties initiated lawsuits challenging the facial validity of the Election Rule, and those challenges were rejected. See *Associated Builders & Contractors of Texas, Inc. v.*

NLRB, 826 F.3d 215 (5th Cir. 2015), affg. No. 1–15–CV–026 RP, 2015 WL 3609116 (W.D. Tex. June 1, 2015); *Chamber of Commerce of U.S. v. NLRB*, 118 F. Supp. 3d 171 (D.D.C. 2015). These rulings did not preclude the possibility that the Election Rule might be invalid as applied in particular cases.

II. Authority Regarding Board Review of the 2014 Election Rule Amendments

Agencies have the authority to reconsider past decisions and rules and to retain, revise, replace, and rescind decisions and rules. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514–515 (2009); *Motor Vehicle Manufacturers Ass’n of U.S., Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 (1983); *National Ass’n of Home Builders v. EPA*, 682 F.3d 1032, 1038–1039, 1043 (DC Cir. 2012).

The Election Rule has been in effect for more than 2 years. The current five-member Board includes only two members who participated in the 2014 rulemaking: Member Pearce, who joined the majority vote to adopt the final rule, and Chairman Miscimarra, who joined former Member Johnson in dissent. In addition to the proceedings described above, and other congressional hearings and proposed legislation, numerous cases litigated before the Board have presented significant issues concerning application of the Election Rule. See, e.g., *UPS Ground Freight, Inc.*, 365 NLRB No. 113 (2017); *European Imports, Inc.*, 365 NLRB No. 41 (2017); *Yale University*, 365 NLRB No. 40 (2017); *Brunswick Bowling Products, LLC*, 364 NLRB No. 96 (2016).

III. Request for Information From the Public

The Board invites information relating to the following questions:

1. Should the 2014 Election Rule be retained without change?
2. Should the 2014 Election Rule be retained with modifications? If so, what should be modified?
3. Should the 2014 Election Rule be rescinded? If so, should the Board revert to the Election Regulations that were in effect prior to the 2014 Election Rule’s adoption, or should the Board make changes to the prior Election Regulations? If the Board should make changes to the prior Election Regulations, what should be changed?

IV. Response to the Dissents

It is surprising that the Board lacks unanimity about merely posing three questions about the 2014 Election Rule, when none of the questions suggests a single change in the Board’s

representation-election procedures. Nonetheless, two dissenting colleagues object to the request for information regarding the Election Rule because, among other things, they believe that (i) the Election Rule has worked effectively (or even, in Member Pearce’s estimation, essentially flawlessly), (ii) any request for information from the public about the Rule is premature, (iii) merely requesting information reveals a predetermination on our part to revise or rescind the Election Rule, and (iv) future changes will be based on “alternative facts” and “manufactur[ed]” rationales.

It is the Board’s duty to periodically conduct an objective and critical review of the effectiveness and appropriateness of our rules. In any event, our dissenting colleagues would answer the above Question 1 in the affirmative: They believe the Election Rule should be retained without change. That is their opinion. However, the Board is seeking the opinions of others: Unions, employers, associations, labor-law practitioners, academics, members of Congress, and anyone from the general public who wishes to provide information relating to the questions posed above. In addition, we welcome the views of the General Counsel and also the Regional Directors, whose experience working with the 2014 Election Rule makes them a valuable resource.

One thing is clear: Issuing the above request for information is unlike the process followed by the Board majority that adopted the 2014 Election Rule. The rulemaking process that culminated in the 2014 Election Rule (like the process followed prior to issuance of the election rule adopted by Members Pearce and Becker in 2011) started with a lengthy proposed rule that outlined dozens of changes in the Board’s election procedures, without any prior request for information from the public regarding the Board’s election procedures. By contrast, the above request does not suggest even a single specific change in current representation-election procedures. Again, the Board merely poses three questions, two of which contemplate the possible retention of the 2014 Election Rule.¹

¹ Member McFerran contends that the Board’s open-ended request “depart[s] from the norms of rulemaking under the Administrative Procedure Act.” Her contention is misplaced. The Board is merely requesting information. We are not engaged in rulemaking.

V. Dissenting Views of Member Mark Gaston Pearce and Member Lauren McFerran

Member Pearce, dissenting.

I dissent from the Notice and Request for Information, which should more aptly be titled a “Notice and Quest for Alternative Facts.” It ignores the Final Rule’s success in improving the Board’s representation-case procedures and judicial rejection of dissenting Members Miscimarra and Johnson’s legal pronouncements about the Final Rule.

Some two and a half years ago, the National Labor Relations Board concluded lengthy rulemaking pursuant to the Administrative Procedure Act to reexamine our representation-case procedures. We had proposed a number of targeted solutions to discrete problems identified with the Board’s methods of processing petitions for elections with a goal of removing unnecessary barriers to the fair and expeditious resolution of representation cases. The rulemaking sought to simplify representation-case procedures, codify best practices, increase transparency and uniformity across regions, eliminate duplicative and unnecessary litigation, and modernize rules concerning documents and communication in light of changing technology. After a painstaking three and a half year process, involving the consideration of tens of thousands of comments generated over two separate comment periods totaling 141 days, and 4 days of hearings with live questioning by the Board Members, we issued a final rule that became effective on April 14, 2015. *Representation-Case Procedures*, 79 FR 74308 (Dec. 15, 2014).

The Final Rule was careful and comprehensive—spanning over 100 pages of the **Federal Register**’s triple-column format in explaining the 25 changes ultimately made to the Board’s rules and regulations. For each change, the Final Rule identified the problem to be ameliorated, catalogued every type of substantive response from the public, and set forth the Board’s analysis as to why the proposed amendment was either being adopted, discarded or modified.¹

¹ See *Associated Builders and Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215, 229 (5th Cir. 2016) (noting that the Board “conducted an exhaustive and lengthy review of the issues, evidence, and testimony, responded to contrary arguments, and offered factual and legal support for its final conclusions”); *Chamber of Commerce of the United States of America v. NLRB*, 118 F. Supp.3d 171, 220 (D.D.C. 2015) (“[T]he Board engaged in a comprehensive analysis of a multitude of issues relating to the need for and the propriety of the Final Rule, and it directly addressed the commenters’ many concerns[.]”).

Complying with the rulemaking process, and dealing with the deluge of public comments generated, was not an easy task for our Agency. Thousands of staff hours were expended; research and training was required into statutes and procedures with which we were unfamiliar; expensive licensing was purchased for software to sort, and websites to house, the tens of thousands of comments received; and contributions were made from all corners of the Agency. Through this extensive process, the fundamental questions were asked and answered. The amended procedures have now been in place for some two and a half years, and my colleagues show no serious justification for calling them into question.

Indeed, it is with some irony that I am reminded of the sentiment expressed in dissent to the Final Rule in 2014 that “the countless number of hours spent by Board personnel in rulemaking” would be better spent expeditiously processing cases. 79 FR at 74457. Yet, in the past 9 months, the Board’s case output has fallen precipitously,² and we face the specter of budget cuts that could further hamper our ability to perform our statutory mission. Now, the majority will burden the Agency with the exercise of continued rulemaking in an area that has already been thoroughly addressed.

As a consequence, our attention will be diverted from case processing to explore the rollback of a Final Rule that has provided a bounty of beneficial changes, and which applies equally to initial organizing campaigns and efforts to decertify incumbent unions. A non-exhaustive list includes:

- Parties may now use modern technology to electronically file and serve petitions and other documents, thereby saving time and money, and affording non-filing parties the earliest possible notice.
- Petitions and election objections must be supported, and must be served on other parties.
- Board procedures are more transparent, and more meaningful information is more widely available at earlier stages of our proceedings.

² Comparing the period February 1 through October 2017, to the equivalent nine-month period from 2016, the Board’s output of contested unfair labor practice decisions and published representation case decisions has been reduced by approximately 45 percent (*i.e.*, a drop in excess of 100 cases). Searches in the Board’s NxGen case processing software show that from February 1, 2017, to October 31, 2017, the Board issued 136 decisions in contested unfair labor practice cases and published representation cases, while from February 1, 2016, to October 31, 2016, the Board issued 247 such decisions.

- Issues in dispute are clarified, and parties are enabled to make more informed judgments about whether to enter into election agreements.

- Across regions, employees’ Section 7 rights are afforded more equal treatment, the timing of hearings is more predictable, and litigation is more efficient and uniform.

- Parties are more often spared the expense of litigating, and the Board is more often spared the burden of deciding, issues that are not necessary to determine whether a question of representation exists, and which may be mooted by election results.

- The Board enjoys the benefit of a regional director decision in all representation cases.

- Board practice more closely adheres to the statutory directive that requests for review not stay any action of the regional director unless specifically ordered by the Board.

- Nonemployer parties are able to communicate about election issues with voters using modern means of communication such as email, texts and cell phones, and are less likely to challenge voters out of ignorance.

- Notices of Election are more informative, and more often electronically disseminated.

- Employees voting subject to challenge are more easily identified, and the chances are lessened of their ballots being comingled.

And all of this has been accomplished while processing representation cases more expeditiously from petition, to election, to closure.

So why would the majority suggest rescinding all of these benefits to the Agency, employees, employers, and unions? In evaluating that question, it is worthwhile to remind ourselves of a basic tenet of administrative law: while an agency rule, once adopted, is not frozen in place, the agency must offer valid reasons for changing it and must fairly account for the benefits lost as a result of the change. *Citizens Awareness Network, Inc. v. U.S.*, 391 F.3d 338, 351–352 (1st Cir. 2004).

None of the reasons offered by today’s majority constitutes a persuasive justification for requesting information from the public, let alone for rescinding or modifying the Final Rule. The majority notes that the Final Rule has been in effect for more than two years. But the fact that two years have transpired since the Final Rule was adopted hardly constitutes a reason for rescinding or modifying it. The Board has a wealth of casehandling information that can be obtained through an analysis of our own records. And because the Board has access to all

regional director pre- and post-election decisions, and because parties may request Board review of any action taken by the regional directors, the Board already is aware of the nature of any complaints about how the Final Rule has worked in particular cases. As for reverting to the prior representation rules, the public already had the opportunity to comment on whether they should be maintained or modified.

The majority next points to a change in Board member composition, but by itself, that is not a sufficient reason for rescinding, modifying, or requesting information from the public concerning the Final Rule. The majority also cites a grand total of four cases (out of the many cases) applying the Final Rule, but none provides any reason to invite public comment on the Final Rule, much less for the Board to reconsider it. While the majority also cites congressional efforts to overturn the Final Rule, they did not succeed, and cannot be used to demonstrate that the Final Rule contravenes our governing statute. As the courts have recognized, “It is well-established that ‘the view of a later Congress cannot control the interpretation of an earlier enacted statute.’” *Huffman v. OPM*, 263 F.3d 1341, 1354 (Fed. Cir. 2001) (quoting *O’Gilvie v. United States*, 519 U.S. 79, 90 (1996)). Finally, as the majority is forced to concede, every legal challenge to the Final Rule has been struck down by the courts.

In evaluating the appropriateness of the Notice and Request for Information, it is also worth journeying back in time to consider the pronouncements and dire predictions voiced by then-Members Miscimarra and Johnson about the Final Rule when it issued. In considering these matters, the reader need not take my word, for the dissent appears in the **Federal Register**.

Suffice it to say that the Final Rule’s dissenters were so wrong about so much. They did not simply disagree with the Board’s judgments, but instead claimed that the Final Rule violated the NLRA, the APA, and the U.S. Constitution.

The Final Rule dissent pronounced that the Rule’s amendments contradicted our statute and were otherwise impermissibly arbitrary. 79 FR at 74431. It was wrong on both counts. See *Associated Builders and Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215, 218 (5th Cir. 2016) (The “rule, on its face, does not violate the National Labor Relations Act or the Administrative Procedure Act[.]”); *Chamber of Commerce of the United States of America v. NLRB*, 118 F. Supp. 3d 171, 220 (D.D.C. 2015) (rejecting

claims that the Final Rule contravenes either the NLRA or the Constitution or is arbitrary and capricious or an abuse of the Board's discretion).

The Final Rule dissent pronounced that the Rule's primary purpose and effect was to shorten the time from the filing of petition to the conduct of the election, and that this violated the NLRA and was otherwise arbitrary or capricious. 79 FR at 74430, 74433–74435. It was wrong on all three counts. See *ABC of Texas*, 826 F.3d at 227–228 (noting that the Board properly considered delay in scheduling elections and that the Board also reasoned that the final rule was necessary to further “a variety of additional permissible goals and interests”); *Chamber of Commerce*, 118 F.Supp.3d at 218–219 (rejecting claim that the Rule promotes speed in holding elections at the expense of all other statutory goals and requirements, and noting that many of the Rule's provisions do not relate to the length of the election cycle).

The Final Rule dissent pronounced that the Rule's granting regional directors discretion to defer litigation of individual eligibility issues at the pre-election hearing was contrary to the statute and was arbitrary and capricious in violation of the APA. 79 FR at 74430, 74436–74438, 74444–74446. The courts rejected those arguments. See *Chamber of Commerce*, 118 F. Supp. 3d at 181, 195–203 (“Granting regional directors the discretion to decline to hear evidence on individual voter eligibility and inclusion issues does not violate the NLRA [and] is not arbitrary and capricious.”); *ABC of Texas*, 826 F.3d at 220–223. See also *Associated Builders and Contractors of Texas, Inc. v. NLRB*, 2015 WL 3609116 * 2, *7 (W.D. Tex. 2015).

The Final Rule dissent pronounced that the Rule violated the Act and the Constitution by infringing on protected speech and by providing an insufficient time period for employees to understand the issues before having to vote, thereby compelling them to vote now, understand later. (79 FR at 74430–74431, 74436, 74438). But these claims were also rejected by the courts. See *Chamber of Commerce*, 118 F. Supp. 3d at 181–182, 189, 206–208, 220 (“The elimination of the presumptive pre-election waiting period does not violate the NLRA or the First Amendment” and “[p]laintiffs have failed to show that the Final Rule inhibits . . . debate in any meaningful way.”); *ABC of Texas*, 826 F.3d at 220, 226–227 (rejecting claim that “the cumulative effect of the rule change improperly shortens the overall pre-election period in violation of the

‘free speech’ provision of the Act” or inhibits meaningful debate).

The Final Rule dissent pronounced that the Rule ran afoul of the APA because the Board failed to demonstrate a need for the amendments. 79 FR 74431, 74434. Here again, the courts rejected that contention. See, e.g., *Chamber of Commerce*, 118 F. Supp. 3d at 219–220 (“the Board has offered grounds to show that the issues targeted by the Final Rule were sufficiently tangible to warrant action”); *ABC of Texas*, 826 F.3d at 227–229.

The Final Rule dissent pronounced that the Rule's accelerated deadlines and hearing provisions violated employers' due process rights and the NLRA's appropriate hearing requirement. 79 FR at 74431–74442, 74451. Wrong. See *Chamber of Commerce*, 118 F.Supp.3d at 177, 205–206 (due process challenge does “not withstand close inspection” because, among other reasons, it is “predicated on mischaracterizations of what the Final Rule actually provides”); *Associated Builders and Contractors of Texas, Inc. v. NLRB*, 2015 WL 3609116 *2, *5–*7, affd, 826 F.3d at 220, 222–223 (“the rule changes to the pre-election hearing did not exceed the boundaries of the Board's statutory authority”).

The Final Rule dissent pronounced that the Rule's provision making Board review of regional director post-election determinations discretionary contravened the Board's duty to oversee the election process and was arbitrary and capricious. 79 FR at 74431, 74449–74451. Wrong again. See *Chamber of Commerce*, 118 F. Supp. 3d at 215–218 (rejecting claims that “the Final Rule's ‘elimination of mandatory Board review of post-election disputes . . . contravenes the Board's ‘statutory obligation to oversee the election process’” and is arbitrary and capricious).

The Final Rule dissent pronounced that the Rule's voter list provisions were not rationally justified or consistent with the Act, did not adequately address privacy concerns, and imposed unreasonable compliance burdens on employers. 79 FR at 74452, 74455. Wrong on all counts. See *Chamber of Commerce*, 118 F. Supp. 3d at 209–215 (“The Employee Information Disclosure Requirement [in the Rule's voter list provisions] does not violate the NLRA,” and “is not arbitrary and capricious;” the Board did not act arbitrarily in concluding that “the [r]equirement ensures fair and free employee choice” and “facilitates the public interest;” and “the Board engaged in a lengthy and thorough analysis of the privacy risks and other concerns raised by the

commenters before reaching its conclusion that the Employee Information Disclosure Requirement was warranted.”); *ABC of Texas*, 826 F.3d at 223–226 (rejecting claims that the voter list provisions violate the NLRA and conflict with federal laws that protect employee privacy; that the provisions “are arbitrary and capricious under the APA because the rule disregards employees' privacy concerns,” and “place an undue, substantial burden on employers”); see also *Associated Builders and Contractors of Texas, Inc. v. NLRB*, 2015 WL 3609116 *2, *8–*11.

Apart from their wrong-headed views concerning the legal merits of the Rule, the Final Rule dissenters made a number of erroneous predictions regarding how the Final Rule would work in practice. But as far-fetched as I found these speculations in 2014, one can now see that these predictions are refuted by the Board's actual experience administering the Final Rule. A quick review of several published agency statistics shows some of their most notable speculations of dysfunction to be completely unfounded.

The Final Rule dissenters speculated that the changes made by the Rule would drive down the Board's historically high rate of elections conducted by agreement of the parties either because the Final Rule does not provide enough time to reach agreement, 79 FR 74442, or because parties can no longer stipulate to mandatory Board review of post-election disputes, 79 FR 74450. They argued, “[e]ven if the percentage of election agreements decreases by a few points, the resulting increase in pre- and post-election litigation will likely negate any reduction of purported delay due to the Final Rule's implementation.” 79 FR at 74450. But they were wrong. Following the Final Rule's implementation, the Board's election agreement rate has actually increased.³

Additionally, the Final Rule dissenters claimed that the Rule would do little to address those few representation cases that in their view involved too much delay, namely those cases that take more than 56 days to process from petition to election. 79 FR at 74456–57.⁴ But, in fact, the

³ See Percentage of Elections Conducted Pursuant to Election Agreements in FY2017, www.nlr.gov/news-outreach/graphs-data/petitions-and-elections (reporting a post-Final Rule election agreement rate of 91.7% in fiscal year (FY) 2017; past versions of this chart reported a post-Final Rule election agreement rate of 91.7% in FY 2016, and pre-Final Rule election agreement rates of 91.1% for both FY 2014 and FY 2013).

⁴ See also 79 FR at 74434 (The dissenters highlighted pre-Final Rule fiscal year 2013 as a

percentage of elections that were conducted more than 56 days from petition has decreased since the Final Rule was adopted.⁵ Moreover, for contested cases—the category which consistently failed to meet the 56-day target—the Final Rule has reduced the median time from petition to election by more than three weeks.⁶

The Final Rule dissent further hypothesized that whatever time-savings might be achieved in processing cases from petition to election, there was a likelihood that “the overall time needed to resolve post-election issues will increase.” 79 FR at 74435. Here again, the dissent was wrong. The Agency’s 100-day closure rate—which by definition takes into account a representation case’s overall processing time—is better than ever. In FY 2017, the second fiscal year following the Final Rule’s implementation, the Agency achieved a historic high of closing 89.9% of its representation cases within 100 days of a petition’s filing. And in FY 2016, the first fiscal year following the Final Rule’s implementation, the Agency’s representation case closure rate of 87.6% outpaced all but one of the six years preceding the Final Rule.⁷

All of the foregoing raises the question: If the Final Rule dissent’s claims of statutory infirmity have been roundly rejected by the courts, and the predictions that the Final Rule would cause procedural dysfunction have been undercut by agency experience, why is

period in which 94.3% of elections were conducted within 56 days of the petition as a means of concluding that “by the Board’s own measures, less than 6% of elections were unduly ‘delayed.’” Of course, as explained in the Final Rule, the Board disagreed that only those cases taking more than 56 days were worthy of attention. 79 FR at 74317.

⁵ See Performance Accountability Reports, FYs 2013–2017, www.nlr.gov/reports-guidance/reports (reporting that, pre-Final Rule, the Agency processed 94.3% of its representation cases from petition to election in 56 days in FY 2013 and 95.7% in FY 2014, as compared to post-Final Rule rates of 99.1% in FY 2016 and 98.5% in FY 2017).

⁶ See Median Days from Petition to Election, www.nlr.gov/news-outreach/graphs-data/petitions-and-elections (reporting post-Final Rule median processing times for contested cases as 36 days in FY 2017 and 35 days in FY 2016, as compared to pre-Final Rule median processing times ranging from 59 to 67 days in FYs 2008 to 2014). See also Annual Review of Revised R-Case Rules, www.nlr.gov/news-outreach/news-story/annual-review-revised-r-case-rules (reporting that in the first calendar year following the Final Rule’s implementation, the median time to process contested cases from petition to election fell from 64 to 34 days).

⁷ See Performance Accountability Reports, fiscal years 2013–2017, www.nlr.gov/reports-guidance/reports (indicating the following representation case 100-day closure rates: FY 2017–89.9%, FY 2016–87.6%, FY 2014–88.1%; FY 2013–87.4%; FY 2012–84.5%; FY 2011–84.7%; FY 2010–86.3%; FY 2009–84.4%).

comment being solicited as to whether the Final Rule should be further amended or rescinded? The answer would appear to be all too clear. When the actual facts do not support the current majority’s preferred outcome, the new Members join Chairman Miscimarra to look for “alternative facts” to justify rolling back the Agency’s progress in the representation-case arena.

It is indeed unfortunate that when historians examine how our Agency functioned during this tumultuous time, they will have no choice but to conclude that the Board abandoned its role as an independent agency and chose to cast aside reasoned deliberation in pursuit of an arbitrary exercise of power.

Accordingly, I dissent.

Member McFerran, dissenting.

On April 14, 2015—after thousands of public comments submitted over two periods spanning 141 days, four days of public hearings, and over a hundred, dense **Federal Register** pages of analysis—a comprehensive update of NLRB election rules and procedures took effect. The Election Rule was designed to simplify and modernize the Board’s representation process, to establish greater transparency and consistency in administration, and to better provide for the fair and expeditious resolution of representation cases. As stated in the Rule’s **Federal Register** preamble:

While retaining the essentials of existing representation case procedures, these amendments remove unnecessary barriers to the fair and expeditious resolution of representation cases. They simplify representation-case procedures, codify best practices, and make them more transparent and uniform across regions. Duplicative and unnecessary litigation is eliminated. Unnecessary delay is reduced. Procedures for Board review are simplified. Rules about documents and communications are modernized in light of changing technology.

79 FR 74308 (Dec. 15, 2014).

During the short, two-and-a-half years since the Rule’s implementation, there has been nothing to suggest that the Rule is either failing to accomplish these objectives or that it is causing any of the harms predicted by its critics. As Member Pearce catalogs in his dissent, by every available metric the Rule appears to have met the Board’s expectations, refuting predictions about the Rule’s supposedly harmful consequences. The majority makes no effort to rebut Member Pearce’s comprehensive analysis. The preliminary available data thus indicates that the rule is achieving its intended goals—without altering the

“playing field” for unions or employers in the election process.¹ The validity of the Rule, moreover, has been upheld in every court where it has been challenged.² In short, the Rule appears to be a success so far.

Nonetheless, today a new Board majority issues a Request for Information (RFI) seeking public opinion about whether to retain, repeal, or modify the Rule—and signaling its own desire to reopen the Rule. Of course, administrative agencies ought to evaluate the effectiveness of their actions, whether in the context of rulemaking or adjudication, and public input can serve an important role in conducting such evaluations.³ But the nature and timing of this RFI, along with its faulty justifications, suggests that the majority’s interest lies not in acquiring objective data upon which to gauge the early effectiveness of the Rule, but instead in manufacturing a rationale for a subsequent rollback of the Rule in light of the change in the composition of the Board. Because it seems as if the RFI is a mere fig leaf to provide cover for an unjustified attack on a years-long, comprehensive effort to make the Board’s election processes more efficient and effective, I cannot support it. I would remain open, however, to a genuine effort to gather useful information about the Rule’s effectiveness to this point.

I. The RFI is premature, poorly crafted, and unlikely to solicit meaningful feedback.

Initially, it seems premature to seek public comment on the Rule a mere two-and-a-half years after the Rule’s

¹ See NLRB, *Annual Review of Revised R-Case Rules*, available at <https://www.nlr.gov/news-outreach/news-story/annual-review-revised-r-case-rules> (showing, in comparison between pre- and post-Rule representation cases, modest decrease in time elapsed from petition to election, no substantial change in party win-rates, and largely stable number of elections agreed to by stipulation); NLRB, *Graphs and Data, Petitions and Elections*, available at <https://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections> (showing similar outcomes, based on fiscal-year data on representation cases).

² See *Assoc. Builders and Contractors v. NLRB*, 826 F.3d 215 (5th Cir. 2016) (rejecting multiple facial challenges to Rule); *Chamber of Commerce v. NLRB*, 118 F. Supp. 3d 171 (D.D.C. 2015) (same).

³ I have no objection at all to seeking public participation in the Board’s policymaking, as reflected in the Board’s standard practice of inviting amicus briefs in major cases, including those where the Board is reconsidering precedent. Ironically, the new majority has now broken with that practice for no good reason in reversing recent precedent. See, e.g., *UPMC*, 365 NLRB No. 153 (2017) (Member McFerran, dissenting). I hope this unfortunate omission does not signal a permanent change to the Board’s approach in seeking public input in major cases.

implementation.⁴ The Rule has been in place for less time at this point than the rulemaking process took from beginning to end.⁵ Moreover, as noted, so far the Rule appears to be achieving its stated ends without producing the dire consequences some purported to fear. In short, there does not appear to be any present basis or need for this RFI.

Nevertheless, as stated, I am not opposed to genuine efforts to meaningfully evaluate the Rule's performance to date. But I believe that any useful request for information would have to seek comprehensive information on the precise effects of the specific changes made by the Rule.⁶ In my view, such detailed information is essential to facilitating meaningful analysis of the Rule's effectiveness, and to determining whether this or any future request for information is warranted. In fact, precisely because agencies benefit most from receiving specific rather than generalized feedback, an agency's typical request for information (unlike this RFI) follows the agency's assessment and identification of what particular information would be useful in evaluating a rule's effectiveness.⁷ Indeed, other agencies'

⁴ I would be surprised if even the most ardent advocates of regulatory review would support such a short regulatory lookback period. Indeed, Section 610 of the Regulatory Flexibility Act, for example, contemplates that agencies may take up to 10 years—significantly longer than our 2-plus years' experience with the Rule—before they may adequately assess a rule's effectiveness. See 5 U.S.C. 610 (providing that agencies shall develop plan "for the review of such rules adopted after the effective date of this chapter within ten years of the publication of such rules as the final rule").

⁵ The Board's original notice of proposed rulemaking was published on June 22, 2011. The final rule upheld by the courts was published on December 15, 2014, with an effective date of April 14, 2015.

⁶ For example, to assess the success of some of the Rule's intended new efficiencies, it would be useful to have quantitative data on: Motions for extensions and motions to file a document out-of-time; missed deadlines; motions for stays of election or other extraordinary relief; eligibility issues deferred until after the election, and whether such issues were mooted by the election results. This type of data would be valuable not only to decision makers at the Agency, but also to the public in determining how to evaluate and comment on the effectiveness of the Rule.

⁷ The majority states that it is the Board's duty to periodically review its rules. Without a doubt, the Board must monitor its rules to be sure that they are meeting their goals and to help the Board better effectuate the statute. But choosing to reopen the Election Rule now is highly dubious. The Board has many longstanding rules—addressing issues from industry jurisdiction to health care bargaining units—which have never been reviewed after promulgation. Yet the majority chooses the newly-minted Election Rule, among all others, for attention—with no explanation for its choice. Given the resources required of both the agency and interested parties when the Board revisits a rule, the Board's periodic review should reflect the exercise of reasoned judgment. In this case, the majority has

requests for information have often posed specific questions reflecting their own considered analysis of what aspects of rulemaking might require further inquiry and are geared toward the acquisition of concrete facts from the public.⁸

The majority's request is not framed to solicit detailed data, or even informed feedback. The broad questions it poses, absent any empirical context, amount to little more than an open-ended "raise-your-hand-if-you-don't-like-the-Rule" straw poll. That is hardly a sound approach to gathering meaningful feedback.

The irony, of course, is that, if the majority were sincerely interested in beginning to assess the Rule's effectiveness, the best initial source of empirical, objective data lies *within* the Agency itself. The Board's regional offices process and oversee the litigation of every single election petition filed under the Rule. All the majority needs to do is ask the Board's General Counsel to prepare a comprehensive report highlighting all relevant factual elements of the processing of election petitions over the past 2-plus years.⁹ If the resulting data were to suggest that, after such a short time on the books, the Rule is in need of refinement, or that additional public input could enhance the Board's understanding of the Rule's functioning, the Board might then craft

failed to identify any reasonable basis for seeking public input on the Election Rule at this time. Nor has the majority made any effort to obtain or analyze easily available data that conceivably could support issuing an RFI.

⁸ See, e.g., Dept. of the Treasury, *Proprietary Trading and Certain Interests in and Relationships With Covered Funds (Volcker Rule); Request for Public Input*, 82 FR 36692, Aug 7, 2017 (enumerating lengthy list of specific, data-oriented questions); Dept. of Labor, Employee Benefits Security Admin., *Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions*, 82 FR 31278, July 6, 2017 (same).

⁹ The majority makes the odd suggestion that the RFI—a measure directed to the general public—is somehow also the most effective way to obtain information from the General Counsel. This is nonsensical. The General Counsel supervises the Board's representation proceedings under a delegation of authority from the Board, and the Board is obviously able to direct the General Counsel to provide whatever relevant information it requests, without issuing an RFI or initiating a rulemaking.

In any event, although I was not a participant in the earlier rulemaking process, it is clear from the Notice of Proposed Rulemaking that the Board based its proposals on a thorough, pre-rulemaking analysis of relevant data and agency experience that enabled it to seek public comment on specific, carefully-crafted policy proposals. In short, the Board did its homework before seeking public participation. The majority's current effort is utterly lacking the same foundation. The majority curiously seems to view this as an *attribute*, rather than a manifest departure from the norms of rulemaking under the Administrative Procedure Act.

tailored questions designed to elicit meaningful, constructive feedback.

Unfortunately, in addition to framing a vague, unfounded inquiry that is unlikely to solicit useful information, the majority's request also establishes an unnecessarily rushed comment process that is likely to frustrate those interested parties who might actually hope to provide meaningful input. To the extent members of the public wish to provide informed feedback on the Rule, they will need information. In the absence of a comprehensive analysis from the General Counsel, outside parties are likely to seek relevant data on the Rule's functioning through a Freedom of Information Act (FOIA) request. The public's acquisition and analysis of such data through the FOIA process will involve the assembly and submission of FOIA requests, which in turn may require the agency to survey and compile extensive data for each such request. Thereafter parties will have to take stock of any data acquired through FOIA before being in a position to give informed feedback on the Rule. This process could take far more than the 60 days provided for comment by the RFI. Indeed, during the 2014 rulemaking process leading up to the Election Rule, the Chamber of Commerce, well into the 60-day comment period, sought an extension to give it more time to both request and analyze FOIA data. While it was ultimately determined that the comment period should not be extended under the circumstances at the time, the Chamber's effort highlights the relevance of FOIA data and the time-intensiveness of parties' analysis of such data. My colleagues' failure to allot time to account for the parties' information-gathering process only confirms that the RFI is not designed to solicit and yield well-informed responses that might genuinely assist the Board's evaluation of the Rule.

II. *The RFI is a transparent effort to manufacture a justification for revising the Rule.*

As emphasized, I fully support the notion that the Board should take care to ensure that its rules and regulations are serving their intended purposes. I would welcome a genuine opportunity to receive and review meaningful information on the Rule's performance at an appropriate time. But this hurried effort to solicit a "show of hands" of public opinion without the benefit of meaningful data (or even thoughtfully framed points of inquiry) bears none of the hallmarks of a genuine effort at regulatory review.¹⁰ Gathering useful

¹⁰ The majority suggests that my view that the rule has been a success thus far is just one

information is demonstrably not the purpose of this RFI. Instead, this RFI is a transparent effort to manufacture a justification for reopening the Rule. No legitimate justification exists.

The Supreme Court has made clear that, when an agency is considering modifying or rescinding a valid existing rule, it must treat the governing rule as the status quo and must provide “good reasons” to justify a departure from it. See *Federal Communications Commission v. Fox Television, 556 U.S. 502, 515* (2009). Obviously, determining whether there are “good reasons” for departing from an existing policy requires an agency to have a reasonable understanding of the policy and how it is functioning. Only with such an understanding can the agency recognize whether there is a good basis for taking a new approach and explain why. *Id.* at 515–516. Indeed, even when an agency is only beginning to explore possible revisions to an existing rule, the principles of reasoned decision-making demand a deliberative approach, informed by the agency’s own experience administering the existing rule.¹¹

“opinion,” and that they are merely soliciting a wider range of opinions from the public to better assess the Rule. But the fact that public opinion on the Rule may be divided—as it was during and after the rulemaking process—is not a reason for the Board to revisit the Rule. Canvassing public opinion might make sense if it were done in a manner that first gathered and considered evidence on the Rule’s functioning, and framed any questions in a way that actually requested useful substantive feedback on the agency’s own analysis.

But the open-ended solicitation we have here, without the benefit of data or analysis, is not a productive way to enlist public opinion. As the dissenters to the Election Rule observed, including Chairman Miscimarra, the rulemaking was of “immense scope and highly technical nature,” and it generated “an unprecedented number of comments, espousing widely divergent views.” 79 FR 74430, 74459. It is accurate to say that the Rule is both comprehensive and technical, and that the public holds polarized views thereon. Yet now the majority broadly seeks public opinion on the fate of the Rule without offering any data or analysis of its own to provide a foundation for the public’s assessment. Ultimately, they provide no persuasive explanation of how soliciting public input in the absence of any agency analysis or proposals—input that, as noted, is tantamount to a “thumbs up or thumbs down” movie review—will provide a foundation for an effective rulemaking process.

¹¹ See, e.g., Dept. of Labor, Wage and Hour Div., *Request for Information on the Family and Medical Leave Act of 1993*, 71 FR 69504, 69505–06, Dec. 1, 2006 (“[T]he subject matter areas [of this RFI] are derived from comments at . . . stakeholder meetings and also from (1) rulings of the Supreme Court of the United States and other federal courts over the past twelve years; (2) the Department’s experience in administering the law; and (3) public input presented in numerous Congressional hearings and public comments filed with the Office of Management and Budget . . . in connection with three annual reports to Congress regarding the Costs and Benefits of Federal regulations in 2001, 2002, 2004. . . . During this process, the Department has heard a variety of concerns expressed about the

If this RFI asked the public specific, well-crafted questions geared toward a neutral assessment of the Rule’s functioning—and was based on a foundation of internal evidence or experience suggesting there was a problem with the Rule’s implementation thus far—there would be far less basis to doubt the majority’s reasons for revisiting it.¹² Indeed, the majority’s reticence to focus this inquiry on the agency’s own data—the most straightforward source of information about how the Rule is working—is puzzling. The majority’s failure to take this basic step suggests that they would rather not let objective facts get in the way of an effort to find some basis to justify reopening the Rule. Hence the majority instead poses the vague questions in this RFI, which belie any “good reasons” for revisiting the Rule.

Further, in the preamble to this RFI the majority has failed to identify, much less establish, any “good reasons” to revisit or to consider reopening the Rule at this time. The majority summarily cites congressional votes, hearings, and proposed (but never-passed) legislation as reasons to issue this RFI. Although such congressional actions might raise concern over a rule’s actual effectiveness in other circumstances, here—where criticism was leveled in the absence of any meaningful experience under the Rule—they seem to signify little more than partisan

FMLA.”); cf. Dept. of Labor, Wage and Hour Div., *Request for Information; Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 82 FR 34616, July 26, 2017 (rule enjoined by court, and Department faced with legal questions concerning its analysis and justification for aspects of rule).

¹² Indeed, if it were properly founded in objective data indicating significant problems with the rule in its implementation, I might well join such an effort to assess the effectiveness of the Rule, as I subscribe to the view that timely, informed public input can be vital to making good public policy. In contrast, my colleagues in the majority seem to take the view that soliciting the views of the public is good only when it furthers their predetermined purposes. In a recent Board decision where public input would have had a far greater likelihood of aiding the Board’s decision-making process, they nonetheless dismissed the possibility that such input might be useful in order to more hastily issue a decision reversing Board precedent. See *UPMC*, 365 NLRB No. 153 (2017). In that case, the public’s own experiential data and legal and policy arguments would have had immediate relevance; yet the Board took the drastic step of reversing precedent without the benefit of such. It seems clear that they seek public input here, however heedlessly, so that they can point to negative public feedback about the rule as an (inadequate) procedural precursor to justify reopening the rulemaking process under the APA; whereas in *UPMC* the adjudicative reversal of precedent did not require the same procedural formality, and thus they took a more expedient route to accomplish their goal in that case.

opposition to the Rule.¹³ Reasoned decision-making is not a matter of partisanship.

The majority also asserts that “numerous” cases litigated before the Board have raised “significant” issues concerning its application. Of course, many issues concerning the proper interpretation and application of the Rule can and should be resolved in adjudication, where they arise. In fact, the four recent cases the majority cites involved case-specific applications of the Rule that offer little if any insight into how well the Rule is working overall.¹⁴ More broadly, as stated, all legal challenges to the Rule have been soundly rejected by the courts.

Last, although not mentioned by the majority, no one has petitioned the Board to revisit the Rule or for new rulemaking on the Board’s election processes. Perhaps the absence of such a petition is attributable to all of the

¹³ Similarly, the unfounded criticism of the Rule as it was adopted, both among its legal challengers and the Board members who dissented from the Rule, is not a sound basis for this RFI. As the United States District Court for the District of Columbia made clear in rejecting a challenge to the Rule: “[The Rule’s challengers’] dramatic pronouncements are predicated on mischaracterizations of what the Final Rule actually provides and the disregard of provisions that contradict plaintiffs’ narrative. And the claims that the regulation contravenes the NLRA are largely based upon statutory language or legislative history that has been excerpted or paraphrased in a misleading fashion. Ultimately, the statutory and constitutional challenges do not withstand close inspection.” *Chamber of Commerce v. NLRB*, supra, 118 F. Supp. 3d at 177. That court further pointed out that rhetoric like “quickie election,” employed by the Rule’s challengers and borrowed from the Board members who dissented from the Rule, were part of a vague, conclusory, and argumentative set of attacks. *Id.* at 189.

¹⁴ If any conclusion can be gleaned from these four cases, it is that they were processed in just the manner contemplated by the Rule: Fostering efficiency while preserving the fairness of the proceedings. For example, in *UPS Ground Freight*, 365 NLRB No. 113 (2017), the employer complained about the conduct and timing of a pre-election hearing, but it did not establish any prejudice to its ability to fully make its arguments. In other words, the procedures under the Rule were prompt and resulted in no unfairness. In *Yale University*, 365 NLRB No. 40 (2017), and *European Imports*, 365 NLRB No. 41 (2017), the Board refused to stay an election, but allowed parties to preserve their pre-election claims—thus leaving the substantive legal claims intact, while making the process more efficient by deferring resolution until after the election, at which time the election results may have mooted those claims. In *Brunswick Bowling*, 364 NLRB No. 96 (2016), the Board emphasized the importance of position statements, which were intended under the Rule to narrow the issues for pre-election hearings, but also noted that a party’s failure to file one did not affect a regional director’s independent statutory duties with respect to representation petitions.

In any event, a better measure of the Rule’s early effectiveness, which I advocate for below, would be a thorough internal Agency review of all the cases processed under the Rule, including those that have not come before the Board.

circumstances described above. Perhaps it is explained by the common-sense notion that the Agency's and the public's limited experience with the Rule would make such a petition glaringly premature. See 5 U.S.C. 553(e).¹⁵

The only remaining asserted justification for considering revisiting the Rule at this early stage is the majority's express reliance on the change in the composition of the Board.¹⁶ This certainly is not a "good reason" for revisiting a past administrative action, particularly in the context of rulemaking. See generally *Motor Vehicles Manufacturers v. State Farm*, 463 U.S. 29 (1983). Yet, I fear this is the origin of the RFI, and regrettably so. The Board has long and consistently rejected motions to reconsider its decisions based on a change in the composition of the Board. See, e.g., *Brown & Root Power & Mfg.*, 2014 WL 4302554 (Aug. 29, 2014); *Visiting Nurse Health System, Inc.*, 338 NLRB 1074 (2003); *Wagner Iron Works*, 108 NLRB 1236 (1954). We should continue to exercise such restraint with respect to the Rule, unless and until a day comes when we discover or are presented with a legitimate basis for taking action. Today, however, is manifestly not that day.

As a result, it should come as no surprise to the majority if a court called upon to review any changes ultimately made to the Rule looks back skeptically at the origins of the rulemaking effort. The RFI is easily viewed as simply a scrim through which the majority is attempting to project a distorted view of the Rule's current functioning and thereby justify a partisan effort to roll it back. Cf. *United Steelworkers v. Pendergrass*, 819 F.2d 1263, 1268 (3d Cir. 1987) ("Some of the questions [in an ANPRM] could hardly have been posed with the serious intention of obtaining meaningful information, since the answers are self-evident."). Such opportunism is wholly inconsistent with the principles of reasoned Agency decision-making. It is equally

¹⁵ Indeed, another argument to defer any examination of the Rule's effectiveness until a later date is that a longer timeframe would yield a larger body of cases that presumably would provide more representative and meaningful insights into its performance.

¹⁶ I reject the majority's implied suggestion that my joining the Board since the Rule was enacted somehow supports today's effort to revisit the Rule. I begin with the proposition that the Rule, promulgated under notice-and-comment and upheld by the courts, is governing law—whether or not particular Board members disagreed with its adoption or would have disagreed, had they been on the Board at the time. As explained, I would support revisiting the Rule only if there were some reasoned basis to do so.

inconsistent with our shared commitment to administer the Act in a manner designed to fairly and faithfully serve Congressional policy and to protect the legitimate interests of the employees, unions, and employers covered by the Act. Whatever one thinks of the Rule, the Agency, its staff, and the public deserve better.

VI. Conclusion

The Board invites interested parties to submit responses during the public response period and welcomes pertinent information regarding the above questions.

Roxanne Rothschild,

Deputy Executive Secretary, National Labor Relations Board.

[FR Doc. 2017-26904 Filed 12-12-17; 4:15 pm]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R04-OAR-2017-0500; FRL-9971-71-Region 4]

Air Plan Approval; Florida; Stationary Sources Emissions Monitoring; Reopening of Comment Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; reopening of public comment period.

SUMMARY: The Environmental Protection Agency (EPA) is reopening the comment period for a proposed rulemaking notice published in the **Federal Register** on October 13, 2017, which accompanied a direct final rulemaking published on the same date. The direct final rulemaking has been withdrawn due to the receipt of an adverse comment. In the October 13, 2017, proposed rulemaking, EPA proposed to approve a portion of a State Implementation Plan (SIP) revision submitted by the State of Florida, through the Florida Department of Environmental Protection (FDEP) on February 1, 2017, for the purpose of revising Florida's requirements and procedures for emissions monitoring at stationary sources. Additionally, the October 13, 2017, document included a proposed correction to remove a Florida Administrative Code (F.A.C.) rule that was previously approved for removal from the SIP in a separate action but was never removed. It was brought to EPA's attention that the February 1, 2017, state submittals and related materials were not accessible to the public through the electronic docket.

The materials are now accessible in the electronic docket. EPA is reopening the comment period for an additional 30 days.

DATES: The comment period for the proposed rule published October 13, 2017 (82 FR 47662), reopened. Comments must be received on or before January 16, 2018. In a future final action based on the proposed rule, EPA will address all public comments received, including the adverse comment received on the direct final rule.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R04-OAR-2017-0500 at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

FOR FURTHER INFORMATION CONTACT: Andres Febres, Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW, Atlanta, Georgia 30303-8960. Mr. Febres can be reached via telephone at (404) 562-8966 or via electronic mail at febres-martinez.andres@epa.gov.

SUPPLEMENTARY INFORMATION: EPA published a proposed rulemaking on October 13, 2017 (82 FR 47662), which accompanied a direct final rulemaking published on the same date (82 FR 47636). The proposed revision includes amendments to three F.A.C. rule sections, as well as the removal of one F.A.C. rule section from the Florida SIP, in order to eliminate redundant language and make updates to the requirements for emissions monitoring

at stationary sources. Additionally, the October 13, 2017, proposed rulemaking included a correction to remove an additional F.A.C. rule that was previously approved for removal from the SIP in a separate action but was never removed. It was brought to EPA's

attention that the February 1, 2017, state submittals and related materials were not accessible to the public through the electronic docket. The materials are now accessible in the electronic docket. EPA is reopening the comment period for an additional 30 days.

Dated: November 21, 2017.

Onis "Trey" Glenn, III,

Regional Administrator, Region 4.

[FR Doc. 2017-26898 Filed 12-13-17; 8:45 am]

BILLING CODE 6560-50-P

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

Food Crediting in Child Nutrition Programs: Request for Information

AGENCY: Food and Nutrition Service, USDA.

ACTION: Request for information.

SUMMARY: The National School Lunch Program, School Breakfast Program, Child and Adult Care Food Program, and Summer Food Service Program (Child Nutrition Programs), which are administered by the United States Department of Agriculture (USDA), Food and Nutrition Service (FNS), play a critical role in ensuring that America's children have access to the nutritious food they need to learn and succeed in the classroom, afterschool, and during the summer. It is FNS' responsibility to establish and support the meal patterns and nutrition standards (collectively referred to as meal patterns) in the Child Nutrition Programs that advance the goals of providing nutritious and satisfying meals to a broad population of children. At the same time, FNS works to simplify the menu planning process for Program operators to promote the efficient use of Program funds and provide a wide variety of food choices to menu planners and children.

In order to claim Federal reimbursement, Child Nutrition Program operators must serve meals and snacks that meet the minimum meal pattern requirements of the respective Program. Crediting is the process designed by FNS to specify how individual food items contribute to the Child Nutrition Programs' meal patterns. Several factors impact how food products can credit toward reimbursable meals, such as volume, weight, and overall nutrient profile.

The purpose of this Request for Information is to help FNS gather feedback from a wide variety of

stakeholders on how FNS' crediting system can best address today's evolving food and nutrition environment, as well as to offer first-rate customer service to those operating and benefitting from the Child Nutrition Programs. FNS welcomes comments from all interested stakeholders. While FNS is interested in your general comments about the crediting process, FNS also invites comments on the crediting of several specific food products. FNS is especially interested in understanding both the possible benefits and any negative impacts associated with potential changes to how certain foods may or may not credit.

DATES: To be assured of consideration, written information must be submitted or postmarked on or before February 12, 2018.

ADDRESSES: The Food and Nutrition Service, USDA, invites the submission of the requested information through one of the following methods:

- *Preferred method:* Submit information through the Federal eRulemaking Portal at <http://www.regulations.gov>. Follow the online instructions for submissions.
- *Mail:* Submissions should be addressed to Angela Kline, Director, Policy and Program Development, Child Nutrition Programs, Food and Nutrition Service, P.O. Box 66740, Saint Louis, MO 63166-6740.

All information properly and timely submitted, using one of the two methods described above, in response to this Request for Information will be included in the record and will be made available to the public on the internet at <http://www.regulations.gov>. Please be advised that the substance of the information provided and the identity of the individuals or entities submitting it will be subject to public disclosure.

FOR FURTHER INFORMATION CONTACT: Tina Namian, Branch Chief, Policy and Program Development, Child Nutrition Programs, Food and Nutrition Service at (703) 305-2590.

SUPPLEMENTARY INFORMATION:

I. Background

Child Nutrition Programs' Nutrition Standards

One of the United States Department of Agriculture (USDA), Food and Nutrition Service's (FNS) highest priorities is to ensure that participants

in the National School Lunch Program (NSLP), School Breakfast Program (SBP), Child and Adult Care Food Program (CACFP), and Summer Food Service Program (SFS) (collectively referred to as the Child Nutrition Programs) receive wholesome, nutritious, and tasty meals. The Richard B. Russell National School Lunch Act (NSLA) and the Child Nutrition Act of 1966 (CNA) authorize FNS to establish meal patterns and nutrition standards (collectively referred to as meal patterns) for the Child Nutrition Programs. The NSLA requires FNS to develop meal patterns that are consistent with the recommendations of the most recent Dietary Guidelines for Americans (Dietary Guidelines) and current nutrition research.

The Child Nutrition Programs' meal patterns establish the foods and minimum serving sizes that must be served for a meal or snack to be reimbursable. The meal patterns are currently based on food groups (components), not individual nutrients. A reimbursable meal or snack includes a certain amount (or combination) of vegetables, fruits, fluid milk, grains, and meats or meat alternates (e.g., protein foods, such as chicken, and dairy foods, such as yogurt). Each Child Nutrition Program has individualized meal patterns for the various age and grade groups that participate in the Program. The meal patterns were created to enable children to be self-sufficient by providing the adequate and consistent levels of foods and nutrients children need to learn and grow, as well as help children build healthy habits that can last a lifetime.

Crediting Methodology

Crediting is the process established by FNS to determine how individual foods contribute to the Child Nutrition Programs' meal patterns. A food is considered creditable when it meets the minimum standards that count toward a reimbursable meal or snack. Generally, this means foods are grouped into categories of similar foods which are credited in a similar way.

The main focus of FNS' crediting system is to provide simple information that allows Child Nutrition Program operators to (1) easily plan menus with foods and quantities that meet the meal patterns, and (2) offer foods in a way that encourages healthy habits and

teaches children how to build balanced meals. Crediting information is conveyed through resources such as FNS' *Food Buying Guide for Child Nutrition Programs* and other technical assistance materials.

A number of factors impact how foods credit toward a reimbursable meal. It is critical that crediting decisions be made on the fullest range of factors possible to ensure transparency and consistency in the crediting process. The overall nutrient profile of a food is a primary consideration. Foods in each food component are based on a range of nutrients instead of an individual food's nutrient profile. For example, foods in the meats/meat alternates component are grouped based on a collection of nutrients that include protein, B vitamins, selenium, choline, phosphorus, zinc, and copper. Therefore, different varieties of meat (e.g., lean beef versus turkey) are not currently evaluated separately based on their protein content. The volume or weight of the food is also an important factor in making crediting determinations. All meats/meat alternates and grains are credited in ounces equivalencies. Fruits, vegetables, and fluid milk are credited based on volume served.

In addition, foods that credit toward a reimbursable meal in the Child Nutrition Programs sometimes have a Federal standard of identity. Standards of identity are established by the U.S. Food and Drug Administration (FDA) and the USDA Food Safety and Inspection Service (FSIS). They are mandatory requirements that determine what a food must contain to be marketed under a certain name. For example, for a product to be labeled peanut butter, it must meet the standard of identity requirements that specify the amount and type of ingredients that may be included. Standards of identity assist FNS in crediting because they provide a common standard under which specific foods are made. This allows FNS to set crediting policy with confidence that products from all manufacturers will have the same characteristics and, thus, make a consistent contribution to the meal patterns. There are some products on the commercial market that do not have an FDA or FSIS standard of identity, but have industry-defined standards. FNS first considers Federal standards of identity when making crediting decisions. When a Federal standard of identity does not exist, then FNS may use industry standards for production to better understand the manufacturing process.

FNS also considers the customary use of a product. For example, some foods are typically consumed as a snack food and have not been considered appropriate for including as part of a meal in the Child Nutrition Programs. Therefore, they are currently not creditable. This is discussed more in section II. Questions and Answers. Finally, FNS considers the role of the Child Nutrition Program in teaching children healthy eating habits when making crediting decisions.

Purpose and Scope

FNS' objective in issuing this Request for Information is to receive input from a broad spectrum of stakeholders to assist FNS in making informed decisions on how FNS' crediting system can best address today's evolving food and nutrition environment, ensure children have access to the nutrition they need, and offer excellent customer service to those operating and benefitting from the Child Nutrition Programs. It is important that FNS' crediting system balances the nutritional needs of the Child Nutrition Programs' participants, as recommended by the Dietary Guidelines, and the need to offer flexibility and a wide range of choices. FNS recognizes that new or reformulated food products are regularly entering the food market. These new or reformulated food products can offer more choices to menu planners and children.

FNS is especially interested in understanding both the possible benefits and any negative impacts associated with potential changes to how certain foods may or may not credit. As such, FNS is seeking feedback from all interested stakeholders on the questions listed below. Some questions address specific foods due to a high volume of interest in those products. However, FNS is open to feedback about the creditability of other food products as well (see Questions 20–25) and crediting process in general. Additionally, while all comments are welcome, FNS is particularly interested in comments that are consistent with the current statutory framework for the Child Nutrition Programs.

II. Questions

Factors To Determine Crediting

FNS currently considers the following factors when making crediting decisions:

- *Volume or weight of the food.* All meats/meat alternates and grains are credited in ounces. Fruits, vegetables, and fluid milk are credited based on volume served. However, dried fruit

credits at twice the volume served and raw, leafy greens credit as half the volume served. Additionally, tomato puree and tomato paste credit as if they were reconstituted, instead of as volume served.

1. Is it appropriate to continue to credit foods based on the volume or weight served, with the few exceptions discussed above? Why or why not?

2. What are the benefits and negative impacts of having different crediting values for different forms of vegetables and fruits?

- *Overall nutrient profile.* Foods in each component are based on a range of nutrients instead of an individual food's nutrient profile. For example, foods in the meats/meat alternates component are grouped based on a collection of nutrients that include protein, B vitamins, selenium, choline, phosphorus, zinc, copper, and vitamins D and E. Generally, FNS has not considered fortification in the creditability of foods.

3. Should fortification play a role in determining if and how a food is credited in the Child Nutrition Programs? Why or why not?

4. Is the presence of certain nutrients more important than other nutrients when determining if and how a food credits in the Child Nutrition Programs? Why or why not?

- *Federal standards of identity and industry standards of production.* Many creditable food products in the Child Nutrition Programs have Federal standards of identity or industry standards for production. Standards of identity assist FNS in crediting because they ensure food products with the same name have the same characteristics and, therefore, make a consistent contribution to the meal patterns.

5. If a food product does not have a Federal standard of identity or industry standards for production, how could these food products credit in the Child Nutrition Programs? Please be as specific as possible.

- *Customary use of the food product.* Some foods are generally consumed as snacks and, therefore, have not been considered appropriate for service in the Child Nutrition Programs. In other cases, the volume of food required to meet the minimum serving size would be unreasonably large. In other cases, such products do credit. For example, tortillas and tortilla products, such as taco shells, may credit as a grain item in the Child Nutrition Programs because in certain cultures they are served as the grain component of a meal. (Please see below for more information about snack-type foods.)

6. Is it appropriate to continue to consider the customary use of a product when determining how a food credits in the Child Nutrition Programs? Why or why not?

- *The role of the Child Nutrition Program in teaching children healthy eating habits.* Meals and snacks served in the Child Nutrition Programs act as a teaching tool for children by visually demonstrating how to build a healthy, balanced meal with the key food groups and amounts recommended by the Dietary Guidelines. For example, although pasta made from lentils has a standard of identity and may be used in all Child Nutrition Programs, in order for the pasta to credit as a vegetable, it must be served with another vegetable, such as broccoli or tomato sauce, to help children recognize the vegetable component. Likewise, lentil pasta can credit as a meat alternate if it is served with another meat/meat alternate, such as chicken or black beans.

7. What role should such educational considerations play in determining the creditability of a food in the Child Nutrition Programs?

8. Are there other factors FNS should consider in determining how foods credit in the Child Nutrition Programs? Why or why not?

9. Are there additional ways FNS can make the crediting process more simple, fair, or transparent? Please be as specific as possible.

Foods From the Meat/Meat Alternate Component

Shelf-stable, Dried or Semi-dried Meat, Poultry, and Seafood Snacks, and Surimi: Currently, shelf stable, dried and semi-dried meat, poultry, and seafood products, such as beef jerky or summer sausage, (collectively referred to as dried meat/poultry/seafood snacks) currently do not credit towards the Child Nutrition Programs' meal patterns. These foods have a Federal standard of identity that varies widely, there is a wide variety of industry standards for production, and they are typically seen as snack-type foods. However, FNS understands these products may be appealing to some Child Nutrition Program operators because dried meat/poultry/seafood snacks are shelf stable, work well with alternative meal delivery methods, such as breakfast in the classroom and lunches for field trips, and provide more choices to menu planners and children. Similarly, surimi, which is whitefish that is processed to resemble more expensive seafood and labeled as "imitation," such as imitation crab, does not credit towards the Child Nutrition Programs' meal patterns. Surimi lacks

an FDA standard of identity and there is a wide variety of industry standards for production. Additionally, foods labeled as "imitation" may have significantly different nutrition profiles than the foods they are meant to replace. To assist reviewers in adequately compiling public feedback, please provide separate comments on dried meat/poultry/seafood snacks, and imitation crab.

10. Are Child Nutrition Program operators currently offering any of these foods as an extra item that does not contribute to the Child Nutrition Programs' meal patterns? If so, which ones?

10a. If yes, how are they being served (e.g., as an extra component at snack) and how often?

11. Should FNS allow any of these foods to contribute to the Child Nutrition Programs' meal patterns? Why or why not?

12. If any of these foods are allowed to contribute to the Child Nutrition Programs' meal patterns, how should they be credited? Be as specific as possible, such as the volume or weight needed, or a specific nutrient content.

12a. Is there an ingredient or processing method that would qualify or disqualify these products?

13. If any of these foods are allowed to contribute to the Child Nutrition Programs' meal patterns, would Child Nutrition Program operators incorporate these foods into menus to meet the meats/meat alternates requirement? Why or why not?

13a. If yes, how would they be served (e.g., at snack, as part of a reimbursable lunch)?

14. If any of these foods are allowed to contribute to the Child Nutrition Programs' meal patterns, how would this impact the Child Nutrition Programs, including its participants and operators? What are the potential benefits and negative impacts?

Yogurt: Yogurt may be used to meet all or part of the meats/meat alternates component. It may be plain or flavored, unsweetened or sweetened, traditional (non-strained or non-thickened) or Greek or Greek-style (high protein, strained or thickened). Four ounces (weight) or ½ cup (volume) of traditional or high protein yogurt is credited as one ounce equivalent of meat alternate. This crediting was based on public comment (62 FR 10187, April 1997) and acknowledges the relatively low levels of iron and niacin in yogurt compared to other foods from the meats/meat alternates component. Since then, high protein yogurt has increased in popularity and availability. As such, FNS was asked to consider whether it

would be beneficial to allow a lesser volume of high protein yogurt to credit toward the meat/meat alternate component compared to traditional yogurt. The rationale for this request was that high protein yogurt contains a higher level of protein per ounce versus traditional yogurt. Currently, crediting has not been based on an individual food's nutrient profile, or any one nutrient. That is, the contribution of a food towards the meat/meat alternate requirement is not based solely on the grams of protein. For example, different varieties of meat (e.g., lean beef versus turkey) are not evaluated separately based on their protein content.

15. Are Child Nutrition Program operators currently offering high protein yogurt as part of a reimbursable meal?

16. Should FNS create a separate crediting standard for high protein yogurt that is different than the crediting standard for traditional yogurt for the Child Nutrition Programs? Why or why not?

17. If high protein yogurt is allowed to contribute differently to the Child Nutrition Programs' meal patterns than traditional yogurt, how should high protein yogurt be credited? Be as specific as possible, such as the volume or weight needed.

17a. Is there an ingredient or processing method that could qualify or disqualify a particular yogurt from crediting in the Child Nutrition Programs (e.g., a particular thickening agent could disqualify a high protein yogurt)?

18. If high protein yogurt is allowed to contribute differently to the Child Nutrition Programs' meal patterns than traditional yogurt, would Child Nutrition Program operators take advantage of using it to meet the meats/meat alternates requirement? Why or why not?

18a. If yes, how would Child Nutrition Program operators serve it (e.g., at snack, as part of a reimbursable lunch)?

19. If high protein yogurt is allowed to contribute differently to the Child Nutrition Programs' meal patterns than traditional yogurt, how would this impact the Child Nutrition Programs, including its participants and operators, as well as food manufacturers? What are the potential benefits and negative impacts?

Other Foods Not Currently Creditable

In the past, FNS has chosen not to credit a small number of other foods in the Child Nutrition Programs because these foods do not meet the requirement for any food component in the Child Nutrition Programs' meal patterns. For

various reasons this has occurred, including being considered snack-type foods, lacking a standard of identity, or because the volume of food required to meet the minimum serving size would be unreasonably large. For example, foods such as popcorn, vegetable chips (does not include chips made from grain such as tortilla chips), bacon, and tempeh are currently not creditable for the aforementioned reasons. A list of various foods that do not currently credit in the Child Nutrition Programs is available in FNS' *Food Buying Guide for Child Nutrition Programs* under "Other Foods" (see <https://fns.usda.gov/sites/default/files/tn/fbg-section5-other.pdf>). Comments on any foods currently not creditable in the Child Nutrition Programs are welcome, using the following questions as a guide.

20. Are Child Nutrition Program operators currently offering any of these foods as an extra item that does not contribute to the Child Nutrition Programs' meal patterns? If so, which ones?

21. Should FNS allow any of these foods to contribute to the Child Nutrition Programs' meal patterns? Why or why not? If so, which ones?

22. If any of these foods are allowed to contribute to the Child Nutrition Programs' meal patterns, how should they be credited? Be as specific as possible, such as the volume or weight needed, or a specific nutrient content.

22a. Is there an ingredient, processing method, or nutrient standard (e.g., sodium content) that should qualify or disqualify any of these foods?

23. If any of these foods are allowed to contribute to the Child Nutrition Programs' meal patterns, would Child Nutrition Program operators incorporate them into menus to meet the Child Nutrition Programs' meal patterns? Why or why not?

23a. If yes, how would they be served (e.g., as part of a reimbursable snack)?

24. If any of these foods are allowed to contribute to the Child Nutrition Programs' meal patterns, how would this impact the Child Nutrition Programs, including its participants and operators, as well as food manufacturers? What are the potential benefits and negative impacts?

25. Are there additional products not mentioned in this request for information that are currently not creditable, but you would wish to provide comments on? Please be as specific as possible.

FNS appreciates your thoughtful and responsive comments. FNS welcomes comments from all interested stakeholders and will consider all of them carefully. Your comments are

essential to enabling FNS to provide first rate customer service to those we serve.

Dated: December 7, 2017.

Brandon Lipps,

Administrator, Food and Nutrition Service.

[FR Doc. 2017-26979 Filed 12-13-17; 8:45 am]

BILLING CODE 3410-30-P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B-77-2017]

Foreign-Trade Zone (FTZ) 158— Jackson, Mississippi; Notification of Proposed Production Activity; Traxys Cometals Processing, Inc. (Manganese and Aluminum Alloying Agents); Burnsville, Mississippi

Traxys Cometals Processing, Inc. (Traxys Cometals), submitted a notification of proposed production activity to the FTZ Board for its facility in Burnsville, Mississippi. The notification conforming to the requirements of the regulations of the FTZ Board (15 CFR 400.22) was received on November 27, 2017.

The applicant indicates that it will be submitting a separate application for FTZ designation at the Traxys Cometals facility under FTZ 158. The facility will be used to produce high-grade manganese and aluminum alloying agents to be supplied to steel and aluminum production plants. Pursuant to 15 CFR 400.14(b), FTZ activity would be limited to the specific foreign-status materials and components and specific finished products described in the submitted notification (as described below) and subsequently authorized by the FTZ Board.

Production under FTZ procedures could exempt Traxys Cometals from customs duty payments on the foreign-status components used in export production. On its domestic sales, for the foreign-status materials/components noted below, Traxys Cometals would be able to choose the duty rates during customs entry procedures that apply to carbon-free manganese briquettes, low-carbon manganese briquettes, manganese powder, MnAl (manganese/aluminum) briquettes, and CrAl (chromium/aluminum) briquettes (duty rate ranges from 1.4% to 14%). Traxys Cometals would be able to avoid duty on foreign-status components which become scrap/waste. Customs duties also could possibly be deferred or reduced on foreign-status production equipment.

The components and materials sourced from abroad include electrolytic manganese flakes, chromium powder, and chromium waste (duty rate ranges from duty-free to 14%).

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 January 23, 2018.

A copy of the notification will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 21013, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230-0002, and in the "Reading Room" section of the Board's website, which is accessible via www.trade.gov/ftz.

For further information, contact Christopher Wedderburn at Chris.Wedderburn@trade.gov or (202) 482-1963.

Dated: December 11, 2017.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2017-26970 Filed 12-13-17; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XF884

Pacific Fishery Management Council; Public Meeting (Webinar)

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

ACTION: Notice of public meeting (webinar).

SUMMARY: The Pacific Fishery Management Council's (Pacific Council) will host the Area 2A Pacific Halibut Managers Coordination Meeting via webinar. The meeting is open to the public.

DATES: The webinar meeting will be held on Wednesday, January 3, 2018, from 10 a.m. until business for the day has been completed.

ADDRESSES: The meeting will be held via webinar. A public listening station is available at the Pacific Council office (address below). To attend the webinar (1) join the meeting by visiting this link <https://www.gotomeeting.com/webinar> and selecting 'join a webinar' in the upper right corner (2) enter the Webinar ID: 793-330-227, and (3) enter your name and email address (required).

After logging in to the webinar, please (1) dial this TOLL number 1 (213) 929-4232 (not a toll-free number), (2) enter the attendee phone audio access code 676-925-992, and (3) then enter your audio phone pin (shown after joining the webinar). NOTE: We have disabled Mic/Speakers as an option and require all participants to use a telephone or cell phone to participate. Technical Information and system requirements: PC-based attendees are required to use Windows® 7, Vista, or XP; Mac®-based attendees are required to use Mac OS® X 10.5 or newer; Mobile attendees are required to use iPhone®, iPad®, Android™ phone or Android tablet (See <https://www.gotomeeting.com/meeting/ipad-iphone-android-apps>). You may send an email to Mr. Kris Kleinschmidt at Kris.Kleinschmidt@noaa.gov or contact him at (503) 820-2280, extension 411 for technical assistance. A public listening station will also be available at the Pacific Council office.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220.

FOR FURTHER INFORMATION CONTACT: Ms. Robin Ehlke, Pacific Council; telephone: (503) 820-2410.

SUPPLEMENTARY INFORMATION: The primary purpose of the Area 2A Pacific halibut manager's meeting is to prepare and develop recommendations for the January 22-26, 2018, International Pacific Halibut Commission's (IPHC) annual meeting in Portland, Oregon. Recommendations generated from the meeting will be communicated to the IPHC by the Pacific Council's representative, Mr. Phil Anderson. Attendees may also address other topics relating to Pacific halibut management. No management actions will be decided by the attendees. The meeting will be open to the public, and the agenda, which will be posted on the PFMC website prior to the meeting, will provide for a public comment period.

Although non-emergency issues not contained in the meeting agenda may be discussed, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this document and any issues arising after publication of this document 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 physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt (503) 820-2411 at least 10 business days prior to the meeting date.

Dated: December 11, 2017.

Jeffrey N. Lonergan,

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

[FR Doc. 2017-26975 Filed 12-13-17; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF DEFENSE

Office of the Secretary

Vietnam War Commemoration Advisory Committee; Notice of Federal Advisory Committee Meeting

AGENCY: Deputy Chief Management Officer, Department of Defense.

ACTION: Notice of Federal Advisory Committee meeting.

SUMMARY: The Department of Defense (DoD) is publishing this notice to announce that the following Federal Advisory Committee meeting of the Vietnam War Commemoration Advisory Committee will take place.

DATES: Thursday, February 8, 2018, from 8:30 a.m. to 4:00 p.m.

ADDRESSES: 241 18th Street South, Room 101, Arlington, VA 22202.

FOR FURTHER INFORMATION CONTACT: Mrs. Marcia L. Moore, 703-571-2005 (Voice), 703-692-4691 (Facsimile), marcia.l.moore12.civ@mail.mil (Email). Mailing address is DoD Vietnam War Commemoration Program Office, 241 18th Street South, Suite 101, Arlington, VA 22202. Website: <http://www.vietnamwar50th.com>. The most up-to-date changes to the meeting agenda can be found on the website.

SUPPLEMENTARY INFORMATION: This meeting is being held under the provisions of the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102-3.140 and 102-3.150.

Pursuant to 5 U.S.C. 552b and 41 CFR 102-3.140 through 102-3.165, and the availability of space, this meeting is open to the public. All members of the public who wish to attend the public meeting must contact Mrs. Marcia Moore or Mr. Mark Franklin at the number listed in the **FOR FURTHER INFORMATION CONTACT** section by February 1, 2018.

Purpose of the Meeting: The Committee will convene and receive briefings on current activities, accomplishments to-date, the Strategic Plan for the Vietnam War 50th Commemoration's 2018-2025, and activities and plans influenced by the Committee's recommendations.

Agenda: The Committee will convene at 8:30 a.m. to 4:00 p.m. on February 8, 2018. The morning briefings will cover current activities and accomplishments to date for the Commemoration of the Vietnam War. The afternoon agenda will be a review of the Strategic Plan for the Vietnam War 50th Commemoration's 2018-2025 and activities and plans influenced by the Committee's recommendations.

Meeting Accessibility: Special Accommodations: Individuals requiring special accommodations to access the public meeting should contact Mrs. Marcia Moore or Mr. Mark Franklin at the number listed in the **FOR FURTHER INFORMATION CONTACT** section by February 1, 2018 so that appropriate arrangements can be made.

Written Statements: Pursuant to 41 CFR 102-3.105(j) and 102-3.140, and section 10(a)(3) of the Federal Advisory Committee Act of 1972, the public or interested organizations may submit written comments to the Committee about its mission and topics pertaining to this public meeting. Written comments should be received by the DFO by February 1, 2018. Written comments should be submitted via email to the address for the DFO given in the **FOR FURTHER INFORMATION CONTACT** section in either Adobe Acrobat or Microsoft Word format. Please note that since the Committee operates under the provisions of the Federal Advisory Committee Act, as amended, all submitted comments and public presentations will be treated as public documents and will be made available for public inspection, including, but not limited to, being posted on the Committee's website.

Dated: December 8, 2017.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2017-26921 Filed 12-13-17; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE**Office of the Secretary****[Docket ID: DOD–2013–OS–0161]****Submission for OMB Review;
Comment Request****AGENCY:** Defense Finance and Accounting Service (DFAS), Department of Defense.**ACTION:** 30-day information collection notice.**SUMMARY:** The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act.**DATES:** Consideration will be given to all comments received by January 16, 2018.**ADDRESSES:** Comments and recommendations on the proposed information collection should be emailed to Ms. Jasmeet Seehra, DoD Desk Officer, at *Oira_submission@omb.eop.gov*. Please identify the proposed information collection by DoD Desk Officer and the Docket ID number and title of the information collection.**FOR FURTHER INFORMATION CONTACT:** Fred Licari, 571–372–0493.**SUPPLEMENTARY INFORMATION:***Title, Associated Form and OMB Number:* Claim Certification and Voucher for Death Gratuity Payment; DD Form 397; OMB Control Number 0730–0017.*Type of Request:* Reinstatement, without change, of a previously approved collection for which approval has expired.*Number of Respondents:* 500.*Responses per Respondent:* 1.*Annual Responses:* 500.*Average Burden per Response:* 30 minutes.*Annual Burden Hours:* 250.*Needs and Uses:* The information collection requirement allows the government to collect the signatures and information needed to pay a death gratuity. Pursuant to 10 U.S.C. 1475–1480, a designated beneficiary(ies) or next-of-kin can receive a death gratuity payment for a deceased service member. This form serves as a record of the disbursement. The DoD Financial Management Regulation (FMR), Volume 7 A, Chapter 36, defines the eligible beneficiaries and procedures for payment. To provide internal controls for this benefit, and to comply with the above-cited statutes, the information requested is needed to substantiate the receipt of the benefit.*Affected Public:* Individuals or Households.*Frequency:* On occasion.*Respondent's Obligation:* Voluntary.*OMB Desk Officer:* Ms. Jasmeet Seehra.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, Docket ID number and title 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.*DOD Clearance Officer:* Mr. Frederick Licari.

Written requests for copies of the information collection proposal should be sent to Mr. Licari at WHS/ESD Directives Division, 4800 Mark Center Drive, East Tower, Suite 03F09, Alexandria, VA 22350–3100.

Dated: December 11, 2017.

Aaron Siegel,*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 2017–26958 Filed 12–13–17; 8:45 am]

BILLING CODE 5001–06–P**DEPARTMENT OF EDUCATION****[Docket No.: ED–2017–ICCD–0156]****Agency Information Collection Activities; Comment Request; Teacher Cancellation Low Income Directory****AGENCY:** Federal Student Aid (FSA), Department of Education (ED).**ACTION:** Notice.**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, ED is proposing an extension of an existing information collection.**DATES:** Interested persons are invited to submit comments on or before February 12, 2018.**ADDRESSES:** To access and review all the documents related to the information collection listed in this notice, please use <http://www.regulations.gov> by searching the Docket ID number ED–2017–ICCD–0156. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at <http://www.regulations.gov> by selecting the Docket ID number or via postal mail,commercial delivery, or hand delivery. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW, LBJ, Room 216–34, Washington, DC 20202–4537.**FOR FURTHER INFORMATION CONTACT:** For specific questions related to collection activities, please contact Tammy Gay, 816–804–0848.**SUPPLEMENTARY INFORMATION:** The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department 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.*Title of Collection:* Teacher Cancellation Low Income Directory.*OMB Control Number:* 1845–0077.*Type of Review:* An extension of an existing information collection.*Respondents/Affected Public:* State, Local, and Tribal Governments.*Total Estimated Number of Annual Responses:* 57.*Total Estimated Number of Annual Burden Hours:* 6,840.*Abstract:* The Higher Education Act of 1965, as amended, (HEA) allows for up to a one hundred percent cancellation of a Federal Perkins Loan and loan forgiveness of a Federal Family

Education Loan and Direct Loan program loan if the graduate teaches full-time in an elementary or secondary school serving low-income students.

The data collected for the development of the Teacher Cancellation Low Income Directory provides web-based access to a list of all elementary and secondary schools, and educational service agencies that serve a total enrollment of more than 30 percent low income students (as defined under Title I, Part A of the Elementary and Secondary Education Act of 1965, as amended). The Directory allows post-secondary institutions to determine whether or not a teacher, who received a Federal Perkins Loan, Direct Loan, or Federal Family Education Loan at their school, is eligible to receive loan cancellation or forgiveness or that a teacher who received a TEACH Grant is meeting the service obligation.

Dated: December 11, 2017.

Kate Mullan,

Acting Director, Information Collection Clearance Division, Office of the Chief Privacy Officer, Office of Management.

[FR Doc. 2017-26957 Filed 12-13-17; 8:45 am]

BILLING CODE 4000-01-P

DEPARTMENT OF EDUCATION

[Docket No.: ED-2017-ICCD-0154]

Agency Information Collection Activities; Comment Request; Work Colleges Expenditure Report

AGENCY: Federal Student Aid (FSA), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing a new information collection.

DATES: Interested persons are invited to submit comments on or before February 12, 2018.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use <http://www.regulations.gov> by searching the Docket ID number ED-2017-ICCD-0154. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at <http://www.regulations.gov> by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the

Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW, LBJ, Room 216-34, Washington, DC 20202-4537.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Tammy Gay, 816-804-0848.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department 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.

Title of Collection: Work Colleges Expenditure Report.

OMB Control Number: 1845-NEW.

Type of Review: A new information collection.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 10.

Total Estimated Number of Annual Burden Hours: 20.

Abstract: The Higher Education Opportunity Act, Public Law 110-315 includes provisions for the Higher Education Act of 1965, as amended, in section 448 that promotes the use of comprehensive work-learning-service programs as a valuable education approach when it is an integral part of the institution's education program and a part of a financial plan which decreases reliance on grants and loans. Work Colleges participants are required to report expenditure of funds annually.

The data collected in this report is used by the Department to monitor program effectiveness and accountability of fund expenditures. The data is used in conjunction with institutional program reviews to assess the administrative capability and compliance of the applicant. There are no other resources for collecting this data.

Dated: December 11, 2017.

Kate Mullan,

Acting Director, Information Collection Clearance Division, Office of the Chief Privacy Officer, Office of Management.

[FR Doc. 2017-26955 Filed 12-13-17; 8:45 am]

BILLING CODE 4000-01-P

DEPARTMENT OF EDUCATION

[Docket No.: ED-2017-ICCD-0155]

Agency Information Collection Activities; Comment Request; Work Colleges Application and Agreement

AGENCY: Federal Student Aid (FSA), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing a new information collection. **DATES:** Interested persons are invited to submit comments on or before February 12, 2018.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use <http://www.regulations.gov> by searching the Docket ID number ED-2017-ICCD-0155. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at <http://www.regulations.gov> by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW, LBJ, Room 216-34, Washington, DC 20202-4537. **FOR FURTHER INFORMATION CONTACT:** For specific questions related to collection activities, please contact Tammy Gay, 816-804-0848.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an

opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department 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.

Title of Collection: Work Colleges Application and Agreement.

OMB Control Number: 1845—NEW.

Type of Review: A new information collection.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 10.

Total Estimated Number of Annual Burden Hours: 20.

Abstract: The Higher Education Opportunity Act, Public Law 110–315 includes provisions for the Higher

Education Act of 1965, as amended, in section 448 that promotes the use of comprehensive work-learning-service programs as a valuable education approach when it is an integral part of the institution's education program and a part of a financial plan which decreases reliance on grants and loans. The Work Colleges Application and Agreement form is the tool for an institution to apply for participation in this program. The data will be used by the Department to assess an institution's preparedness to participate in this program and as a signed agreement to comply with all requirements for participating in the program. The data is used in conjunction with institutional program reviews to assess the administrative capability and compliance of the applicant.

Dated: December 11, 2017.

Kate Mullan,

Acting Director, Information Collection Clearance Division, Office of the Chief Privacy Officer, Office of Management.

[FR Doc. 2017–26956 Filed 12–13–17; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CD18–3–000]

City of Fitchburg, Massachusetts; Notice of Preliminary Determination of a Qualifying Conduit Hydropower Facility and Soliciting Comments and Motions To Intervene

On December 1, 2017, the City of Fitchburg, Massachusetts, filed a notice

of intent to construct a qualifying conduit hydropower facility, pursuant to section 30 of the Federal Power Act (FPA), as amended by section 4 of the Hydropower Regulatory Efficiency Act of 2013 (HREA). The proposed Narrows Road Pressure Reduction Valve (PRV) Station Project would have an installed capacity of up to 10 kilowatts (kW), and would be located along an existing municipal water supply line within the Narrows Road PRV station near the City of Fitchburg, Worcester County, Massachusetts.

Applicant Contact: Weston & Sampson Engineers, Inc., 100 International Drive, Suite 152, Portsmouth, NH 03801, Phone No. (603) 431–3937.

FERC Contact: Christopher Chaney, Phone No. (202) 502–6778, email: Christopher.Chaney@ferc.gov.

Qualifying Conduit Hydropower Facility Description: The proposed project would consist of: (1) One pump as turbine unit with a nameplate capacity of 10 kW located within the existing Narrows Road PRV station; and (2) appurtenant facilities. The proposed project would have an estimated annual generating capacity of about 65,000 kilowatt-hours.

A qualifying conduit hydropower facility is one that is determined or deemed to meet all of the criteria shown in the table below.

TABLE 1—CRITERIA FOR QUALIFYING CONDUIT HYDROPOWER FACILITY

Statutory provision	Description	Satisfies (Y/N)
FPA 30(a)(3)(A), as amended by HREA ..	The conduit the facility uses is a tunnel, canal, pipeline, aqueduct, flume, ditch, or similar manmade water conveyance that is operated for the distribution of water for agricultural, municipal, or industrial consumption and not primarily for the generation of electricity.	Y
FPA 30(a)(3)(C)(i), as amended by HREA	The facility is constructed, operated, or maintained for the generation of electric power and uses for such generation only the hydroelectric potential of a non-federally owned conduit.	Y
FPA 30(a)(3)(C)(ii), as amended by HREA.	The facility has an installed capacity that does not exceed 5 megawatts	Y
FPA 30(a)(3)(C)(iii), as amended by HREA.	On or before August 9, 2013, the facility is not licensed, or exempted from the licensing requirements of Part I of the FPA.	Y

Preliminary Determination: The proposed addition of the hydroelectric project along the existing municipal water supply line will not alter its primary purpose. Therefore, based upon the above information and criteria,

Commission staff preliminarily determines that the proposal satisfies the requirements for a qualifying conduit hydropower facility, which is not required to be licensed or exempted from licensing.

Comments and Motions to Intervene: Deadline for filing comments contesting whether the facility meets the qualifying criteria is 45 days from the issuance date of this notice.

Deadline for filing motions to intervene is 30 days from the issuance date of this notice.

Anyone may submit comments or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210 and 385.214. Any motions to intervene must be received on or before the specified deadline date for the particular proceeding.

Filing and Service of Responsive Documents: All filings must (1) bear in all capital letters the COMMENTS CONTESTING QUALIFICATION FOR A CONDUIT HYDROPOWER FACILITY” or “MOTION TO INTERVENE, as applicable; (2) state in the heading the name of the applicant and the project number of the application to which the filing responds; (3) state the name, address, and telephone number of the person filing; and (4) otherwise comply with the requirements of sections 385.2001 through 385.2005 of the Commission’s regulations.¹ All comments contesting Commission staff’s preliminary determination that the facility meets the qualifying criteria must set forth their evidentiary basis.

The Commission strongly encourages electronic filing. Please file motions to intervene and comments using the Commission’s eFiling system at <http://www.ferc.gov/docs-filing/efiling.asp>. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at <http://www.ferc.gov/docs-filing/ecomment.asp>. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at FERCOnlineSupport@ferc.gov, (866) 208-3676 (toll free), or (202) 502-8659 (TTY). In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. 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.

Locations of Notice of Intent: Copies of the notice of intent can be obtained directly from the applicant or such copies can be viewed and reproduced at the Commission in its Public Reference Room, Room 2A, 888 First Street NE, Washington, DC 20426. The filing may also be viewed on the web at <http://www.ferc.gov/docs-filing/elibrary.asp> using the “eLibrary” link. Enter the docket number (*i.e.*, CD18-3) in the

docket number field to access the document. For assistance, call toll-free 1-866-208-3676 or email FERCOnlineSupport@ferc.gov. For TTY, call (202) 502-8659.

Dated: December 7, 2017.

Kimberly D. Bose,
Secretary.

[FR Doc. 2017-26924 Filed 12-13-17; 8:45 am]

BILLING CODE 6717-01-P

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: RP18-242-000.

Applicants: Southern Natural Gas Company, L.L.C.

Description: Compliance filing Abandon Rate Schedule X-72 Compliance Filing CP18-2-000 to be effective 1/1/2018.

Filed Date: 12/6/17.

Accession Number: 20171206-5003.

Comments Due: 5 p.m. ET 12/18/17.

Docket Numbers: RP18-243-000.

Applicants: Blue Lake Gas Storage Company.

Description: Compliance filing Settlement Compliance Filing RP17-898-000 to be effective 12/1/2017.

Filed Date: 12/6/17.

Accession Number: 20171206-5042.

Comments Due: 5 p.m. ET 12/18/17.

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: December 7, 2017.

Kimberly D. Bose,
Secretary.

[FR Doc. 2017-26926 Filed 12-13-17; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER18-391-000]

EnPowered; 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 of EnPowered’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 December 27, 2017.

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

¹ 18 CFR 385.2001-2005 (2017).

Public Reference Room in Washington, DC. There is an eSubscription link on the website 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: December 7, 2017.

Kimberly D. Bose,
Secretary.

[FR Doc. 2017-26928 Filed 12-13-17; 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: EC18-28-000.

Applicants: American Transmission Company LLC, Wisconsin Power and Light Company.

Description: Application for Authority to Acquire Transmission Facilities under Section 203 of the FPA of American Transmission Company LLC, et al.

Filed Date: 12/6/17.

Accession Number: 20171206-5135.

Comments Due: 5 p.m. ET 12/27/17.

Docket Numbers: EC18-29-000.

Applicants: Big Savage, LLC, Big Sky Wind, LLC, EverPower Commercial Services LLC, Highland North LLC, Howard Wind LLC, Krayn Wind LLC, Mustang Hills, LLC, Patton Wind Farm, LLC.

Description: Application Under FPA Section 203 of Big Savage, LLC et al.

Filed Date: 12/6/17.

Accession Number: 20171206-5143.

Comments Due: 5 p.m. ET 12/27/17.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER12-524-001.

Applicants: Longview Power, LLC.

Description: Compliance filing: Informational Filing Regarding Upstream Change in Control and Request for Waiver to be effective N/A.

Filed Date: 12/6/17.

Accession Number: 20171206-5094.

Comments Due: 5 p.m. ET 12/27/17.

Docket Numbers: ER17-1916-001.

Applicants: Southern Maryland Electric Cooperative, PJM Interconnection, L.L.C.

Description: Compliance filing: SMECO submits compliance filing to

replace the placeholder effective date to be effective N/A.

Filed Date: 12/7/17.

Accession Number: 20171207-5068.

Comments Due: 5 p.m. ET 12/28/17.

Docket Numbers: ER17-2291-001.

Applicants: PJM Interconnection, L.L.C.

Description: Tariff Amendment: PJM submits Response to Deficiency Letter re Pseudo-Tie PJM Tariff Revisions to be effective 11/9/2017.

Filed Date: 12/7/17.

Accession Number: 20171207-5082.

Comments Due: 5 p.m. ET 12/28/17.

Docket Numbers: ER18-390-000.

Applicants: AES Ohio Generation, LLC.

Description: Compliance filing: AES Reactive Power Compliance Filing [EC17-117-000] to be effective 12/31/9998.

Filed Date: 12/5/17.

Accession Number: 20171205-5120.

Comments Due: 5 p.m. ET 12/19/17.

Docket Numbers: ER18-400-000.

Applicants: Tucson Electric Power Company.

Description: § 205(d) Rate Filing: Engineering and Design Agreement, Rate Schedule No. 338 to be effective 12/8/2017.

Filed Date: 12/7/17.

Accession Number: 20171207-5054.

Comments Due: 5 p.m. ET 12/28/17.

Docket Numbers: ER18-401-000.

Applicants: Southwestern Public Service Company.

Description: § 205(d) Rate Filing: SPS-RBEC-GSEC-IA-TXNW-699-0.0.0 to be effective 12/8/2017.

Filed Date: 12/7/17.

Accession Number: 20171207-5061.

Comments Due: 5 p.m. ET 12/28/17.

Docket Numbers: ER18-402-000.

Applicants: Virginia Electric and Power Company, PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: VEPCO submits WDSAs, Service Agreement Nos. 4852, 4853, 4854, and 4855 to be effective 11/11/2017.

Filed Date: 12/7/17.

Accession Number: 20171207-5066.

Comments Due: 5 p.m. ET 12/28/17.

Docket Numbers: ER18-403-000.

Applicants: Westar Energy, Inc.

Description: Tariff Cancellation: Notice of Cancellation of certain designated Rate Schedules to be effective 6/1/2015.

Filed Date: 12/7/17.

Accession Number: 20171207-5080.

Comments Due: 5 p.m. ET 12/28/17.

Docket Numbers: ER18-404-000.

Applicants: Baltimore Gas and Electric Company, PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: BGE submits revisions to Attachment H-2A re: Abandoned Plant and Land Costs to be effective 2/5/2018.

Filed Date: 12/7/17.

Accession Number: 20171207-5083.

Comments Due: 5 p.m. ET 12/28/17.

Docket Numbers: ER18-405-000.

Applicants: Carson Cogeneration Company LP.

Description: Tariff Cancellation: Cancellation of Market Based Rate Tariff to be effective 12/8/2017.

Filed Date: 12/7/17.

Accession Number: 20171207-5088.

Comments Due: 5 p.m. ET 12/28/17.

Docket Numbers: ER18-406-000.

Applicants: Brunner Island, LLC.

Description: § 205(d) Rate Filing: Revised Reactive Service Rate Schedule and Request for Waiver to be effective 12/31/9998.

Filed Date: 12/7/17.

Accession Number: 20171207-5094.

Comments Due: 5 p.m. ET 12/28/17.

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: December 7, 2017.

Kimberly D. Bose,
Secretary.

[FR Doc. 2017-26925 Filed 12-13-17; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. Ad18-6-000]

Notice of Availability of the Revised Engineering Guidelines for the Evaluation of Hydropower Projects: Chapter 11—Arch Dams and Request for Comments

The staff of the Office of Energy Projects (OEP) is revising Chapter 11—

Arch Dams of its *Engineering Guidelines for the Evaluation of Hydropower Projects*. The staff has revised Chapter 11—Arch Dams¹ and comments are now requested on the draft document from federal and state agencies, licensees whose infrastructure portfolio includes arch dams, independent consultants and inspectors, and other interested parties with special expertise with respect dam safety and arch dams. A 60-day public comment period is allotted to collect comments. Please note that this comment period will close on February 5, 2018.

Interested parties can help us determine the appropriate updates and improvements by providing: Meaningful comments or suggestions that focus on the specific sections requiring clarification; updates to reflect current laws and regulations; or improved measures for evaluating the safety of arch dams. The more specific your comments, the more useful they will be. A detailed explanation of your submissions and/or any references of scientific studies associated with your comments will greatly help us with this process. We will consider all timely comments on the revised *Guidelines* before issuing the final version.

For your convenience, there are three methods which you can use to submit your comments to the Commission. In all instances please reference the docket number (AD18–6–000) on the first page of your submission. The Commission strongly encourages electronic filing.

(1) You can file your comments electronically using the eComment feature on the Commission's website (www.ferc.gov) under the link to *Documents and Filings*. This is an easy method for interested persons to submit brief, text-only comments up to 6,000 characters. You must include your name and contact information at the end of your comments;

(2) You can file your comments electronically using the eFiling feature on the Commission's website (www.ferc.gov) under the link to *Documents and Filings*. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on eRegister. When selecting the filing type, select General, then chose Comment (on Filing, Environ. Report or Tech Conf); or

(3) In lieu of electronic filing, you can mail a paper copy of your comments to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426.

The OEP staff provided copies of revised Chapter 11—Arch Dams to federal and state agencies, licensees whose portfolio includes arch dams, independent consultants and inspectors, and other interested parties. In addition, all information related to the proposed updates to Chapter 11—Arch Dams and submitted comments can be found on the FERC website (www.ferc.gov) using the eLibrary link. Click on the eLibrary link, click on General Search and enter the docket number, excluding the last three digits in the Docket Number field (*i.e.*, AD18–6). Be sure you have selected an appropriate date range. The Commission also offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with electronic notification of these filings and direct links to the documents. Go to www.ferc.gov/docs-filing/esubscription.asp. Users must be registered in order to use eSubscription.

For assistance with filing or any of the Commission's online systems, please contact FERC Online Support at FercOnlineSupport@ferc.gov or toll free at (866) 208–3676, or for TTY, contact (202) 502–8258.

Dated: December 7, 2017.

Kimberly D. Bose,
Secretary.

[FR Doc. 2017–26927 Filed 12–13–17; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PF17–7–000]

Cimarron River Pipeline, LLC; Notice of Intent To Prepare an Environmental Assessment for the Planned Request for Comments on Environmental Issues

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental assessment (EA) that will discuss the environmental impacts of the Cimarron Expansion Project involving construction and operation of facilities by Cimarron River Pipeline, LLC (Cimarron) in Beaver and Texas

Counties, Oklahoma and Seward County, Kansas. The Commission will use this EA in its decision-making process to determine whether the Project is in the public convenience and necessity.

This notice announces the opening of the scoping process the Commission will use to gather input from the public and interested agencies on the Project. You can make a difference by providing us with your specific comments or concerns about the Project. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. Your input will help the Commission staff determine what issues they need to evaluate in the EA. To ensure that your comments are timely and properly recorded, please send your comments so that the Commission receives them in Washington, DC on or before January 8, 2018.

If you sent comments on this Project to the Commission before the opening of this docket on July 10, 2017, you will need to file those comments in Docket No. PF17–7–000 to ensure they are considered as part of this proceeding.

This notice is being sent to the Commission's current environmental mailing list for this Project. State and local government representatives should notify their constituents of this planned Project and encourage them to comment on their areas of concern.

If you are a landowner receiving this notice, a pipeline company representative may contact you about the acquisition of an easement to construct, operate, and maintain the planned facilities. The company would seek to negotiate a mutually acceptable agreement. However, if the Commission approves the Project, that approval conveys with it the right of eminent domain. Therefore, if easement negotiations fail to produce an agreement, the pipeline company could initiate condemnation proceedings where compensation would be determined in accordance with state law.

A fact sheet prepared by the FERC entitled "An Interstate Natural Gas Facility On My Land? What Do I Need To Know?" is available for viewing on the FERC website (www.ferc.gov). This fact sheet addresses a number of typically asked questions, including the use of eminent domain and how to participate in the Commission's proceedings.

Public Participation

For your convenience, there are three methods you can use to submit your

¹ The existing Chapter 11—Arch Dams is dated October 1999 and can be found on the Federal Energy Regulatory Commission's (Commission) website to use as a reference to see the changes made: <http://www.ferc.gov/industries/hydropower/safety/guidelines/eng-guide/chap11.pdf>.

comments to the Commission. The Commission encourages electronic filing of comments and has expert staff available to assist you at (202) 502-8258 or FercOnlineSupport@ferc.gov. Please carefully follow these instructions so that your comments are properly recorded.

(1) You can file your comments electronically using the *eComment* feature on the Commission's website (www.ferc.gov) under the link to *Documents and Filings*. This is an easy method for submitting brief, text-only comments on a project;

(2) You can file your comments electronically by using the *eFiling* feature on the Commission's website (www.ferc.gov) under the link to *Documents and Filings*. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on "eRegister." If you are filing a comment on a particular project, please select "Comment on a Filing" as the filing type; or

(3) You can file a paper copy of your comments by mailing them to the following address. Be sure to reference the Project docket number (PF17-7-000) with your submission:

Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426.

Summary of the Planned Project

Cimarron plans to construct, own, operate, and maintain the Project facilities to provide up to an aggregate of 631 million standard cubic feet of natural gas per day of additional firm natural gas transportation capacity in order to support the growing demand for liquids-rich natural gas transportation service in the region to ensure that gas is properly treated and processed before it is distributed for market use.

Cimarron plans to expand its pipeline system by constructing about 49.3 miles of new natural gas pipeline in Beaver County, Oklahoma and Seward County, Kansas and leasing approximately 19.1 miles of an existing, currently idle 26-inch-diameter pipeline in Texas and Beaver Counties, Oklahoma.

A total of 23 miles of the Project would consist of 20-inch-diameter pipeline extending north from a proposed tie-in facility located near Cimarron's existing Beaver Compressor Station in Beaver County. At a new tie-in with the leased pipeline in Beaver County, the 20-inch-diameter pipeline would change to 30-inch-diameter pipeline and continue north about 24.3

miles through Seward County, Kansas before reaching a new drip valve site. Two 30-inch-diameter pipelines would then extend for approximately 1.5 miles and 0.6 mile, respectively, to the National Helium Gas Processing Plant. The planned Project also includes two new receipt point facilities, one at the beginning of the leased pipeline in Texas County, Oklahoma and one along the 0.6-mile-long 30-inch-diameter pipeline between the new drip valve site and the National Helium Gas Processing Plant. The Project also includes the construction of five new pig launcher and/or receiver facilities¹ at the beginning and end of the new pipelines and at the end of the leased pipeline; three meter and regulator facilities; and four mainline valves.

The general location of the Project facilities is shown in appendix 1.²

Land Requirements for Construction

Construction of the planned facilities would disturb about 649.7 acres of land for the pipelines and aboveground facilities. Following construction, Cimarron would maintain about 339.2 acres for permanent operation of the Project facilities; the remaining acreage would be restored and revert to former uses. About 67 percent of the planned pipeline route is within or parallel to existing pipeline, utility, or road rights-of-way.

The EA Process

The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from an action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. NEPA also requires us³ to discover and address concerns the public may have about proposals. This process is referred to as scoping. The main goal of the scoping process is to focus the analysis in the EA on the important environmental issues. By this notice, the Commission requests public comments on the scope of the issues to address in the EA. We will consider all

¹ A "pig" is a tool that the pipeline company inserts into and pushes through the pipeline for cleaning the pipeline, conducting internal inspections, or other purposes.

² The appendices referenced in this notice will not appear in the *Federal Register*. Copies of the appendices were sent to all those receiving this notice in the mail and are available at www.ferc.gov using the link called "eLibrary" or from the Commission's Public Reference Room, 888 First Street NE, Washington, DC 20426, or call (202) 502-8371. For instructions on connecting to eLibrary, refer to page 6 of this notice.

³ We, us, and our refer to the environmental staff of the Commission's Office of Energy Projects.

filed comments during the preparation of the EA.

In the EA we will discuss impacts that could occur as a result of the construction and operation of the planned Project under these general headings:

- Geology and soils;
- land use;
- water resources, fisheries, and wetlands;
- cultural resources;
- vegetation and wildlife;
- air quality and noise;
- endangered and threatened species;
- public safety; and
- cumulative impacts.

We will also evaluate possible alternatives to the planned Project or portions of the Project, and make recommendations on how to lessen or avoid impacts on the various resource areas.

Although no formal application has been filed, we have already initiated our NEPA review under the Commission's pre-filing process. The purpose of the pre-filing process is to encourage early involvement of interested stakeholders and to identify and resolve issues before the FERC receives an application. As part of our pre-filing review, we have begun to contact some federal and state agencies to discuss their involvement in the scoping process and the preparation of the EA.

The EA will present our independent analysis of the issues. The EA will be available in the public record through eLibrary. Depending on the comments received during the scoping process, we may also publish and distribute the EA to the public for an allotted comment period. We will consider all comments on the EA before we make our recommendations to the Commission. To ensure we have the opportunity to consider and address your comments, please carefully follow the instructions in the Public Participation section, beginning on page 2.

With this notice, we are asking agencies with jurisdiction by law and/or special expertise with respect to the environmental issues related to this Project to formally cooperate with us in the preparation of the EA.⁴ Agencies that would like to request cooperating agency status should follow the instructions for filing comments provided under the Public Participation section of this notice.

⁴ The Council on Environmental Quality regulations addressing cooperating agency responsibilities are at Title 40, Code of Federal Regulations, Part 1501.6.

Consultations Under Section 106 of the National Historic Preservation Act

In accordance with the Advisory Council on Historic Preservation's implementing regulations for Section 106 of the National Historic Preservation Act, we are using this notice to initiate consultation with the applicable State Historic Preservation Office(s), and to solicit their views and those of other government agencies, interested Indian tribes, and the public on the Project's potential effects on historic properties.⁵ We will define the Project-specific Area of Potential Effects (APE) in consultation with the SHPO(s) as the Project develops. On natural gas facility projects, the APE at a minimum encompasses all areas subject to ground disturbance (examples include construction right-of-way, contractor/pipe storage yards, compressor stations, and access roads). Our EA for this Project will document our findings on the impacts on historic properties and summarize the status of consultations under Section 106.

Environmental Mailing List

The environmental mailing list includes federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American Tribes; other interested parties; and local libraries and newspapers. This list also includes all affected landowners (as defined in the Commission's regulations) who are potential right-of-way grantors, whose property may be used temporarily for Project purposes, or who own homes within certain distances of aboveground facilities, and anyone who submits comments on the Project. We will update the environmental mailing list as the analysis proceeds to ensure that we send the information related to this environmental review to all individuals, organizations, and government entities interested in and/or potentially affected by the planned Project.

If we publish and distribute the EA, copies will be sent to the environmental mailing list for public review and comment. If you would prefer to receive a paper copy of the document instead of the CD version or would like to remove your name from the mailing list, please return the attached Information Request (appendix 2).

⁵ The Advisory Council on Historic Preservation regulations are at Title 36, Code of Federal Regulations, Part 800. Those regulations define historic properties as any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register of Historic Places.

Becoming an Intervenor

Once Cimarron files its application with the Commission, you may want to become an "intervenor" which is an official party to the Commission's proceeding. Intervenors play a more formal role in the process and are able to file briefs, appear at hearings, and be heard by the courts if they choose to appeal the Commission's final ruling. An intervenor formally participates in the proceeding by filing a request to intervene. Motions to intervene are more fully described at <http://www.ferc.gov/resources/guides/how-to/intervene.asp>. Instructions for becoming an intervenor are in the "Document-less Intervention Guide" under the "e-filing" link on the Commission's website. Please note that the Commission will not accept requests for intervenor status at this time. You must wait until the Commission receives a formal application for the Project.

Additional Information

Additional information about the Project is available from the Commission's Office of External Affairs, at (866) 208-FERC, or on the FERC website (www.ferc.gov) using the eLibrary link. Click on the eLibrary link, click on "General Search" and enter the docket number, excluding the last three digits in the Docket Number field (*i.e.*, PF17-7). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at FercOnlineSupport@ferc.gov or toll free at (866) 208-3676, or for TTY, contact (202) 502-8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to www.ferc.gov/docs-filing/esubscription.asp.

Finally, public sessions or site visits will be posted on the Commission's calendar located at www.ferc.gov/EventCalendar/EventsList.aspx along with other related information.

Dated: December 7, 2017.

Kimberly D. Bose,
Secretary.

[FR Doc. 2017-26929 Filed 12-13-17; 8:45 am]

BILLING CODE 6717-01-P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060-1205]

Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act of 1995 (PRA), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written comments should be submitted on or before February 12, 2018. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contacts below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email: PRA@fcc.gov and to Cathy.Williams@fcc.gov.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418-2918.

SUPPLEMENTARY INFORMATION: As part of its continuing effort to reduce paperwork burdens, and as required by

the PRA, 44 U.S.C. 3501–3520, the FCC invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

OMB Control No.: 3060–1205.

Title: Section 74.802, Low Power Auxiliary Stations Co-channel Coordination with TV Broadcast Stations.

Form No.: Not Applicable.

Type of Review: Extension of a currently approved collection.

Respondents: Individuals and households; business or other for-profit entities; not-for-profit institutions; Federal government; and state, local or tribal government.

Number of Respondents and Responses: 400 respondents and 227 responses.

Estimated Time Per Response: 1.0 hour.

Frequency of Response: On occasion reporting requirement and third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this collection of information is contained in 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.

Total Annual Burden: 227 hours.

Total Annual Cost: \$56,750.00.

Privacy Act Impact Assessment: This information collection may affect individuals or households. However, the information collection consists of third-party disclosures in which the Commission has no direct involvement. Personally identifiable information (PII) is not being collected by, made available to, or made accessible by the Commission. There are no additional impacts under the Privacy Act.

Nature and Extent of Confidentiality: In general there is no need for confidentiality with this collection of information.

Needs and Uses: On June 2, 2014, the Commission released a Report and Order, FCC 14–50, GN Docket No. 12–268, “Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions.” This order adopted a revision to a Commission rule, 47 CFR 74.802(b), to permit low power auxiliary stations (LPAS), including wireless microphones, to operate in the bands allocated for TV broadcasting at revised distances from a co-channel television's contour, and provided LPAS operators to operate even closer to television stations proved that any such operations are coordinated with TV broadcast stations that could be affected by the LPAS operations.

The Commission seeks Office of Management and Budget (OMB) approval for an extension of the currently approved information collection for the coordination process adopted in the Commission's Report and Order, FCC 14–50 for such co-channel operations, in 47 CFR 74.802d(b)(2).

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2017–26945 Filed 12–13–17; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–1154]

Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act of 1995 (PRA), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize

the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written comments should be submitted on or before February 12, 2018. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contacts below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email: *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov*.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION: As part of its continuing effort to reduce paperwork burdens, and as required by the PRA, 44 U.S.C. 3501–3520, the FCC invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

OMB Control Number: 3060–1154.

Title: Commercial Advertisement Loudness Mitigation (“CALM”) Act; General Waiver Requests.

Form Number: Not applicable.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents and Responses: 20 respondents and 20 responses.

Frequency of Response: On occasion reporting requirement.

Estimated Time per Response: 20 hours.

Total Annual Burden: 400 hours.

Total Annual Cost: \$12,000.

Obligation to Respond: Required to obtain benefits. The statutory authority for this collection of information is contained in 47 U.S.C. 151, 152, 154(i), 303(r) and 621.

Nature and Extent of Confidentiality: There is no assurance of confidentiality provided to respondents, but, in accordance with the Commission's rules, 47 CFR 0.459, a station/MVPD may request confidential treatment for financial information supplied with its waiver request.

Privacy Impact Assessment: No impact(s).

Needs and Uses: TV stations and multiple video programming distributors (MVPDs) may file general waiver requests to request waiver of the rules implementing the CALM Act for good cause. The information obtained by general waiver requests will be used by Commission staff to evaluate whether grant of a waiver would be in the public interest.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2017-26941 Filed 12-13-17; 8:45 am]

BILLING CODE 6712-01-P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060-0264 and OMB 3060-0297]

Information Collections Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act of 1995 (PRA), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the

Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written comments should be submitted on or before February 12, 2018. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contacts below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email: PRA@fcc.gov and to Cathy.Williams@fcc.gov.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418-2918.

SUPPLEMENTARY INFORMATION: As part of its continuing effort to reduce paperwork burdens, and as required by the PRA, 44 U.S.C. 3501-3520, the FCC invites the general public and other Federal agencies to take this opportunity to comment on the following information collections.

Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

OMB Control Number: 3060-0264.

Title: Section 80.413, On-Board Station Equipment Records.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities, not-for-profit institutions, and state, local or tribal government.

Number of Respondents: 1,000 respondents; 1,000 responses.

Estimated Time per Response: 2 hours.

Frequency of Response: Recordkeeping requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. 154, 303, 307(e), 309 and 332 and 151-155 and sections 301-609 of the Communications Act of 1934, as amended.

Total Annual Burden: 2,000 hours.

Total Annual Cost: No cost.

Privacy Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: There is no need for confidentiality.

Needs and Uses: The Commission is seeking an extension of this expiring information collection in order to obtain the full three year approval from OMB. There is no change to the recordkeeping requirement.

The information collection requirements contained in Section 80.413 require the licensee of an on-board station to keep equipment records which show:

- (1) The ship name and identification of the on-board station;
- (2) The number of and type of repeater and mobile units used on-board the vessel; and
- (3) The date the type of equipment which is added or removed from the on-board station.

The information is used by FCC personnel during inspections and investigations to determine what mobile units and repeaters are associated with on-board stations aboard a particular vessel. If this information were not maintained, no means would be available to determine if this type of radio equipment is authorized or who is responsible for its operation. Enforcement and frequency management programs would be negatively affected if the information were not retained.

OMB Control Number: 3060-0297.

Title: Section 80.503, Cooperative Use of Facilities.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; Not-for-profit institutions; and State, Local, or Tribal Government.

Number of Respondents: 100 respondents; 100 responses.

Estimated Time per Response: 16 hours.

Frequency of Response: Occasion reporting requirement and Recordkeeping requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. Sections 151–155, 301–609 of the Communications Act of 1934, as amended; and 3 UST 3450, 3 UST 4726, 12 UST 2377.

Total Annual Burden: 1,600 hours.

Total Annual Cost: No cost.

Privacy Impact Assessment: No impact(s).

Needs and Uses: The information collection requirements contained in Section 80.503 require that a licensee of a private coast station or marine utility station on shore may install ship radio stations on board United States commercial transport vessels of other persons. In each case these persons must enter into a written agreement verifying that the ship station licensee has the sole right of control of the ship stations, that the vessel operators must use the ship stations subject to the orders and instructions of the coast station or marine utility station on shore, and that the ship station licensee will have sufficient control of the ship station to enable it to carry out its responsibilities under the ship station license. A copy of the contract/written agreement must be kept with the station records and made available for inspection by Commission representatives.

The information is used by FCC personnel during inspection and investigations to insure compliance with applicable rules. If this information was not available, enforcement efforts could be hindered; frequency congestion in certain bands could increase; and the financial viability of some public coast radiotelephone stations could be threatened.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2017–26944 Filed 12–13–17; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice of Termination of Receivership of 10485, Bank of Wausau, Wausau, Wisconsin

The Federal Deposit Insurance Corporation (FDIC or Receiver), as

Receiver for 10485, Bank of Wausau, Wausau, Wisconsin, has been authorized to take all actions necessary to terminate the Receivership Estate of Bank of Wausau (Receivership Estate); the Receiver has made all dividend distributions required by law.

The Receiver has further irrevocably authorized and appointed FDIC-Corporate as its attorney-in-fact to execute and file any and all documents that may be required to be executed by the Receiver which FDIC-Corporate, in its sole discretion, deems necessary, including but not limited to releases, discharges, satisfactions, endorsements, assignments, and deeds.

Effective December 1, 2017, the Receivership Estate has been terminated, the Receiver discharged, and the Receivership Estate has ceased to exist as a legal entity.

Dated: December 11, 2017.

Robert E. Feldman,

Executive Secretary, Federal Deposit Insurance Corporation.

[FR Doc. 2017–26980 Filed 12–13–17; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications

must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 8, 2018.

A. Federal Reserve Bank of St. Louis (David L. Hubbard, Senior Manager) P.O. Box 442, St. Louis, Missouri 63166–2034. Comments can also be sent electronically to

Comments.applications@stls.frb.org:

1. *MRV Financial Corp., Sainte Genevieve, Missouri;* to acquire at least 21.30 percent of the voting shares of Grok Bancshares, Inc., St. Louis, Missouri, and thereby indirectly acquire CBC Bank, Bowling Green, Missouri.

Board of Governors of the Federal Reserve System, December 8, 2017.

Ann E. Misback,

Secretary of the Board.

[FR Doc. 2017–26902 Filed 12–13–17; 8:45 am]

BILLING CODE P

FEDERAL RESERVE SYSTEM

Agency Information Collection Activities: Announcement of Board Approval Under Delegated Authority and Submission to OMB

AGENCY: Board of Governors of the Federal Reserve System.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) is adopting a proposal to extend for three years, without revision, the Reporting Requirements Associated with Regulation XX Concentration Limit (FR XX) and Financial Company (as defined) Report of Consolidated Liabilities (FR XX–1) (OMB No. 7100–0363).

FOR FURTHER INFORMATION CONTACT:

Federal Reserve Board Clearance Officer—Nuha Elmaghrabi—Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, Washington, DC 20551 (202) 452–3829. Telecommunications Device for the Deaf (TDD) users may contact (202) 263–4869, Board of Governors of the Federal Reserve System, Washington, DC 20551.

OMB Desk Officer—Shagufta Ahmed—Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503 or by fax to (202) 395–6974.

SUPPLEMENTARY INFORMATION: On June 15, 1984, the Office of Management and Budget (OMB) delegated to the Board authority under the Paperwork Reduction Act (PRA) to approve of and assign OMB control numbers to collection of information requests and

requirements conducted or sponsored by the Board. Board-approved collections of information are incorporated into the official OMB inventory of currently approved collections of information. Copies of the Paperwork Reduction Act Submission, supporting statements and approved collection of information instrument(s) are placed into OMB's public docket files. The Federal Reserve may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

Final Approval Under OMB Delegated Authority of the Extension for Three Years, Without Revision, of the Following Report

Report title: Reporting Requirements Associated with Regulation XX Concentration Limit; Financial Company (as defined) Report of Consolidated Liabilities.

Agency form number: FR XX; FR XX-1.

OMB control number: 7100-0363.

Frequency: Event-generated; annual.

Respondents: Insured depository institutions, bank holding companies, foreign banking organizations, savings and loan holding companies, companies that control insured depository institutions, and nonbank financial companies supervised by the Board; U.S. and foreign financial companies that do not otherwise report consolidated financial information to the Board or other appropriate Federal banking agency.

Estimated number of respondents: FR XX (Section 251.4(b)): 1; FR XX (Section 251.4(c)): 1; FR XX-1: 43.

Estimated average hours per response: FR XX (Section 251.4(b)): 10; FR XX (Section 251.4(c)): 10; FR XX-1: 2.

Estimated annual burden hours: FR XX (Section 251.4(b)): 10; FR XX (Section 251.4(c)): 10; FR XX-1: 86 (106 total).

General description of report: The Board adopted Regulation XX to implement section 14 of the Bank Holding Company Act of 1956 (BHC Act), which was added by section 622 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). Section 14 established a financial sector concentration limit that generally prohibits a financial company from merging or consolidating with, or otherwise acquiring, another company if the resulting company's liabilities upon consummation would exceed 10 percent of the aggregate liabilities of all financial companies. Regulation XX established

certain reporting requirements for financial companies. The Board created the FR XX-1 reporting form to collect information required to be submitted by Regulation XX.

Legal authorization and confidentiality: This information collection is authorized by section 14 of the Bank Holding Company Act (12 U.S.C. 1852(d)) and Regulation XX (12 CFR part 251). The obligation of financial companies to comply with the consolidated liabilities reporting requirement is mandatory. Compliance by financial companies with the transactional reporting requirements is required in order to obtain the benefit of Board consent to consummation of the transactions.

Section 251.6 and FR XX-1. As noted, the required reporting of calendar year-end liabilities under section 251.6 of Regulation XX can be satisfied by many financial companies through their continued reporting of consolidated financial information to the Board or other appropriate Federal banking agency though the various reports listed above. The information collected on those forms has been the subject of separate authorization and confidentiality determinations. With regard to the collection of the specific information at issue, calendar year-end liabilities (including as collected on the FR XX-1), such information generally is not considered confidential, but some information, depending on the circumstances, may be the type of confidential commercial and financial information that may be withheld under exemption 4 of the Freedom of Information Act (FOIA) (5 U.S.C. 552(b)(4)). As required information, it may be withheld under exemption 4 on a case-by-case basis only if public disclosure could result in substantial competitive harm to the submitting institution. Any request from a submitter for confidential treatment should be accompanied by a detailed justification for confidentiality.

Section 251.4. The information collected under section 251.4 (under both its prior written consent provision for individual transactions and the general consent authority) consists of (1) a description of the acquisition and (2) the change in and resultant aggregate amount of financial company liabilities. The reported liabilities information, in like fashion to the liabilities information reported under section 251.6, generally is not considered confidential but, depending on the circumstances, may be the type of confidential commercial and financial information that may be withheld under exemption 4 of FOIA. The description of the individual

acquisitions provided under the prior written consent provisions generally would not be deemed confidential, but that some such information may be of the type that could be withheld under exemption 4 on a case-by-case basis, under the standards enumerated above.

Current actions: On August 16, 2017, the Board published a notice in the **Federal Register** (82 FR 38906) requesting public comment for 60 days on the extension, without revision, of the FR XX and FR XX-1. The comment period for this notice expired on October 16, 2017. The Board did not receive any comments. The information collection will be extended as proposed.

Board of Governors of the Federal Reserve System, December 11, 2017.

Ann E. Misback,

Secretary of the Board.

[FR Doc. 2017-26962 Filed 12-13-17; 8:45 am]

BILLING CODE 6210-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2011-N-0279]

Agency Information Collection Activities; Proposed Collection; Comment Request; Prescription Drug Marketing Act of 1987; Administrative Procedures, Policies, and Requirements

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the information collection in the regulations on the Prescription Drug Marketing Act of 1987; Administrative Procedures, Policies, and Requirements.

DATES: Submit either electronic or written comments on the collection of information by February 12, 2018.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must

be submitted on or before February 12, 2018. The <https://www.regulations.gov> electronic filing system will accept comments until midnight Eastern Time at the end of February 12, 2018. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

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

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

Written/Paper Submissions

Submit written/paper submissions as follows:

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

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

Instructions: All submissions received must include the Docket No. FDA-2011-N-0279 for "Agency Information Collection Activities; Proposed Collection; Comment Request; Prescription Drug Marketing Act of 1987; Administrative Procedures, Policies, and Requirements." Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed

in the docket and, except for those submitted as "Confidential Submissions," publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

- **Confidential Submissions—**To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states "THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION." The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as "confidential." Any information marked as "confidential" will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

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

FOR FURTHER INFORMATION CONTACT:

Domini Bean, Office of Operations, Food and Drug Administration, Three White Flint North, 10A-12M, 11601 Landsdown St., North Bethesda, MD 20852, 301-796-5733, PRASStaff@fda.hhs.gov.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501-3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. "Collection of information" is defined

in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Prescription Drug Marketing Act of 1987—Administrative Procedures, Policies, and Requirements

OMB Control Number 0910-0435—Extension

This information collection supports FDA regulations. Specifically, regulations codified at 21 CFR part 203 implement the Prescription Drug Marketing Act of 1987 (PDMA). The PDMA was intended to ensure safe and effective drug products and to avoid an unacceptable risk that counterfeit, adulterated, misbranded, subpotent, or expired drugs are sold to consumers. The reporting and recordkeeping requirements found in the regulations are intended to help achieve the following goals: (1) To ban the reimportation of prescription drugs produced in the United States, except when reimported by the manufacturer or under FDA authorization for emergency medical care; (2) to ban the sale, purchase, or trade, or the offer to sell, purchase, or trade, of any prescription drug sample; (3) to limit the distribution of drug samples to practitioners licensed or authorized to prescribe such drugs or to pharmacies of

hospitals or other healthcare entities at the request of a licensed or authorized practitioner; (4) to require licensed or authorized practitioners to request prescription drug samples in writing; (5) to mandate storage, handling, and recordkeeping requirements for prescription drug samples; (6) to prohibit, with certain exceptions, the

sale, purchase, or trade, or the offer to sell, purchase, or trade, of prescription drugs that were purchased by hospitals or other healthcare entities or that were donated or supplied at a reduced price to a charitable organization; and (7) to require unauthorized wholesale distributors to provide, prior to the wholesale distribution of a prescription

drug to another wholesale distributor or retail pharmacy, a statement identifying each prior sale, purchase, or trade of the drug. In the tables below we have listed specific regulatory provisions that include information collection.

We estimate the burden of the information collection as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN ¹

21 CFR section/activity	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response (in hours)	Total hours
203.11—Reimportation	1	1	1	0.5	1
203.30(a)(1) and (b)—Drug sample requests	61,961	12	743,532	0.06	44,612
203.30(a)(3), (a)(4), and (c)—Drug sample receipts	61,961	12	743,532	0.06	44,612
203.31(a)(1) and (b)—Drug sample requests	232,355	135	31,367,925	0.04	1,254,717
203.31(a)(3), (a)(4), and (c)—Drug sample receipts	232,355	135	31,367,925	0.03	941,038
203.37(a)—Falsification of records	50	4	200	0.25	50
203.37(b)—Loss or theft of samples	50	40	2,000	0.25	500
203.37(c)—Convictions	1	1	1	1	1
203.37(d)—Contact person	50	1	50	0.08	4
203.39(g)—Reconciliation report	1	1	1	1	1
Total					2,285,536

¹ There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN ¹

21 CFR section/activity	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping (in hours)	Total hours
203.23(a) and (b)—Returned drugs	31,676	5	158,380	0.25	39,595
203.23(c)—Returned drugs documentation	31,676	5	158,380	0.08	12,670
203.30(a)(2) and 203.31(a)(2)—Practitioner verification	2,208	100	220,800	0.5	110,400
203.31(d)(1) and (d)(2)—Inventory record and reconciliation report	2,208	1	2,208	40	88,320
203.31(d)(4)—Investigation of discrepancies and losses	442	1	442	24	10,608
203.31(e)—Representatives lists	2,208	1	2,208	1	2,208
203.34—Administrative systems	90	1	90	40	3,600
203.37(a)—Falsification of drug sample records	50	4	200	6	1,200
203.37(b)—Loss or theft of drug samples	50	40	2,000	6	12,000
203.39(d)—Destroyed or returned drug samples	65	1	65	1	65
203.39(e)—Donated drug samples	3,221	1	3,221	0.5	1,611
203.39(f)—Distribution of donated drug samples	3,221	1	3,221	8	25,768
203.39(g)—Drug samples donated to charitable institutions	3,221	1	3,221	8	25,768
203.50(a)—Drug origin statement	125	100	12,500	0.17	2,125
203.50(b)—Drug origin statement retention	125	100	12,500	0.5	6,250
203.50(d)—Authorized distributors of record	691	1	691	2	1,382
Total					343,570

¹ There are no capital costs or operating and maintenance costs associated with this collection of information.

Based on a review of the information collection, we have retained the currently approved estimated burden.

Dated: December 8, 2017.
Leslie Kux,
Associate Commissioner for Policy.
 [FR Doc. 2017-26933 Filed 12-13-17; 8:45 am]
BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**Food and Drug Administration**

[Docket No. FDA-2011-N-0362]

Agency Information Collection Activities; Proposed Collection; Comment Request; Current Good Manufacturing Practice Regulations for Finished Pharmaceuticals**AGENCY:** Food and Drug Administration, HHS.**ACTION:** Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the information collection for the Current Good Manufacturing Practice Regulations for Finished Pharmaceuticals.

DATES: Submit either electronic or written comments on the collection of information by February 12, 2018.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before February 12, 2018. The <https://www.regulations.gov> electronic filing system will accept comments until midnight Eastern Time at the end of February 12, 2018. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or

anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

Written/Paper Submissions

Submit written/paper submissions as follows:

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

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

Instructions: All submissions received must include the Docket No. FDA-2011-N-0362 for "Current Good Manufacturing Practice Regulations for Finished Pharmaceuticals." Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as "Confidential Submissions," publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff office between 9 a.m. and 4 p.m., Monday through Friday.

- **Confidential Submissions—**To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states "THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION." The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not

in the body of your comments and you must identify this information as "confidential." Any information marked as "confidential" will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

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

FOR FURTHER INFORMATION CONTACT:

Domini Bean, Office of Operations, Food and Drug Administration, Three White Flint North, 10-12M, 11601 Landsdown St., North Bethesda, MD 20852, 301-796-5733, PRAStaff@fda.hhs.gov.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501-3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. "Collection of information" is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4)

ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Current Good Manufacturing Practice Regulations for Finished Pharmaceuticals (21 CFR Parts 210 and 211)

OMB Control Number 0910-0139—Extension

This information collection supports FDA regulations. Specifically, under section 501(a)(2)(B) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 351(a)(2)(B)), a drug is adulterated if the methods used in or the facilities or controls used for its manufacture, processing, packing, or holding do not conform to or are not operated or administered in conformity with Current Good Manufacturing Practice (CGMP). The CGMP regulations help ensure drug products meet the statutory requirements for safety and have their purported or represented identity, strength, quality, and purity characteristics. The information collection requirements in the CGMP regulations provide FDA with the necessary information to perform its duty to protect public health and safety. CGMP requirements establish accountability for manufacturing and processing drug products, provide for meaningful FDA inspections, and enable manufacturers to improve the quality of drug products over time. The CGMP recordkeeping requirements also serve preventive and remedial purposes and provide crucial information if it is necessary to recall a drug product.

The general requirements for recordkeeping under part 211 (21 CFR part 211) are set forth in § 211.180. Any production, control, or distribution record associated with a batch and required to be maintained in compliance with part 211 must be retained for at least 1 year after the expiration date of the batch and, for certain over-the-counter (OTC) drugs, 3 years after distribution of the batch (§ 211.180(a)). Records for all components, drug product containers, closures, and labeling are required to be maintained for at least 1 year after the expiration date and 3 years for certain OTC products (§ 211.180(b)).

All part 211 records must be readily available for authorized inspections during the retention period (§ 211.180(c)), and such records may be retained either as original records or as true copies (§ 211.180(d)). Additionally, § 11.2(a) (21 CFR 11.2(a)) provides that

“for records required to be maintained but not submitted to the Agency, persons may use electronic records in lieu of paper records or electronic signatures in lieu of traditional signatures, in whole or in part, provided that the requirements of this part are met.” To the extent this electronic option is used, the burden of maintaining paper records should be substantially reduced, as should any review of such records.

To facilitate improvements and corrective actions, records must be maintained so data can be used to evaluate the quality standards of each drug product on at least an annual basis and determine whether to change any drug product specifications or manufacturing or control procedures (§ 211.180(e)). Written procedures for these evaluations are to be established and include provisions for a review of a representative number of batches and, where applicable, records associated with the batch; provisions for a review of complaints, recalls, returned or salvaged drug products; and investigations conducted under § 211.192 for each drug product.

The specific information collection provisions are as follows:

- Section 211.34—Consultants advising on the manufacture, processing, packing, or holding of drug products must have sufficient education, training, and experience to advise on the subject for which they are retained. Records must be maintained stating the name, address, and qualifications of any consultants and the type of service they provide.
- Section 211.67(c)—Records must be kept of maintenance, cleaning, sanitizing, and inspection as specified in §§ 211.180 and 211.182.
- Section 211.68—Appropriate controls must be exercised over computer or related systems to assure that changes in master production and control records or other records are instituted only by authorized personnel.
- Section 211.68(a)—Records must be maintained of calibration checks, inspections, and computer or related system programs for automatic, mechanical, and electronic equipment.
- Section 211.68(b)—All appropriate controls must be exercised over all computers or related systems and control data systems to assure that changes in master production and control records or other records are instituted only by authorized persons.
- Section 211.72—Filters for liquid filtration used in the manufacture, processing, or packing of injectable drug products intended for human use must not release fibers into such products.

- Section 211.80(d)—Each container or grouping of containers for components or drug product containers or closures must be identified with a distinctive code for each lot in each shipment received. This code must be used in recording the disposition of each lot. Each lot must be appropriately identified as to its status.

- Section 211.100(b)—Written production and process control procedures must be followed in the execution of the various production and process control functions and must be documented at the time of performance. Any deviation from the written procedures must be recorded and justified.

- Section 211.105(b)—Major equipment must be identified by a distinctive identification number or code that must be recorded in the batch production record to show the specific equipment used in the manufacture of each batch of a drug product. In cases where only one of a particular type of equipment exists in a manufacturing facility, the name of the equipment may be used in lieu of a distinctive identification number or code.

- Section 211.122(c)—Records must be maintained for each shipment received of each different labeling and packaging material indicating receipt, examination, or testing.

- Section 211.130(e)—Inspection of packaging and labeling facilities must be made immediately before use to assure that all drug products have been removed from previous operations. Inspection must also be made to assure that packaging and labeling materials not suitable for subsequent operations have been removed. Results of inspection must be documented in the batch production records.

- Section 211.132(c)—Certain retail packages of OTC drug products must bear a statement that is prominently placed so consumers are alerted to the specific tamper-evident feature of the package. The labeling statement is required to be so placed that it will be unaffected if the tamper-resistant feature of the package is breached or missing. If the tamper-evident feature chosen is one that uses an identifying characteristic, that characteristic is required to be referred to in the labeling statement.

- Section 211.132(d)—A request for an exemption from packaging and labeling requirements by a manufacturer or packer is required to be submitted in the form of a citizen petition under 21 CFR 10.30.

- Section 211.137—Requirements regarding product expiration dating and compliance with 21 CFR 201.17.

- Section 211.160(a)—The establishment of any specifications, standards, sampling plans, test procedures, or other laboratory control mechanisms, including any change in such specifications, standards, sampling plans, test procedures, or other laboratory control mechanisms, must be drafted by the appropriate organizational unit and reviewed and approved by the quality control unit. These requirements must be followed and documented at the time of performance. Any deviation from the written specifications, standards, sampling plans, test procedures, or other laboratory control mechanisms must be recorded and justified.

- Section 211.165(e)—The accuracy, sensitivity, specificity, and reproducibility of test methods employed by a firm must be established and documented. Such validation and documentation may be accomplished in accordance with § 211.194(a)(2).

- Section 211.166—Stability testing program for drug products.

- Section 211.173—Animals used in testing components, in-process materials, or drug products for compliance with established specifications must be maintained and controlled in a manner that assures their suitability for their intended use. They must be identified, and adequate records must be maintained showing the history of their use.

- Section 211.180(e)—Written records required by part 211 must be maintained so that data can be used for evaluating, at least annually, the quality standards of each drug product to determine the need for changes in drug product specifications or manufacturing or control procedures. Written procedures must be established and followed for such evaluations and must include provisions for a representative number of batches, whether approved or unapproved or rejected, and a review of complaints, recalls, returned or salvaged drug products, and investigations conducted under § 211.192 for each drug product.

- Section 211.180(f)—Procedures must be established to assure that the responsible officials of the firm, if they are not personally involved in or immediately aware of such actions, are notified in writing of any investigations, conducted under § 211.198, § 211.204, or § 211.208, any recalls, reports of inspectional observations issued, or any regulatory actions relating to good manufacturing practices brought by FDA.

- Section 211.182—Specifies requirements for equipment cleaning records and the use log.

- Section 211.184—Specifies requirements for component, drug product container, closure, and labeling records.

- Section 211.186—Specifies master production and control records requirements.

- Section 211.188—Specifies batch production and control records requirement.

- Section 211.192—Specifies the information that must be maintained on the investigation of discrepancies found in the review of all drug product production and control records by the quality control staff.

- Section 211.194—Explains and describes laboratory records that must be retained.

- Section 211.196—Specifies the information that must be included in records on the distribution of the drug.

- Section 211.198—Specifies and describes the handling of all complaint files received by the applicant.

- Section 211.204—Specifies that records be maintained of returned and salvaged drug products and describes the procedures involved.

Written procedures, referred to here as standard operating procedures (SOPs), are required for many part 211 records. Current SOP requirements were initially provided in a final rule published in the **Federal Register** of September 29, 1978 (43 FR 45014), and are now an integral and familiar part of the drug manufacturing process. The major information collection impact of SOPs results from their creation. Thereafter, SOPs need to be periodically updated. A combined estimate for routine maintenance of SOPs is provided in table 1. The 25 SOP provisions under part 211 in the combined maintenance estimate include:

- Section 211.22(d)—Responsibilities and procedures of the quality control unit;

- Section 211.56(b)—Sanitation procedures;

- Section 211.56(c)—Use of suitable rodenticides, insecticides, fungicides, fumigating agents, and cleaning and sanitizing agents;

- Section 211.67(b)—Cleaning and maintenance of equipment;

- Section 211.68(a)—Proper performance of automatic, mechanical, and electronic equipment;

- Section 211.80(a)—Receipt, identification, storage, handling, sampling, testing, and approval or rejection of components and drug product containers or closures;

- Section 211.94(d)—Standards or specifications, methods of testing, and methods of cleaning, sterilizing, and

processing to remove pyrogenic properties for drug product containers and closures;

- Section 211.100(a)—Production and process control;

- Section 211.110(a)—Sampling and testing of in-process materials and drug products;

- Section 211.113(a)—Prevention of objectionable microorganisms in drug products not required to be sterile;

- Section 211.113(b)—Prevention of microbiological contamination of drug products purporting to be sterile, including validation of any sterilization process;

- Section 211.115(a)—System for reprocessing batches that do not conform to standards or specifications to insure that reprocessed batches conform with all established standards, specifications, and characteristics;

- Section 211.122(a)—Receipt, identification, storage, handling, sampling, examination and/or testing of labeling and packaging materials;

- Section 211.125(f)—Control procedures for the issuance of labeling;

- Section 211.130—Packaging and label operations, prevention of mixup and cross contamination, identification and handling of filed drug product containers that are set aside and held in unlabeled condition, and identification of the drug product with a lot or control number that permits determination of the history of the manufacture and control of the batch;

- Section 211.142—Warehousing;

- Section 211.150—Distribution of drug products;

- Section 211.160—Laboratory controls;

- Section 211.165(c)—Testing and release for distribution;

- Section 211.166(a)—Stability testing;

- Section 211.167—Special testing requirements;

- Section 211.180(f)—Notification of responsible officials of investigations, recalls, reports of inspectional observations, and any regulatory actions relating to good manufacturing practice;

- Section 211.198(a)—Written and oral complaint procedures, including quality control unit review of any complaint involving specifications failures, and serious and unexpected adverse drug experiences;

- Section 211.204—Holding, testing, and reprocessing of returned drug products; and

- Section 211.208—Drug product salvaging.

In addition, the following regulations in parts 610 and 680 (21 CFR parts 610 and 680) reference certain CGMP regulations in part 211: §§ 610.12(g),

610.13(a)(2), 610.18(d), 680.2(f), and 680.3(f). In table 1, the burden associated with the information collection requirements in these regulations is included in the burden estimates under §§ 211.165, 211.167, 211.188, and 211.194, as appropriate.

Although most CGMP provisions covered in this document were created many years ago, some existing firms expanding into new manufacturing areas and startup firms will need to create SOPs. As provided in table 1, FDA assumes approximately 50 firms

will have to create up to 25 SOPs for a total of 1,250 records, estimating 20 hours per recordkeeper to create 25 new SOPs for a total of 25,000 hours.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL RECORDKEEPING BURDEN ¹

21 CFR section/activity	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping (in hours) ¹	Total hours
SOP Maintenance	3,270	.....	3,270	25	81,750
New Startup SOPs	50	25	1,250	20	25,000
211.34—Consultants	3,270	0.25	818	5	4,090
211.67(c)—Equipment cleaning and maintenance	3,270	50	163,500	0.25	40,875
211.68—Changes in master production and control records or other records	3,270	2	6,540	1	6,540
211.68(a)—Automatic, mechanical, and electronic equipment	3,270	10	32,700	0.5	16,350
211.68(b)—Computer or related systems	3,270	5	16,350	0.25	4,088
211.72—Filters	416	0.25	104	1	104
211.80(d)—Components and drug product containers or closures	3,270	0.25	818	0.1	82
211.100(b)—Production and process controls	3,270	3	9,810	2	19,620
211.105(b)—Equipment identification	3,270	0.25	818	0.25	205
211.122(c)—Labeling and packaging material	3,270	50	163,500	0.25	40,875
211.130(e)—Labeling and packaging facilities	3,270	50	163,500	0.25	40,875
211.132(c)—Tamper-evident packaging	1,613	20	32,260	0.5	16,130
211.132(d)—Tamper-evident packaging	1,613	0.2	323	0.5	162
211.137—Expiration dating	3,270	5	16,350	0.5	8,175
211.160(a)—Laboratory controls	3,270	2	6,540	1	6,540
211.165(e)—Test methodology	3,270	1	3,270	1	3,270
211.166—Stability testing	3,270	2	6,540	0.5	3,270
211.173—Laboratory animals	33	1	33	0.25	8
211.180(e)—Production, control, and distribution records ..	3,270	0.2	654	0.25	164
211.180(f)—Procedures for notification of regulatory actions	3,270	0.2	654	1	654
211.182—Equipment cleaning and use log	3,270	2	6,540	0.25	1,635
211.184—Component, drug product container, closure, and labeling records	3,270	3	9,810	0.5	4,905
211.186—Master production and control records	3,270	10	32,700	2	65,400
211.188—Batch production and control records	3,270	25	81,750	2	163,500
211.192—Discrepancies in drug product production and control records	3,270	2	6,540	1	6,540
211.194—Laboratory records	3,270	25	81,750	0.5	40,875
211.196—Distribution records	3,270	25	81,750	0.25	20,438
211.198—Compliant files	3,270	5	16,350	1	16,350
211.204—Returned drug products	3,270	10	32,700	0.5	16,350
Total					651,139

¹ Burden estimates of less than 1 hour are expressed as a fraction of an hour in the format “[number of minutes per response]/60”.

The recordkeeping requirement estimates provided in table 2 are specific to medical gases. In particular, on June 29, 2017, FDA published a Notice of Availability (NOA) in the **Federal Register** regarding revised draft guidance for industry entitled “Current Good Manufacturing Practice for Medical Gases” (82 FR 29565). This guidance is intended to help medical gas manufacturers comply with applicable CGMP regulations found in

parts 210 and 211. In the NOA for the revised draft guidance, FDA noted the guidance includes information collection provisions subject to review by the OMB under the PRA and, in accordance with the PRA, before publication of the final guidance, FDA intends to solicit public comment and obtain OMB approval for any recommended new information collections or material modifications to previously approved collections of

information found in FDA regulations. This notice is intended to solicit such public comment.

The regulations addressed in table 2 are the same as those listed in table 1, but the estimated information collection burden differs and is specific to medical gas manufacturing. FDA estimates the burden of this collection of information as follows:

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN (MEDICAL GASES) ¹

21 CFR section/activity	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping (in hours) ¹	Total hours
SOP Maintenance	2,284	0.65	1,485	25	37,125
New startup SOPs	100	25	2,500	20	50,000
211.34—Consultants	2,284	0.25	571	0.5	286
211.67(c)—Equipment cleaning and maintenance	2,284	32.5	74,230	0.25	18,558
211.68—Changes in master production and control records or other records	2,284	2	4,568	1	4,568
211.68(a)—Automatic, mechanical, and electronic equipment	2,284	10	22,840	0.5	11,420
211.68(b)—Computer or related systems	2,284	5	11,420	0.25	2,855
211.72—Filters	2,284	0.25	571	1	571
211.80(d)—Components and drug product containers or closures	2,284	0.25	571	0.1	57
211.100(b)—Production and process controls	2,284	3	6,382	2	13,704
211.105(b)—Equipment identification	2,284	0.25	571	0.25	143
211.122(c)—Labeling and packaging material	2,284	50	114,200	0.25	28,550
211.130(e)—Labeling and packaging facilities	2,284	50	114,200	0.25	28,550
211.132(c)—Tamper-evident packaging	2,284	20	45,680	0.5	22,840
211.132(d)—Tamper-evident packaging	2,284	0.2	457	0.5	229
211.137—Expiration dating	2,284	3.25	7,423	0.33	2,450
211.160(a)—Laboratory controls	2,284	2	4,568	1	4,568
211.165(e)—Test methodology	2,284	1	2,284	1	2,284
211.166—Stability testing	2,284	1.3	2,969	0.33	980
211.173—Laboratory animals	2,284	1	2,284	0.25	571
211.180(e)—Production, control, and distribution records ..	2,284	0.2	457	0.25	114
211.180(f)—Procedures for notification of regulatory actions	2,284	0.2	457	1	457
211.182—Equipment cleaning and use log	2,284	1.3	2,969	0.16	475
211.184—Component, drug product container, closure, and labeling records	2,284	1.95	4,454	0.33	1,470
211.186—Master production and control records	2,284	10	22,840	2	45,680
211.188—Batch production and control records	2,284	16.25	37,115	1.3	48,250
211.192—Discrepancies in drug product production and control records	2,284	2	4,568	1	4,568
211.194—Laboratory records	2,284	25	57,100	0.5	28,550
211.196—Distribution records	2,284	25	57,100	0.25	14,275
211.198—Complaint files	2,284	5	11,420	1	11,420
211.204—Returned drug products	2,284	10	22,840	0.5	11,420
Total					396,988

¹ Burden estimates of less than 1 hour are expressed as a fraction of an hour in the format “[number of minutes per response]/60”.

Dated: December 8, 2017.
Leslie Kux,
Associate Commissioner for Policy.
 [FR Doc. 2017-26932 Filed 12-13-17; 8:45 am]
BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration
 [Docket No. FDA-2015-D-4562]

Public Workshop on Safety Assessment for Investigational New Drug Safety Reporting; Correction

AGENCY: Food and Drug Administration, HHS.
ACTION: Notice; correction.

SUMMARY: The Food and Drug Administration is correcting a notice entitled “Safety Assessment for

Investigational New Drug Safety Reporting; Public Workshop” that appeared in the **Federal Register** of November 27, 2017. The document announced a public workshop to engage external stakeholders in discussions related to finalizing the draft guidance entitled “Safety Assessment for IND Safety Reporting.” The date of the meeting has changed.

FOR FURTHER INFORMATION CONTACT:
 Lauren Wedlake, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6362, Silver Spring, MD 20993, 301-796-2728, Lauren.Wedlake@fda.hhs.gov.

In the **Federal Register** of Monday, November 27, 2017, in FR Doc. 2017-25454, the following correction is made:

1. On page 56036, in the first column, in the first sentence of the **DATES** section, “The public workshop will be

held on January 11, 2018, from 9 a.m. to 4 p.m., Eastern Time.” is corrected to read “The public workshop will be held on March 8, 2018, from 9 a.m. to 4 p.m., Eastern Time.”

Dated: December 8, 2017.
Leslie Kux,
Associate Commissioner for Policy.
 [FR Doc. 2017-26938 Filed 12-13-17; 8:45 am]
BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2017-N-6312]

Patient-Focused Drug Development: Developing and Submitting Proposed Draft Guidance Relating to Patient Experience Data; Public Workshop; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public workshop; request for comments.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the following public workshop entitled “Patient-Focused Drug Development: Developing and Submitting Proposed Draft Guidance Relating to Patient Experience Data.” The purpose of the public workshop is to convene a discussion on how a person seeking to develop and submit proposed draft guidance relating to patient experience data for consideration by FDA may submit such proposed draft guidance to the Agency. This workshop will inform development of patient-focused drug development guidance as required by the 21st Century Cures Act (Cures Act). FDA plans to publish a background document approximately 2 weeks before the workshop date.

DATES: The public workshop will be held on March 19, 2018, from 1 p.m. to 5 p.m. Submit either electronic or written comments on this public workshop by May 18, 2018. See the **SUPPLEMENTARY INFORMATION** section for additional registration information.

ADDRESSES: The public workshop will be held at FDA’s White Oak Campus, 10903 New Hampshire Ave., Bldg. 31 Conference Center, the Great Room (Rm. 1503), Silver Spring, MD 20993. Entrance for the public workshop participants (non-FDA employees) is through Building 1 where routine security check procedures will be performed. For parking and security information, please refer to <https://www.fda.gov/AboutFDA/WorkingatFDA/BuildingsandFacilities/WhiteOakCampusInformation/ucm241740.htm>. Workshop updates, agenda, and background document will be made available at <https://www.fda.gov/Drugs/NewsEvents/ucm582081.htm> prior to the workshop.

You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted

on or before May 18, 2018. The <https://www.regulations.gov> electronic filing system will accept comments until midnight Eastern Time at the end of May 18, 2018. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

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

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see “Written/Paper Submissions” and “Instructions”).

Written/Paper Submissions

Submit written/paper submissions as follows:

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

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

Instructions: All submissions received must include the Docket No. FDA-2017-N-6312 for “Patient-Focused Drug Development: Developing and Submitting Proposed Draft Guidance Relating to Patient Experience Data.” Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as “Confidential Submissions,” publicly viewable at

<https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

- **Confidential Submissions—**To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states “THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.” The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as “confidential.” Any information marked as “confidential” will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA’s posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

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

FOR FURTHER INFORMATION CONTACT: Meghana Chalasani, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 1146, Silver Spring, MD 20993-0002, 240-402-6525, Fax: 301-847-8443, Meghana.Chalasani@fda.hhs.gov.

SUPPLEMENTARY INFORMATION:

I. Background

This public workshop is intended to support FDA implementation of requirements for guidance development under section 3002 of the Cures Act (Pub. L. 114-255). Section 3002 of Title III, Subtitle A, of the Cures Act directs

FDA to develop patient-focused drug development guidance to address a number of areas, including how a person seeking to develop and submit a proposed draft guidance relating to patient experience data for consideration by FDA may submit such proposed draft guidances.

In FDA's "Plan for Issuance of Patient-Focused Drug Development Guidance," (the Plan) available at <https://www.fda.gov/downloads/ForIndustry/UserFees/PrescriptionDrugUserFee/UCM563618.pdf>, the Agency proposed issuing a guidance addressing this topic described in section 3002 during the second quarter of 2018. FDA recognizes that, like the other patient-focused drug development guidances described in the Plan, developing this draft guidance will also benefit from public input from the wider community of patients, patient advocates, academic researchers, expert practitioners, drug developers, and other stakeholders prior to FDA's drafting of the guidance. Accordingly, the Agency is scheduling this public workshop. After this public workshop, FDA will take into consideration the stakeholder input from the workshop and the public docket, and publish a draft guidance by the end of fiscal year 2018.

II. Purpose and Scope of Meeting

FDA is announcing a public workshop to convene a discussion on topics related to developing and submitting proposed draft guidance relating to patient experience data by an external stakeholder. The purpose of this public workshop is to obtain input from stakeholders on considerations for development and submission of proposed draft guidance relating to patient experience data submitted by an external stakeholder, including: (1) Defining the scope of the proposed draft guidance, (2) developing the proposed draft guidance, and (3) submitting the proposed draft guidance to FDA, including the process and format. The Agency is seeking information and comments from a broad range of stakeholders, including patients, patient advocates, academic and medical researchers, expert practitioners, drug developers, and other interested persons. FDA will publish a background document outlining the topic areas that will be addressed in the draft guidance approximately 2 weeks before the workshop date at the following website: <https://www.fda.gov/Drugs/NewsEvents/ucm582081.htm>.

After this public workshop, FDA will take into consideration the stakeholder input from the workshop and the public

docket, and publish a draft guidance by the end of fiscal year 2018.

III. Participating in the Public Workshop

Registration: Interested parties are encouraged to register early. To register electronically, please visit <https://pfdd-proposeddraftguidance.eventbrite.com>. Persons without access to the internet can call 240-402-6525 to register. If you are unable to attend the public workshop in person, you can register to view a live webcast. You will be asked to indicate in your registration if you plan to attend in person or via the webcast. Seating will be limited, so early registration is recommended. Registration is free and will be on a first-come, first-served basis. However, FDA may limit the number of participants from each organization based on space limitations. Registrants will receive confirmation once they have been accepted. Onsite registration on the day of the public workshop will be based on space availability. If you need special accommodations because of a disability, please contact Meghana Chalasani (see **FOR FURTHER INFORMATION CONTACT**) at least 7 days before the public workshop.

Open Public Comment: There will be time allotted during the public workshop for open public comment. Sign-up for this session will be on a first-come, first-serve basis on the day of the public workshop. Individuals and organizations with common interests are urged to consolidate or coordinate, and request time for a joint presentation. No commercial or promotional material will be permitted to be presented or distributed at the public workshop.

Transcripts: As soon as a transcript is available of the public workshop, FDA will post it at <https://www.fda.gov/Drugs/NewsEvents/ucm582081.htm>.

Dated: December 11, 2017.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2017-26978 Filed 12-13-17; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Government-Owned Inventions; Availability for Licensing

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: The invention listed below is owned by an agency of the U.S. Government and is available for

licensing to achieve expeditious commercialization of results of federally-funded research and development. Foreign patent applications are filed on selected inventions to extend market coverage for companies and may also be available for licensing.

FOR FURTHER INFORMATION CONTACT: Dr. Natalie Greco, 301-761-7898; Natalie.Greco@nih.gov. Licensing information and copies of the patent applications listed below may be obtained by communicating with the indicated licensing contact at the Technology Transfer and Intellectual Property Office, National Institute of Allergy and Infectious Diseases, 5601 Fishers Lane, Rockville, MD 20852; tel. 301-496-2644. A signed Confidential Disclosure Agreement will be required to receive copies of unpublished patent applications.

SUPPLEMENTARY INFORMATION: Technology description follows.

Monoclonal Antibody Specific for DNA/RNA Hybrid Molecules

Description of Technology

NIAD has a hybridoma available for non-exclusive licensing that produces a monoclonal antibody specific for DNA/RNA hybrids. This antibody, which has been extensively characterized by NIH researchers, is already a widely-used research tool. It is currently the only monoclonal antibody available that is specific for DNA/RNA hybrids, making it a unique reagent. It is used in immuno-fluorescence (IF) microscopy, where it can be used to detect sites of transcriptional activity and potentially sites of viral replication. It has also been used in DNA/RNA immunoprecipitation (DRIP) experiments by a variety of researchers.

Aside from its use as a research tool, this antibody has potential to be used in diagnostic kits for viral/bacterial infections, cancers, and a variety of other human diseases. DNA/RNA hybrids arise during normal cellular function, but they are typically present in cells at low levels. When DNA/RNA hybrids are found at high levels in a cell, it indicates that the cell is "abnormal". For example, the cell may be cancerous or infected with a virus. NIH researchers have also incorporated the antibody into a micro-array platform, expanding its potential for use in diagnostic devices.

This technology is available for licensing for commercial development in accordance with 35 U.S.C. 209 and 37 CFR part 404, as well as for further development and evaluation under a research collaboration.

Potential Commercial Applications

Research tool:

- Detection and visualization of DNA/RNA hybrids, “R-loops”, or sites of viral replication in cells
- DNA/RNA immunoprecipitation (DRIP) studies
- Antibody based micro-arrays
For use in diagnostic kits that detect:
- Viral/bacterial infections
- miRNA biomarkers of disease (*i.e.* certain cancers)

Competitive Advantages

- Only available monoclonal antibody specific for DNA/RNA hybrids
- Binding properties extensively characterized by NIH researchers
- Widely-accepted as a key research reagent
- Antibody based micro-arrays are inexpensive, efficient, and increase detection of small or structured transcripts, as well as transcripts present at low levels

Development Stage

- *in vitro* data available

Inventors

S. Leppla, C. Leysath, D. Phillips, D. Garboczi, L. Lantz (all of NIAID).

Publications

- Phillips DD, et al. (2013)—PMID: 23784994—PMCID: *PMC4061737*—The sub-nanomolar binding of DNA-RNA hybrids by the single-chain Fv fragment of antibody S9.6
- Hu Z, et al. (2006)—PMID: 16614443—PMCID: *PMC1435976*—An antibody-based microarray assay for small RNA detection

Intellectual Property: HHS Reference No. E-738-2013

Licensing Contact: Dr. Natalie Greco, 301-761-7898; *Natalie.Greco@nih.gov*

Collaborative Research Opportunity: The National Institute of Allergy and Infectious Diseases is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate or commercialize antibodies produced by the S9.6 hybridoma. For collaboration opportunities, please contact Dr. Natalie Greco, 301-761-7898; *Natalie.Greco@nih.gov*.

Dated: December 1, 2017.

Suzanne Frisbie,

Deputy Director, Technology Transfer and Intellectual Property Office, National Institute of Allergy and Infectious Diseases.

[FR Doc. 2017-26937 Filed 12-13-17; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Submission for OMB Review; 30-Day Comment Request; Special Volunteer and Guest Researcher Assignment (Office of Intramural Research, Office of the Director)

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the National Institutes of Health (NIH) has submitted to the Office of Management and Budget (OMB) a request for review and approval of the information collection listed below.

DATES: Comments regarding this information collection are best assured of having their full effect if received within 30-days of the date of this publication.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the: Office of Management and Budget, Office of Regulatory Affairs, *OIRA_submission@omb.eop.gov* or by fax to 202-395-6974, Attention: Desk Officer for NIH.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact: Dr. Arlyn Garcia-Perez, Assistant Director, Office of Intramural Research, Office of the Director, National Institutes of Health, 1 Center Drive MSC 0140, Building 1, Room 160, MSC-0140, Bethesda, Maryland 20892 or call non-toll-free number (301) 496-1921 or (301) 496-

1381 or Email your request, including your address to: *GarciaA@od.nih.gov*.

SUPPLEMENTARY INFORMATION: This proposed information collection was previously published in the **Federal Register** on September 15, 2017, page 43394 (82 FR 43394) and allowed 60 days for public comment. No public comments were received. The purpose of this notice is to allow an additional 30 days for public comment. The Office of Intramural Research (OIR), Office of the Director, National Institutes of Health, may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

In compliance with Section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the National Institutes of Health (NIH) has submitted to the Office of Management and Budget (OMB) a request for review and approval of the information collection listed below.

Proposed Collection: Special Volunteer and Guest Researcher Assignment—0925-0177, exp., date 08/31/2017—Reinstatement without Change of, Office of Intramural Research (OIR), Office of the Director (OD), National Institutes of Health (NIH).

Need and Use of Information Collection: Form Number: NIH-590 is a single form completed by an NIH official for each Guest Researcher or Special Volunteer prior to his/her arrival at NIH. The information on the form is necessary for the approving official to reach a decision on whether to allow a Guest Researcher to use NIH facilities, or whether to accept volunteer services offered by a Special Volunteer. If the original assignment is extended, another form notating the extension is completed to update the file. In addition, each Special Volunteer and Guest Researcher reads and signs an NIH Agreement.

OMB approval is requested for 3 years. There are no costs to respondents other than their time. The total estimated annualized burden hours are 527.

ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Type of respondents	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total annual hour burden hours
Special Volunteer and Guest Researcher Assignment.	Special Volunteers and Guest researchers.	2,870	1	6/60	287
NIH Special Volunteer Agreement	Special Volunteers	2,600	1	5/60	217

ESTIMATED ANNUALIZED BURDEN HOURS—Continued

Form name	Type of respondents	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total annual hour burden hours
NIH Guest Researcher Agreement ...	Guest Researchers	270	1	5/60	23
Totals .....	.....	2,870	.....	.....	527

Dated: December 8, 2017.

Lawrence A. Tabak,
Deputy Director, NIH.

[FR Doc. 2017-26966 Filed 12-13-17; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG-2017-0952]

Information Collection Request to Office of Management and Budget; OMB Control Number: 1625-0011

AGENCY: Coast Guard, DHS.

ACTION: 60-Day notice requesting comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the U.S. Coast Guard intends to submit an Information Collection Request (ICR) to the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs (OIRA), requesting an extension of its approval for the following collection of information: 1625-0011, Applications for Private Aids to Navigation and for Class I Private Aids to Navigation on Artificial Islands and Fixed Structures; without change. Our ICR describes the information we seek to collect from the public. Before submitting this ICR to OIRA, the Coast Guard is inviting comments as described below.

DATES: Comments must reach the Coast Guard on or before February 12, 2018.

ADDRESSES: You may submit comments identified by Coast Guard docket number [USCG-2017-0952] to the Coast Guard using the Federal eRulemaking Portal at <http://www.regulations.gov>. See the "Public participation and request for comments" portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

A copy of the ICR is available through the docket on the internet at <http://www.regulations.gov>. Additionally, copies are available from: Commandant (CG-612), Attn: Paperwork Reduction Act Manager, U.S. Coast Guard, 2703

Martin Luther King Jr Ave. SE, Stop 7710, Washington, DC 20593-7710.

FOR FURTHER INFORMATION CONTACT:

Contact Mr. Anthony Smith, Office of Information Management, telephone 202-475-3532, or fax 202-372-8405, for questions on these documents.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

This Notice relies on the authority of the Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended. An ICR is an application to OIRA seeking the approval, extension, or renewal of a Coast Guard collection of information (Collection). The ICR contains information describing the Collection's purpose, the Collection's likely burden on the affected public, an explanation of the necessity of the Collection, and other important information describing the Collection. There is one ICR for each Collection.

The Coast Guard invites comments on whether this ICR should be granted based on the Collection being necessary for the proper performance of Departmental functions. In particular, the Coast Guard would appreciate comments addressing: (1) The practical utility of the Collection; (2) the accuracy of the estimated burden of the Collection; (3) ways to enhance the quality, utility, and clarity of information subject to the Collection; and (4) ways to minimize the burden of the Collection on respondents, including the use of automated collection techniques or other forms of information technology. In response to your comments, we may revise this ICR or decide not to seek an extension of approval for the Collection. We will consider all comments and material received during the comment period.

We encourage you to respond to this request by submitting comments and related materials. Comments must contain the OMB Control Number of the ICR and the docket number of this request [USCG-2017-0952], and must be received by February 12, 2018.

Submitting Comments

We encourage you to submit comments through the Federal eRulemaking Portal at <http://www.regulations.gov>. If your material cannot be submitted using <http://www.regulations.gov>, contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions. Documents mentioned in this notice, and all public comments, are in our online docket at <http://www.regulations.gov> and can be viewed by following that website's instructions. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted.

We accept anonymous comments. All comments received will be posted without change to <http://www.regulations.gov> and will include any personal information you have provided. For more about privacy and the docket, you may review a Privacy Act notice regarding the Federal Docket Management System in the March 24, 2005, issue of the **Federal Register** (70 FR 15086).

Information Collection Request

Title: Applications for Private Aids to Navigation and for Class I Private Aids to Navigation on Artificial Islands and Fixed Structures.

OMB Control Number: 1625-0011.

Summary: Under the provision of 14 U.S.C. 81, the Coast Guard is authorized to establish aids to navigation. Title 14 U.S.C. 83 prohibits establishment of aids to navigation without permission of the Coast Guard. Title 33 CFR 66.01-5 provides a means for private individuals to establish privately maintained aids to navigation. Under 43 U.S.C. 1333, the Coast Guard has the authority to promulgate and enforce regulations concerning lights and other warning devices relating to the promotion of safety of life and property on artificial islands, installations, and other devices on the outer continental shelf involved in the exploration, development, removal, or transportation of resources there from. Title 33 CFR 67.35-1 prescribes the type of aids to navigation that must be installed on artificial

islands and fixed structures. Under the provision of 33 U.S.C. 409, the Secretary of Homeland Security is mandated to prescribe rules and regulations for governing the marking of sunken vessels. This authorization was delegated to the Commandant of the Coast Guard under Department of Homeland Security. Delegation number 0170 and the marking of sunken vessels are set out in 33 CFR part 64.11. The information collected for the rule can be obtained from the owners of sunken vessels. The information collection requirements are contained in 33 CFR 66.01-5, and 67.35-5.

Need: The information on these private aid applications (CG-2554 and CG-4143) provides the Coast Guard with vital information about private aids to navigation and is essential for safe marine navigation. These forms are required under 33 CFR 66 & 67. The information is processed to ensure the private aid is in compliance with current regulations. Additionally, these forms provide the Coast Guard with information which can be distributed to the public to advise of new, or changes to private aids to navigation. In addition, collecting the applicant's contact information is important because it allows the Coast Guard to contact the applicant should there be a discrepancy or mishap involving the permitted private aid to navigation. Certain discrepancies create hazards to navigation and must be responded to and immediately corrected or repaired.

Forms: CG-2554, Private Aids To Navigation Application and CG-4143, Application For Class I Private Aids To Navigation On Artificial Islands and Fixed Structures.

Respondents: Owners of private aids to navigation.

Frequency: On occasion.

Hour Burden Estimate: The estimated burden has decreased from 2,000 hours to 1,709 hours due to a decrease in the number of respondents a year.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended.

Dated: December 6, 2017.

James D. Roppel,

U.S. Coast Guard, Acting Chief, Office of Information Management.

[FR Doc. 2017-26939 Filed 12-13-17; 8:45 am]

BILLING CODE 9110-04-P

DEPARTMENT OF THE INTERIOR

Geological Survey

[GX17AE6000C1000]

Intent To Grant Exclusive Patent License to Montana Emergent Technologies

AGENCY: U.S. Geological Survey, Department of the Interior.

ACTION: Notice of intent to grant exclusive patent license; request for comments.

SUMMARY: The U.S. Geological Survey (USGS), Department of the Interior, is contemplating the grant of an exclusive license in the United States of America, its territories, possessions and commonwealths, to USGS's interest in the invention embodied in U.S. Provisional Application No. 62/333,616, titled "Subsurface Environment Sampler," to Montana Emergent Technologies (MET). USGS requests public comments on or objections to the proposed grant.

DATES: Comments or objections must be received by December 29, 2017.

ADDRESSES: Written comments or objections relating to the prospective license may be submitted by U.S. mail, facsimile, or email to James Mitchell, Patent and Licensing Manager, Office of Policy and Analysis, USGS, 12201 Sunrise Valley Drive, MS 153, Reston, VA 20192, (703) 648-4688 (fax); jmmitchell@usgs.gov. Information relating to the prospective license will be available at this address during regular business hours, Monday through Friday, except Federal holidays. Information about other USGS inventions available for licensing can be found online at https://www2.usgs.gov/tech-transfer/available_patents.html.

FOR FURTHER INFORMATION CONTACT: James Mitchell, Patent and Licensing Manager, Office of Policy and Analysis, USGS, 12201 Sunrise Valley Drive, MS 153, Reston, VA 20192, (703) 648-4344 (phone), (703) 648-4688 (fax); jmmitchell@usgs.gov. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service (FRS) at 1-800-877-8339 to contact the above individual during normal business hours. The Service is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The prospective exclusive license will be royalty bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. The prospective

exclusive license may be granted unless, within fifteen (15) days from the date of this published Notice, USGS receives written evidence and argument which establish that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7. The Provisional Patent Application was filed on March 9, 2016 and describes product sampler and methods for testing subsurface environment.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 35 U.S.C. 209.

Katherine McCulloch,

Deputy Associate Director for the Office for Administration.

[FR Doc. 2017-26959 Filed 12-13-17; 8:45 am]

BILLING CODE 4338-11-P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

[S1D1S SS08011000 SX066A0067F
178S180110; S2D2D SS08011000 SX066A00
33F 17XS501520; OMB Control Number
1029-0107]

Agency Information Collection Activities: Submission to the Office of Management and Budget for Review and Approval; Subsidence Insurance Program Grants

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the Office of Surface Mining Reclamation and Enforcement (OSMRE) are proposing to renew an information collection relating to Subsidence insurance program grants.

DATES: Interested persons are invited to submit comments on or before January 16, 2018.

ADDRESSES: Send written comments on this information collection request (ICR) to the Office of Management and Budget's Desk Officer for the Department of the Interior by email at OIRA_Submission@omb.eop.gov; or via

facsimile to (202) 395–5806. Please provide a copy of your comments to John Trelease, Office of Surface Mining Reclamation and Enforcement, 1849 C. Street NW, Mail Stop 4559, Washington, DC 20240; or by email to jtrelease@osmre.gov. Please reference OMB Control Number 1029–0107 in the subject line of your comment

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact John Trelease by email at jtrelease@osmre.gov, or by telephone at (202) 208–2783. You may also view the ICR at <http://www.reginfo.gov/public/do/PRAMain>.

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995, we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provides the requested data in the desired format.

A **Federal Register** notice with a 60-day public comment period soliciting comments on this collection of information was published on August 16, 2017 (82 FR 38930). No comments were received.

We are again soliciting comments on the proposed ICR that is described below. We are especially interested in public comment addressing the following issues: (1) Is the collection necessary to the proper functions of OSMRE; (2) is the estimate of burden accurate; (3) how might OSMRE enhance the quality, utility, and clarity of the information to be collected; and (4) how might OSMRE minimize the burden of this collection on the respondents, including through the use of information technology.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Title: 30 CFR part 887—Subsidence insurance program grants.

OMB Control Number: 1029–0107.

Summary: States and Indian tribes having an approved reclamation plan may establish, administer and operate self-sustaining State and Indian Tribe-administered programs to insure private property against damages caused by land subsidence resulting from underground mining. States and Indian tribes interested in requesting monies for their insurance programs would apply to the Director of OSMRE.

Bureau Form Number: None.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: States and Indian tribes with approved coal reclamation plans.

Total Estimated Number of Annual Respondents: One State or Tribal AML reclamation agency.

Total Estimated Number of Annual Responses: 1.

Estimated Completion Time per Response: 8 hours.

Total Estimated Number of Annual Burden Hours: 8 hours.

Respondent's Obligation: Required to Obtain or Retain a Benefit.

Frequency of Collection: One time.

Total Estimated Annual Nonhour Burden Cost: \$0.

An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Dated: October 25, 2017.

John A. Trelease,

Acting Chief, Division of Regulatory Support.

[FR Doc. 2017–26930 Filed 12–13–17; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

[S1D1S SS08011000 SX066A0067F 178S180110; S2D2D SS08011000 SX066A00 33F 17XS501520; OMB Control Number 1029–0054]

Agency Information Collection Activities: Submission to the Office of Management and Budget for Review and Approval; Abandoned Mine Reclamation Funds

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the Office of Surface Mining

Reclamation and Enforcement (OSMRE) are proposing to renew an information collection with revisions relating to abandoned mine reclamation funds.

DATES: Interested persons are invited to submit comments on or before January 16, 2018.

ADDRESSES: Send written comments on this information collection request (ICR) to the Office of Management and Budget's Desk Officer for the Department of the Interior by email at OIRA_Submission@omb.eop.gov; or via facsimile to (202) 395–5806. Please provide a copy of your comments to John Trelease, Office of Surface Mining Reclamation and Enforcement, 1849 C. Street NW, Mail Stop 4559, Washington, DC 20240; or by email to jtrelease@osmre.gov. Please reference OMB Control Number 1029–0054 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact John Trelease by email at jtrelease@osmre.gov, or by telephone at (202) 208–2783. You may also view the ICR at <http://www.reginfo.gov/public/do/PRAMain>.

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995, we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provides the requested data in the desired format.

A **Federal Register** notice with a 60-day public comment period soliciting comments on this collection of information was published on August 16, 2017 (82 FR 38931). No comments were received.

We are again soliciting comments on the proposed ICR that is described below. We are especially interested in public comment addressing the following issues: (1) Is the collection necessary to the proper functions of OSMRE; (2) is the estimate of burden accurate; (3) how might OSMRE enhance the quality, utility, and clarity of the information to be collected; and (4) how might OSMRE minimize the burden of this collection on the respondents, including through the use of information technology.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personal identifying

information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Title: 30 CFR part 872—Abandoned Mine Reclamation Funds.

OMB Control Number: 1029–0054.

Summary: 30 CFR part 872 establishes a procedure whereby States and Indian tribes submit written statements announcing the State/Tribe's decision not to submit reclamation plans, and therefore, will not be granted AML funds. Additional information is provided to OSMRE by state reclamation agencies to determine eligibility of economic development projects requesting Treasury Funds allocated to the AML Pilot Program.

Bureau Form Number: None.

Type of Review: Revision of a currently approved collection.

Respondents/Affected Public: State and Tribal abandoned mine land reclamation agencies; and businesses and non-profit organizations.

Total Estimated Number of Annual Respondents: One State or Tribal AML reclamation agency which may submit a notification to cease their AML program; approximately 54 AML Pilot Project applicants, and 6 State AML Pilot Coordinators processing 9 projects each.

Total Estimated Number of Annual Responses: 109.

Estimated Completion Time per Response: One hour for AML reclamation agencies to prepare written statements to cease their AML program; 85 hours for AML Pilot Project applicants, and 155 hours for State AML Pilot Coordinators to review each application.

Total Estimated Number of Annual Burden Hours: 12,961 hours.

Respondent's Obligation: Required to Obtain or Retain a Benefit.

Frequency of Collection: One time.

Total Estimated Annual Nonhour Burden Cost: \$0.

An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Dated: October 25, 2017.

John A. Trelease,

Acting Chief, Division of Regulatory Support.

[FR Doc. 2017–26931 Filed 12–13–17; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF JUSTICE

[OMB Number 1110–0053]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Reinstatement, With Change, of a Previously Approved Collection for Which Approval Has Expired: FBI eFOIA Form

AGENCY: Federal Bureau of Investigation, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Department of Justice (DOJ), Office of Justice Programs, Federal Bureau of Investigation, will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. This proposed information collection was previously published in the **Federal Register**, on October 10, 2017 allowing for a 60 day comment period.

DATES: Comments are encouraged and will be accepted for an additional 30 day until January 16, 2018.

FOR FURTHER INFORMATION CONTACT: If you have additional comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Leanna Ramsey, at 540–868–4292 FOIA Public Information Officer, Federal Bureau of Investigation, 170 Marcel Drive, Winchester, VA 22602.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological

collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Reinstatement of the FBI eFOIA form with changes, a previously approved collection for which approval has expired.

(2) *Title of the Form/Collection:* FBI eFOIA form

(3) *Agency form number, if any, and the applicable component of the Department sponsoring the collection:* The applicable component within the Department of Justice is the Federal Bureau of Investigation.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

The general public who wish to make online FOIA request will be the most affected group. This information collection is to allow the Federal Bureau of Investigation to accept and responded to FOIA requester as defined in 28 CFR part 16.3.

(a) How made and addressed. You may make a request for records of the Department of Justice by writing directly to the Department component that maintains those records. You may find the Department's "Freedom of Information Act Reference Guide"—which is available electronically at the Department's World Wide website, and is available in paper form as well—helpful in making your request. For additional information about the FOIA, you may refer directly to the statute. If you are making a request for records about yourself, see § 16.41(d) for additional requirements. If you are making a request for records about another individual, either a written authorization signed by that individual permitting disclosure of those records to you or proof that that individual is deceased (for example, a copy of a death certificate or an obituary) will help the processing of your request. Your request should be sent to the component's FOIA office at the address listed in appendix I to part 16. In most cases, your FOIA request should be sent to a component's central FOIA office. For records held by a field office of the Federal Bureau of Investigation (FBI) or the Immigration and Naturalization Service (INS), however, you must write directly to that FBI or INS field office address, which can be found in most telephone books or by calling the component's central FOIA office. (The functions of each component are summarized in part 0 of this title and in the description of the

Department and its components in the "United States Government Manual," which is issued annually and is available in most libraries, as well as for sale from the Government Printing Office's Superintendent of Documents. This manual also can be accessed electronically at the Government Printing Office's World Wide website (which can be found at http://www.access.gpo.gov/su_docs.) If you cannot determine where within the Department to send your request, you may send it to the FOIA/PA Mail Referral Unit, Justice Management Division, U.S. Department of Justice, 950 Pennsylvania Avenue NW, Washington, DC 20530-0001. That office will forward your request to the component(s) it believes most likely to have the records that you want. Your request will be considered received as of the date it is received by the proper component's FOIA office. For the quickest possible handling, you should mark both your request letter and the envelope "Freedom of Information Act Request." (b) Description of records sought. You must describe the records that you seek in enough detail to enable Department personnel to locate them with a reasonable amount of effort. Whenever possible, your request should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter of the record. In addition, if you want records about a court case, you should provide the title of the case, the court in which the case was filed, and the nature of the case. If known, you should include any file designations or descriptions for the records that you want. As a general rule, the more specific you are about the records or type of records that you want, the more likely the Department will be able to locate those records in response to your request. If a component determines that your request does not reasonably describe records, it shall tell you either what additional information is needed or why your request is otherwise insufficient. The component also shall give you an opportunity to discuss your request so that you may modify it to meet the requirements of this section. If your request does not reasonably describe the records you seek, the agency's response to your request may be delayed.

Code of Federal Regulations/Title 28—Judicial Administration/Vol. 1/2013-07-01279

(c) Agreement to pay fees. If you make a FOIA request, it shall be considered an agreement by you to pay all applicable fees charged under § 16.11, up to

\$25.00, unless you seek a waiver of fees. The component responsible for responding to your request ordinarily will confirm this agreement in an acknowledgement letter. When making a request, you may specify a willingness to pay a greater or lesser amount.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* An estimated 21,406 FOI/PA requests are completed annually. These requests can be submitted via free-form letter, email or the eFOIA form. In FY 2017, approximately 16,402 online eFOIA forms were submitted. An average of 8 minutes per respondent is needed to complete form the eFOIA form. The estimated range of burden for respondents is expected to be between 4 minutes to 12 minutes for completion.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The estimated public burden associated with this collection is .5 hours. It is estimated that respondents will take .5 hour to complete a questionnaire. The burden hours for collecting respondent data sum to 250 hours 500 respondents × .5 hours = 250 hours).

If additional information is required contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, Suite 3E.405B, Washington, DC 20530.

Dated: December 11, 2017.

Melody Braswell,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. 2017-26953 Filed 12-13-17; 8:45 am]

BILLING CODE 4410-02-P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Meetings of Humanities Panel

AGENCY: National Endowment for the Humanities.

ACTION: Notice of meetings.

SUMMARY: The National Endowment for the Humanities will hold three meetings of the Humanities Panel, a federal advisory committee, during January, 2018. The purpose of the meetings is for panel review, discussion, evaluation, and recommendation of applications for financial assistance under the National Foundation on the Arts and Humanities Act of 1965.

DATES: See Supplementary Information section for meeting dates. The meetings

will open at 8:30 a.m. and will adjourn by 5:00 p.m. on the dates specified below.

ADDRESSES: Please see **SUPPLEMENTARY INFORMATION** for locations.

FOR FURTHER INFORMATION CONTACT:

Elizabeth Voyatzis, Committee Management Officer, 400 7th Street SW, Room 4060, Washington, DC 20506; (202) 606-8322; evoyatzis@neh.gov.

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C. App.), notice is hereby given of the following meetings:

1. *Date:* January 8, 2018.

This meeting will discuss applications for Next Generation Humanities Ph.D.: Planning Grants, submitted to the Division of Education Programs. The meeting will be held at the NEH offices at 400 7th Street SW, Washington, DC 20506.

2. *Date:* January 18, 2018.

This meeting will discuss applications on the subjects of the Americas and Europe: History, Social Sciences, Literature, and Studies Linguistics, for Kluge Fellowships, submitted to the Division of Research Programs. The meeting will be held at The Library of Congress, Jefferson Building, 10 First Street SE, Room LJ-220, Washington, DC 20540.

2. *Date:* January 22, 2018.

This meeting will discuss applications on the subjects of Africa, Asia, and Europe: History, Social Sciences, Literature, and Studies for Kluge Fellowships, submitted to the Division of Research Programs. The meeting will be held at The Library of Congress, Jefferson Building, 10 First Street SE, Room LJ-220, Washington, DC 20540.

Because these meetings will include review of personal and/or proprietary financial and commercial information given in confidence to the agency by grant applicants, the meetings will be closed to the public pursuant to sections 552b(c)(4) and 552b(c)(6) of Title 5, U.S.C., as amended. I have made this determination pursuant to the authority granted me by the Chairman's Delegation of Authority to Close Advisory Committee Meetings dated April 15, 2016.

Dated: December 11, 2017.

Elizabeth Voyatzis,

Committee Management Officer.

[FR Doc. 2017-26965 Filed 12-13-17; 8:45 am]

BILLING CODE 7536-01-P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2018–49 and CP2018–80; MC2018–50 and CP2018–81; MC2018–51 and CP2018–82; MC2018–52 and CP2018–83]

New Postal Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* December 18, 2017.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at <http://www.prc.gov>. Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:**Table of Contents**

- I. Introduction
- II. Docketed Proceeding(s)

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the market dominant or the competitive product list, or the modification of an existing product currently appearing on the market dominant or the competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (<http://www.prc.gov>). Non-public portions of

the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3007.40.

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern market dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3010, and 39 CFR part 3020, subpart B. For request(s) that the Postal Service states concern competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3015, and 39 CFR part 3020, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s):* MC2018–49 and CP2018–80; *Filing Title:* USPS Request to Add Priority Mail Express & Priority Mail Contract 54 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 8, 2017; *Filing Authority:* 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.*; *Public Representative:* Kenneth R. Moeller; *Comments Due:* December 18, 2017.

2. *Docket No(s):* MC2018–50 and CP2018–81; *Filing Title:* USPS Request to Add Priority Mail Contract 386 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 8, 2017; *Filing Authority:* 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.*; *Public Representative:* Kenneth R. Moeller; *Comments Due:* December 18, 2017.

3. *Docket No(s):* MC2018–51 and CP2018–82; *Filing Title:* USPS Request to Add First-Class Package Service Contract 86 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 8, 2017; *Filing Authority:* 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.*; *Public Representative:* Jennaca D. Upperman; *Comments Due:* December 18, 2017.

4. *Docket No(s):* MC2018–52 and CP2018–83; *Filing Title:* USPS Request to Add Priority Mail Contract 387 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 8, 2017; *Filing Authority:* 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.*; *Public Representative:* Jennaca D. Upperman; *Comments Due:* December 18, 2017.

This notice will be published in the **Federal Register**.

Stacy L. Ruble,
Secretary.

[FR Doc. 2017–26973 Filed 12–13–17; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL SERVICE**Product Change—First-Class Package Service Negotiated Service Agreement**

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of notice required under 39 U.S.C. 3642(d)(1):* December 14, 2017.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 8, 2017, it filed with the Postal Regulatory Commission a *USPS Request to Add First-Class Package Service Contract 86 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2018–51, CP2018–82.

Elizabeth A. Reed,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2017–26907 Filed 12–13–17; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE**Product Change—Priority Mail Express and Priority Mail Negotiated Service Agreement**

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of notice required under 39 U.S.C. 3642(d)(1):* December 14, 2017.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 8,

2017, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express & Priority Mail Contract 54 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2018–49, CP2018–80.

Elizabeth A. Reed,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2017–26905 Filed 12–13–17; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of notice required under 39 U.S.C. 3642(d)(1):* December 14, 2017.

FOR FURTHER INFORMATION CONTACT:
Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 8, 2017, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Contract 387 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2018–52, CP2018–83.

Elizabeth A. Reed,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2017–26908 Filed 12–13–17; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of notice required under 39 U.S.C. 3642(d)(1):* December 14, 2017.

FOR FURTHER INFORMATION CONTACT:
Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 8, 2017, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Contract 386 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2018–50, CP2018–81.

Elizabeth A. Reed,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2017–26906 Filed 12–13–17; 8:45 am]
BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–82245; File No. SR–Phlx–2017–99]

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing of Proposed Rule Change To Amend the Exchange Rules To Make Permanent a Program That Allows Transactions To Take Place in Open Outcry Trading at Prices of at Least \$0 But Less Than \$1 per Option Contract (“Sub-Dollar Cabinet Trades”)

December 8, 2017.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b–4 thereunder,² notice is hereby given that on November 29, 2017 Nasdaq PHLX LLC (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to a proposal[sic] to amend the Exchange's rules to make permanent a program that allows transactions to take place in open outcry trading at prices of at least \$0 but less than \$1 per option contract (“sub-dollar cabinet trades”).

The text of the proposed rule change is available on the Exchange's website at <http://nasdaqphlx.cchwallstreet.com/>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 1059 to make permanent a program that allows transactions to take place at a price that is below \$1 per option contract.³ The program is currently subject to a pilot that is scheduled to expire on January 5, 2018.⁴

An “accommodation” or “cabinet” trade refers to trades in listed options on the Exchange that are worthless or not actively traded. Trading is generally conducted in accordance with Exchange Rules, except as provided in Exchange Rule 1059, Accommodation Transactions (Cabinet Trades), which sets forth specific procedures for engaging in cabinet trades.

Rule 1059 provides that a “cabinet order” is a closing limit order at a price of \$1 per option contract for the account of a customer, firm, specialist or ROT. An opening order is not a “cabinet order” but may in certain cases be matched with a cabinet order. Prior to the pilot program, only closing limit orders at a price of \$1 per option contract for the accounts of customer, firm, specialists and Registered Options Traders (“ROTs”) could be placed in the cabinet.

Rule 1059 currently provides that cabinet transactions at a price of \$1 per option contract may occur via open outcry in any options series open for trading on the Exchange. However, the \$1 Cabinet Trading procedures are not available in Penny Pilot Program classes

³ See Commentary .02, Limit Orders Priced Below \$1, to Exchange Rule 1059, Accommodation Transactions.

⁴ See Securities Exchange Act Release No. 79782 (January 12, 2017), 82 FR 6667 (January 19, 2017) (SR–Phlx–2017–01). The Exchange initially adopted the program in 2010. See Securities Exchange Act Release No. 63626 (December 30, 2010), 76 FR 812 (January 6, 2011) (SR–Phlx–2010–185).

because in those classes an option series can trade in a standard increment as low as \$ 0.01 per share (or \$1.00 per option contract with a 100 share multiplier).

The Exchange amended the Cabinet Trading procedures to allow transactions to take place in open outcry at a price of at least \$0 but less than \$1 per option contract. This amendment expires on January 5, 2018. These lower-priced transactions are permitted to be traded pursuant to the same procedures applicable to \$1 Cabinet Trades, except that (i) bids and offers for opening transactions are only permitted to accommodate closing transactions, and (ii) transactions in option classes participating in the Penny Pilot Program are permitted. The Exchange believes that allowing a price of at least \$0 but less than \$1 better accommodates the closing of options positions in series that are worthless or not actively traded, particularly when there has been a significant move in the price of the underlying security, resulting in a large number of series being out-of-the-money. For example, a market participant might have a long position in a put series with a strike price of \$30 and the underlying stock might be trading at \$100. In such an instance, there is likely no market to close-out the position, even at the \$1 cabinet price.

As with other accommodation liquidations under Rule 1059, transactions at prices less than \$1 are not disseminated to the public on the consolidated tape. In addition, as with other accommodation liquidations under Rule 1059, the transactions are exempt from the Consolidated Options Audit Trail (“COATS”) requirements of Exchange Rule 1063(e)(i). However, Rule 1059 requires all transactions, including transaction for less than \$1, to be reported to the Exchange following the close of each business day.

The Exchange notes that while the level of liquidation trades is not meaningful, such trades serve an essential purpose in that they allow market participants to close out options positions that are worthless or not actively trading. To illustrate, in 2016, there were a total of 442 Cabinet Trades comprising 244,734 contracts. Each contract was executed at a trade price of \$ 0.01. The Exchange believes this level of trading demonstrates the benefit of the current program to market participants.

The current rule was adopted on a pilot basis to provide the Exchange time to evaluate the efficacy of the change and to address any operational issues that might arise in processing Cabinet trades. In support of making the program permanent, the Exchange

represents that there are no operational issues in processing and clearing Cabinet Trades in penny and subpenny increments. The Exchange is also not aware of the Options Clearing Corporation (“OCC”) having operational issues with processing Cabinet trades submitted by the Exchange. Each Cabinet Trade is input manually into the clearing system, and then flows seamlessly for settlement at OCC. More specifically, upon receiving an order for a Cabinet Trade, a Floor Broker fills out a designated cabinet transaction form provided by the Exchange noting the order details. The Floor Broker subsequently calls for a market for the order by announcing the terms of the order to the trading crowd. The Floor Broker proceeds to execute the order and submits the designated cabinet transaction form to the Nasdaq Market Operations staff for clearance and reporting at the close of the business day. Nasdaq Market Operations staff then enter the transaction into the Phlx system, which transmits the trade to OCC for clearance and settlement.

At the time of adoption of the pilot the Phlx system permitted reporting a cabinet trade at a price as small as \$0.0001, as it does today. The Exchange system allows Cabinet trades to be processed in a manner similar to how all other trades are processed by the exchange.

Additionally, the Exchange notes that members and member organizations have not raised any concerns with the processing of Cabinet Trades.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁵ in general, and furthers the objectives of Section 6(b)(5) of the Act,⁶ in particular, in that it is 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. The Exchange believes that liquidation trades promote competition and afford market participants the opportunity to close out their options positions. The Exchange believes that permanently approving the rules that allow for liquidations at a price less than \$1 per option contract would better facilitate the closing of options positions that are worthless or not actively trading, especially in Penny Pilot issues where Cabinet Trades are not otherwise permitted. The Exchange believes that

approving the program on a permanent basis is also consistent with the Act. With respect to the level of liquidation trades transacted on the Exchange, the Exchange believes that the data gathered provides meaningful support to make the program permanent.

B. Self-Regulatory Organization’s Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that approving the program on a permanent basis will not impact competition, as it will continue to facilitate members’ ability to close positions in worthless or not actively traded series.

C. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) By order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission’s internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-Phlx-2017-99 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.

⁵ 15 U.S.C. 78f(b).

⁶ 15 U.S.C. 78f(b)(5).

All submissions should refer to File Number SR–Phlx–2017–99. 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 website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission’s Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2017–99 and should be submitted on or before December 29, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁷

Eduardo A. Aleman,
Assistant Secretary.

[FR Doc. 2017–26912 Filed 12–13–17; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–82253; File No. SR–FINRA–2017–011]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Amendment No. 1 to a Proposed Rule Change to Adopt a Fee Schedule to Establish the Fees for Industry Members Related to the National Market System Plan Governing the Consolidated Audit Trail

December 8, 2017.

On May 8, 2017, 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 adopt a fee schedule to establish the fees for Industry Members related to the National Market System Plan Governing the Consolidated Audit Trail (“CAT NMS Plan”). The proposed rule change was published in the **Federal Register** for comment on May 22, 2017.³ The Commission received seven comment letters on the proposed rule change,⁴ and a response to

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ See Securities Exchange Act Release Nos. 80710 (May 17, 2017), 82 FR 23639 (May 23, 2017) (“Original Proposal”).

⁴ Since the CAT NMS Plan Participants’ proposed rule changes to adopt fees to be charged to Industry Members to fund the consolidated audit trail are substantively identical, the Commission is considering all comments received on the proposed rule changes regardless of the comment file to which they were submitted. See text accompanying notes 12–15 *infra*, for a list of the CAT NMS Plan Participants. See Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, to Brent J. Fields, Secretary, Commission (dated June 6, 2017), available at: <https://www.sec.gov/comments/sr-batsbzx-2017-38/batsbzx201738-1788188-153228.pdf>; Letter from Patricia L. Cerny and Steven O’Malley, Compliance Consultants, to Brent J. Fields, Secretary, Commission (dated June 12, 2017), available at: <https://www.sec.gov/comments/sr-cboe-2017-040/cboe2017040-1799253-153675.pdf>; Letter from Daniel Zinn, General Counsel, OTC Markets Group Inc., to Eduardo A. Aleman, Assistant Secretary, Commission (dated June 13, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-1801717-153703.pdf>; Letter from Joanna Mallers, Secretary, FIA Principal Traders Group, to Brent J. Fields, Secretary, Commission (dated June 22, 2017), available at: <https://www.sec.gov/comments/sr-cboe-2017-040/cboe2017040-1819670-154195.pdf>; Letter from Stuart J. Kaswell, Executive Vice President and Managing Director, General Counsel, Managed Funds Association, to Brent J. Fields, Secretary, Commission (dated June 23, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-1822454-154283.pdf>; and Letter from Suzanne H. Shatto, Investor, to Commission (dated June 27, 2017), available at: <https://www.sec.gov/>

comments from the Participants.⁵ On June 30, 2017, the Commission temporarily suspended and initiated proceedings to determine whether to approve or disapprove the proposed rule change.⁶ The Commission thereafter received seven comment letters,⁷ and a response to comments from the Participants.⁸ On November 9, 2017, the Commission extended the time period within which to approve the proposed rule change or disapprove the proposed rule change to January 14, 2018.⁹ On December 1, 2017, FINRA filed Amendment No. 1 to the proposed rule change, as described in Items I and II below, which Items have been

comments/sr-batsedgx-2017-22/batsedgx201722-154443.pdf. The Commission also received a comment letter which is not pertinent to these proposed rule changes. See Letter from Christina Crouch, Smart Ltd., to Brent J. Fields, Secretary, Commission (dated June 5, 2017), available at: <https://www.sec.gov/comments/sr-batsbzx-2017-38/batsbzx201738-1785545-153152.htm>.

⁵ See Letter from CAT NMS Plan Participants to Brent J. Fields, Secretary, Commission (dated June 29, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-1832632-154584.pdf>.

⁶ See Securities Exchange Act Release No. 81067 (June 30, 2017), 82 FR 31656 (July 7, 2017).

⁷ See Letter from W. Hardy Callcott, Partner, Sidley Austin LLP, to Brent J. Fields, Secretary, Commission (dated July 27, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2148338-157737.pdf>; Letter from Kevin Coleman, General Counsel and Chief Compliance Officer, Belvedere Trading LLC, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2148360-157740.pdf>; Letter from Joanna Mallers, Secretary, FIA Principal Traders Group, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2151228-157745.pdf>; Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2150977-157744.pdf>; Letter from Stuart J. Kaswell, Executive Vice President and Managing Director, General Counsel, Managed Funds Association, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2150818-157743.pdf>; Letter from John Kinahan, Chief Executive Officer, Group One Trading, L.P., to Brent J. Fields, Secretary, Commission (dated August 10, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-2214568-160619.pdf>; Letter from Joseph Molluso, Executive Vice President and CFO, Virtu Financial, to Brent J. Fields, Secretary, Commission (dated August 18, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-2238648-160830.pdf>.

⁸ See Letter from Michael Simon, Chair, CAT NMS Plan Operating Committee, to Brent J. Fields, Secretary, Commission (dated November 2, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2674608-161412.pdf>.

⁹ See Securities Exchange Act Release No. 82049 (November 9, 2017), 82 FR 53549 (November 16, 2017).

⁷ 17 CFR 200.30–3(a)(12).

prepared by FINRA.¹⁰ The Commission is publishing this notice to solicit comments from interested persons on Amendment No. 1.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to file Amendment No. 1 to SR-FINRA-2017-011 (the "Original Proposal"), pursuant to which FINRA proposed to adopt a fee schedule to establish the fees for Industry Members related to the National Market System Plan Governing the Consolidated Audit Trail (the "CAT NMS Plan" or "Plan").¹¹ FINRA files this proposed rule change (the "Amendment") to amend the Original Proposal. This Amendment replaces the Original Proposal in its entirety, and also describes the changes from the Original Proposal.

The text of the proposed rule change is available on FINRA's website at <http://www.finra.org>, at the principal office of FINRA and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

BOX Options Exchange LLC, Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe C2 Exchange, Inc., Cboe Exchange, Inc.,¹² Chicago Stock Exchange, Inc.,

¹⁰ Amendment No. 1 replaces and supersedes the Original Proposal in its entirety.

¹¹ Unless otherwise specified, capitalized terms used in this fee filing are defined as set forth herein, the CAT Compliance Rule Series, in the CAT NMS Plan, or the Original Proposal.

¹² Note that Bats BYX Exchange, Inc., Bats BZX Exchange, Inc., Bats EDGA Exchange, Inc., Bats EDGX Exchange, Inc., LLC, C2 Options Exchange, Incorporated, and Chicago Board Options Exchange, Incorporated, have been renamed Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc.,

Financial Industry Regulatory Authority, Inc. ("FINRA"), Investors' Exchange LLC, Miami International Securities Exchange, LLC, MIAx PEARL, LLC, NASDAQ BX, Inc., Nasdaq GEMX, LLC, Nasdaq ISE, LLC, Nasdaq MRX, LLC,¹³ NASDAQ PHLX LLC, The NASDAQ Stock Market LLC, New York Stock Exchange LLC, NYSE American LLC,¹⁴ NYSE Arca, Inc. and NYSE National, Inc.¹⁵ (collectively, the "Participants") filed with the Commission, pursuant to Section 11A of the Exchange Act¹⁶ and Rule 608 of Regulation NMS thereunder,¹⁷ the CAT NMS Plan.¹⁸ The Participants filed the Plan to comply with Rule 613 of Regulation NMS under the Exchange Act.¹⁹ The Plan was published for comment in the **Federal Register** on May 17, 2016,²⁰ and approved by the Commission, as modified, on November 15, 2016.²¹ The Plan is designed to create, implement and maintain a consolidated audit trail ("CAT") that would capture customer and order event information for orders in NMS Securities and OTC Equity Securities, across all markets, from the time of order inception through routing, cancellation, modification, or execution in a single consolidated data source. The Plan accomplishes this by creating CAT NMS, LLC (the "Company"), of which each Participant is a member, to operate the CAT.²² Under the CAT NMS

Cboe C2 Exchange, Inc., Cboe Exchange, Inc., respectively.

¹³ ISE Gemini, LLC, ISE Mercury, LLC and International Securities Exchange, LLC have been renamed Nasdaq GEMX, LLC, Nasdaq MRX, LLC, and Nasdaq ISE, LLC, respectively. See Securities Exchange Act Rel. No. 80248 (March 15, 2017), 82 FR 14547 (March 21, 2017); Securities Exchange Act Rel. No. 80326 (March 29, 2017), 82 FR 16460 (April 4, 2017); and Securities Exchange Act Rel. No. 80325 (March 29, 2017), 82 FR 16445 (April 4, 2017).

¹⁴ NYSE MKT LLC has been renamed NYSE American LLC. See Securities Exchange Act Rel. No. 80283 (March 21, 2017), 82 FR 15244 (March 27, 2017).

¹⁵ National Stock Exchange, Inc. has been renamed NYSE National, Inc. See Securities Exchange Act Rel. No. 79902 (January 30, 2017), 82 FR 9258 (February 3, 2017).

¹⁶ 15 U.S.C. 78k-1.

¹⁷ 17 CFR 242.608.

¹⁸ See Letter from the Participants to Brent J. Fields, Secretary, Commission, dated September 30, 2014; and Letter from Participants to Brent J. Fields, Secretary, Commission, dated February 27, 2015. On December 24, 2015, the Participants submitted an amendment to the CAT NMS Plan. See Letter from Participants to Brent J. Fields, Secretary, Commission, dated December 23, 2015.

¹⁹ 17 CFR 242.613.

²⁰ Securities Exchange Act Release No. 77724 (April 27, 2016), 81 FR 30614 (May 17, 2016).

²¹ Securities Exchange Act Release No. 79318 (November 15, 2016), 81 FR 84696 (November 23, 2016) ("Approval Order").

²² The Plan also serves as the limited liability company agreement for the Company.

Plan, the Operating Committee of the Company ("Operating Committee") has discretion to establish funding for the Company to operate the CAT, including establishing fees that the Participants will pay, and establishing fees for Industry Members that will be implemented by the Participants ("CAT Fees").²³ The Participants are required to file with the SEC under Section 19(b) of the Exchange Act any such CAT Fees applicable to Industry Members that the Operating Committee approves.²⁴

Accordingly, on May 8, 2017, FINRA submitted the Original Proposal to propose the Consolidated Audit Trail Funding Fees, which would require Industry Members that are FINRA members to pay the CAT Fees determined by the Operating Committee. Each of the other Participants filed substantively identical fee filings in accordance with the Plan. The Commission published the Original Proposal for public comment in the **Federal Register** on May 23, 2017,²⁵ and received comments in response to the Original Proposal or similar fee filings by other Participants.²⁶ On June 30, 2017, the Commission suspended, and instituted proceedings to determine whether to approve or disapprove, the Original Proposal.²⁷ The Commission received seven comment letters in response to those proceedings.²⁸

In response to the comments on the Original Proposal, the Operating Committee determined to make the following changes to the funding model:

²³ Section 11.1(b) of the CAT NMS Plan.

²⁴ See *supra* note 16.

²⁵ Securities Exchange Act Release No. 80710 (May 17, 2017), 82 FR 23639 (May 23, 2017) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2017-011).

²⁶ For a summary of comments, see generally Securities Exchange Act Release No. 81067 (June 30, 2017), 82 FR 31656 (July 7, 2017) ("Suspension Order").

²⁷ Suspension Order.

²⁸ See Letter from W. Hardy Callcott, Sidley Austin LLP, to Brent J. Fields, Secretary, SEC, dated July 27, 2017 ("Sidley Letter"); Letter from Kevin Coleman, General Counsel & Chief Compliance Officer, Belvedere Trading LLC, to Brent J. Fields, Secretary, SEC, dated July 28, 2017 ("Belvedere Letter"); Letter from Joanna Mallers, Secretary, FIA Principal Traders Group, to Brent J. Fields, Secretary, SEC, dated July 28, 2017 ("FIA Principal Traders Group Letter"); Letter from Stuart J. Kaswell, Executive Vice President, Managing Director and General Counsel, Managed Funds Association, to Brent J. Fields, Secretary, SEC, dated July 28, 2017 ("MFA Letter"); Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA, to Brent J. Fields, Secretary, SEC, dated July 28, 2017 ("SIFMA Letter"); Letter from John Kinahan, Chief Executive Officer, Group One Trading, L.P., to Brent J. Fields, Secretary, SEC, dated Aug. 10, 2017 ("Group One Letter"); and Letter from Joseph Molluso, Executive Vice President, Virtu Financial, to Brent J. Fields, Secretary, SEC, August 18, 2017 ("Virtu Financial Letter").

(1) Add two additional CAT Fee tiers for Equity Execution Venues; (2) discount the OTC Equity Securities market share of Execution Venue ATSS trading OTC Equity Securities as well as the market share of the FINRA over-the-counter reporting facility (“ORF”) by the average shares per trade ratio between NMS Stocks and OTC Equity Securities (calculated as 0.17% based on available data from the second quarter of 2017) when calculating the market share of Execution Venue ATSS trading OTC Equity Securities and FINRA; (3) discount the Options Market Maker quotes by the trade to quote ratio for options (calculated as 0.01% based on available data for June 2016 through June 2017) when calculating message traffic for Options Market Makers; (4) discount equity market maker quotes by the trade to quote ratio for equities (calculated as 5.43% based on available data for June 2016 through June 2017) when calculating message traffic for equity market makers; (5) decrease the number of tiers for Industry Members (other than the Execution Venue ATSS) from nine to seven; (6) change the allocation of CAT costs between Equity Execution Venues and Options Execution Venues from 75%/25% to 67%/33%; (7) adjust tier percentages and recovery allocations for Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSS); (8) focus the comparability of CAT Fees on the individual entity level, rather than primarily on the comparability of affiliated entities; (9) commence invoicing of CAT Reporters as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Participants and the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants; and (10) require the proposed fees to automatically expire two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. As discussed in detail below, FINRA proposes to amend the Original Proposal to reflect these changes approved by the Operating Committee.

(1) Executive Summary

The following provides an executive summary of the CAT funding model approved by the Operating Committee, as well as Industry Members’ rights and obligations related to the payment of CAT Fees calculated pursuant to the CAT funding model, as amended by this Amendment. A detailed description of the CAT funding model and the CAT Fees, as amended by this Amendment,

as well as the changes made to the Original Proposal follows this executive summary.

(A) CAT Funding Model

- *CAT Costs.* The CAT funding model is designed to establish CAT-specific fees to collectively recover the costs of building and operating the CAT from all CAT Reporters, including Industry Members and Participants. The overall CAT costs used in calculating the CAT Fees in this fee filing are comprised of Plan Processor CAT costs and non-Plan Processor CAT costs incurred, and estimated to be incurred, from November 21, 2016 through November 21, 2017. Although the CAT costs from November 21, 2016 through November 21, 2017 were used in calculating the CAT Fees, the CAT Fees set forth in this fee filing would be in effect until the automatic sunset date, as discussed below. (*See* Section 3(a)(2)(E) below)

- *Bifurcated Funding Model.* The CAT NMS Plan requires a bifurcated funding model, where costs associated with building and operating the CAT would be borne by (1) Participants and Industry Members that are Execution Venues for Eligible Securities through fixed tier fees based on market share, and (2) Industry Members (other than alternative trading systems (“ATSS”) that execute transactions in Eligible Securities (“Execution Venue ATSS”)) through fixed tier fees based on message traffic for Eligible Securities. (*See* Section 3(a)(2) below)

- *Industry Member Fees.* Each Industry Member (other than Execution Venue ATSS) will be placed into one of seven tiers of fixed fees, based on “message traffic” in Eligible Securities for a defined period (as discussed below). Prior to the start of CAT reporting, “message traffic” will be comprised of historical equity and equity options orders, cancels, quotes and executions provided by each exchange and FINRA over the previous three months. After an Industry Member begins reporting to the CAT, “message traffic” will be calculated based on the Industry Member’s Reportable Events reported to the CAT. Industry Members with lower levels of message traffic will pay a lower fee and Industry Members with higher levels of message traffic will pay a higher fee. To avoid disincentives to quoting behavior, Options Market Maker and equity market maker quotes will be discounted when calculating message traffic. (*See* Section 3(a)(2)(B) below)

- *Execution Venue Fees.* Each Equity Execution Venue will be placed in one of four tiers of fixed fees based on market share, and each Options

Execution Venue will be placed in one of two tiers of fixed fees based on market share. Equity Execution Venue market share will be determined by calculating each Equity Execution Venue’s proportion of the total volume of NMS Stock and OTC Equity shares reported by all Equity Execution Venues during the relevant time period. For purposes of calculating market share, the OTC Equity Securities market share of Execution Venue ATSS trading OTC Equity Securities as well as the market share of the FINRA ORF will be discounted. Similarly, market share for Options Execution Venues will be determined by calculating each Options Execution Venue’s proportion of the total volume of Listed Options contracts reported by all Options Execution Venues during the relevant time period. Equity Execution Venues with a larger market share will pay a larger CAT Fee than Equity Execution Venues with a smaller market share. Similarly, Options Execution Venues with a larger market share will pay a larger CAT Fee than Options Execution Venues with a smaller market share. (*See* Section 3(a)(2)(C) below)

- *Cost Allocation.* For the reasons discussed below, in designing the model, the Operating Committee determined that 75 percent of total costs recovered would be allocated to Industry Members (other than Execution Venue ATSS) and 25 percent would be allocated to Execution Venues. In addition, the Operating Committee determined to allocate 67 percent of Execution Venue costs recovered to Equity Execution Venues and 33 percent to Options Execution Venues. (*See* Section 3(a)(2)(D) below)

- *Comparability of Fees.* The CAT funding model charges CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) comparable CAT Fees. (*See* Section 3(a)(2)(F) below)

(B) CAT Fees for Industry Members

- *Fee Schedule.* The quarterly CAT Fees for each tier for Industry Members are set forth in the two fee schedules in the Consolidated Audit Trail Funding Fees, one for Equity ATSS and one for Industry Members other than Equity ATSS. (*See* Section 3(a)(3)(B) below)

- *Quarterly Invoices.* Industry Members will be billed quarterly for CAT Fees, with the invoices payable within 30 days. The quarterly invoices will identify within which tier the Industry Member falls. (*See* Section 3(a)(3)(C) below)

- *Centralized Payment.* Each Industry Member will receive from the Company

one invoice for its applicable CAT Fees, not separate invoices from each Participant of which it is a member. Each Industry Member will pay its CAT Fees to the Company via the centralized system for the collection of CAT Fees established by the Operating Committee. (See Section 3(a)(3)(C) below)

- *Billing Commencement.* Industry Members will begin to receive invoices for CAT Fees as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Participants and the operative date of the Plan amendment adopting CAT Fees for Participants. (See Section 3(a)(2)(G) below)

- *Sunset Provision.* The Consolidated Audit Trail Funding Fees will sunset automatically two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. (See Section 3(a)(2)(J) below)

(2) Description of the CAT Funding Model

Article XI of the CAT NMS Plan requires the Operating Committee to approve the operating budget, including projected costs of developing and operating the CAT for the upcoming year. In addition to a budget, Article XI of the CAT NMS Plan provides that the Operating Committee has discretion to establish funding for the Company, consistent with a bifurcated funding model, where costs associated with building and operating the Central Repository would be borne by (1) Participants and Industry Members that are Execution Venues through fixed tier fees based on market share, and (2) Industry Members (other than Execution Venue ATSS) through fixed tier fees based on message traffic. In its order approving the CAT NMS Plan, the Commission determined that the proposed funding model was “reasonable”²⁹ and “reflects a reasonable exercise of the Participants’ funding authority to recover the Participants’ costs related to the CAT.”³⁰

More specifically, the Commission stated in approving the CAT NMS Plan that “[t]he Commission believes that the proposed funding model is reasonably designed to allocate the costs of the CAT between the Participants and Industry Members.”³¹ The Commission further noted the following:

The Commission believes that the proposed funding model reflects a reasonable exercise of the Participants’ funding

authority to recover the Participants’ costs related to the CAT. The CAT is a regulatory facility jointly owned by the Participants and . . . the Exchange Act specifically permits the Participants to charge their members fees to fund their self-regulatory obligations. The Commission further believes that the proposed funding model is designed to impose fees reasonably related to the Participants’ self-regulatory obligations because the fees would be directly associated with the costs of establishing and maintaining the CAT, and not unrelated SRO services.³²

Accordingly, the funding model approved by the Operating Committee imposes fees on both Participants and Industry Members.

As discussed in Appendix C of the CAT NMS Plan, in developing and approving the approved funding model, the Operating Committee considered the advantages and disadvantages of a variety of alternative funding and cost allocation models before selecting the proposed model.³³ After analyzing the various alternatives, the Operating Committee determined that the proposed tiered, fixed fee funding model provides a variety of advantages in comparison to the alternatives.

In particular, the fixed fee model, as opposed to a variable fee model, provides transparency, ease of calculation, ease of billing and other administrative functions, and predictability of a fixed fee. Such factors are crucial to estimating a reliable revenue stream for the Company and for permitting CAT Reporters to reasonably predict their payment obligations for budgeting purposes. Additionally, a strictly variable or metered funding model based on message volume would be far more likely to affect market behavior and place an inappropriate burden on competition.

In addition, reviews from varying time periods of current broker-dealer order and trading data submitted under existing reporting requirements showed a wide range in activity among broker-dealers, with a number of broker-dealers submitting fewer than 1,000 orders per month and other broker-dealers submitting millions and even billions of orders in the same period. Accordingly, the CAT NMS Plan includes a tiered approach to fees. The tiered approach helps ensure that fees are equitably allocated among similarly situated CAT Reporters and furthers the goal of lessening the impact on smaller firms.³⁴ In addition, in choosing a tiered fee

structure, the Operating Committee concluded that the variety of benefits offered by a tiered fee structure, discussed above, outweighed the fact that CAT Reporters in any particular tier would pay different rates per message traffic order event or per market share (e.g., an Industry Member with the largest amount of message traffic in one tier would pay a smaller amount per order event than an Industry Member in the same tier with the least amount of message traffic). Such variation is the natural result of a tiered fee structure.³⁵ The Operating Committee considered several approaches to developing a tiered model, including defining fee tiers based on such factors as size of firm, message traffic or trading dollar volume. After analyzing the alternatives, it was concluded that the tiering for Industry Members (other than ATSS) should be based on message traffic, which will reflect the relative impact of Industry Member CAT Reporters on the CAT System.

Accordingly, the CAT NMS Plan contemplates that costs will be allocated across the CAT Reporters on a tiered basis in order to allocate higher costs to those CAT Reporters that contribute more to the costs of creating, implementing and maintaining the CAT and lower costs to those that contribute less.³⁶ The fees to be assessed at each tier are calculated so as to recoup a proportion of costs appropriate to the message traffic or market share (as applicable) from CAT Reporters in each tier. Therefore, Industry Members generating the most message traffic will be in the higher tiers, and will be charged a higher fee. Industry Members with lower levels of message traffic will be in lower tiers and will be assessed a smaller fee for the CAT.³⁷ Correspondingly, Execution Venues with the highest market shares will be in the top tier, and will be charged higher fees. Execution Venues with the lowest market shares will be in the lowest tier and will be assessed smaller fees for the CAT.³⁸

The CAT NMS Plan states that Industry Members (other than Execution Venue ATSS) will be charged based on message traffic, and that Execution Venues will be charged based on market share.³⁹ While there are multiple factors that contribute to the cost of building,

²⁹ Moreover, as the SEC noted in approving the CAT NMS Plan, “[t]he Participants also have offered a reasonable basis for establishing a funding model based on broad tiers, in that it may be easier to implement.” Approval Order at 84796.

³⁰ Approval Order at 85005.

³¹ Approval Order at 85005.

³² Approval Order at 85005.

³³ Section 11.3(a) and (b) of the CAT NMS Plan.

³² Approval Order at 84794.

³³ Section B.7, Appendix C of the CAT NMS Plan; Approval Order at 85006.

³⁴ Section B.7, Appendix C of the CAT NMS Plan; Approval Order at 85006.

maintaining and using the CAT, processing and storage of incoming message traffic is one of the most significant cost drivers for the CAT.⁴⁰ Thus, the CAT NMS Plan provides that the fees payable by Industry Members (other than Execution Venue ATSSs) will be based on the message traffic generated by such Industry Member.⁴¹

In contrast to Industry Members, which determine the degree to which they produce message traffic that constitute CAT Reportable Events, the CAT Reportable Events of the Execution Venues are largely derivative of quotations and orders received from Industry Members that they are required to display. The business model for Execution Venues (other than FINRA), however, is focused on executions in their markets. As a result, the Operating Committee believes that it is more equitable to charge Execution Venues based on their market share rather than their message traffic.

Focusing on message traffic would make it more difficult to draw distinctions between large and small Execution Venues and, in particular, between large and small options exchanges. For instance, the Operating Committee analyzed the message traffic of Execution Venues and Industry Members for the period of April 2017 to June 2017 and placed all CAT Reporters into a nine-tier framework (*i.e.*, a single tier may include both Execution Venues and Industry Members). The Operating Committee's analysis found that the majority of exchanges (15 total) were grouped in Tiers 1 and 2. Moreover, virtually all of the options exchanges were in Tiers 1 and 2.⁴² Given the resulting concentration of options exchanges in Tiers 1 and 2 under this approach, the analysis shows that a funding model for Execution Venues based on message traffic would make it more difficult to distinguish between large and small options exchanges, as compared to the proposed fee approach that bases fees for Execution Venues on market share.

The CAT NMS Plan's funding model also is structured to avoid a "reduction in market quality."⁴³ The tiered, fixed fee funding model is designed to limit the disincentives to providing liquidity to the market. For example, the Operating Committee expects that a firm that has a large volume of quotes would

likely be categorized in one of the upper tiers, and would not be assessed a fee for this traffic directly as they would under a more directly metered model. In contrast, strictly variable or metered funding models based on message volume are far more likely to affect market behavior. In approving the CAT NMS Plan, the SEC stated that "[t]he Participants also offered a reasonable basis for establishing a funding model based on broad tiers, in that it may be . . . less likely to have an incremental deterrent effect on liquidity provision."⁴⁴

The funding model also is structured to avoid a reduction in market quality because it discounts Options Market Maker and equity market maker quotes when calculating message traffic for Options Market Makers and equity market makers, respectively. As discussed in more detail below, the Operating Committee determined to discount the Options Market Maker quotes by the trade to quote ratio for options when calculating message traffic for Options Market Makers. Similarly, to avoid disincentives to quoting behavior on the equities side as well, the Operating Committee determined to discount equity market maker quotes by the trade to quote ratio for equities when calculating message traffic for equity market makers. The proposed discounts recognize the value of the market makers' quoting activity to the market as a whole.

The CAT NMS Plan is further structured to avoid potential conflicts raised by the Operating Committee determining fees applicable to its own members—the Participants. First, the Company will operate on a "break-even" basis, with fees imposed to cover costs and an appropriate reserve. Any surpluses will be treated as an operational reserve to offset future fees and will not be distributed to the Participants as profits.⁴⁵ To ensure that the Participants' operation of the CAT will not contribute to the funding of their other operations, Section 11.1(c) of the CAT NMS Plan specifically states that "[a]ny surplus of the Company's revenues over its expenses shall be treated as an operational reserve to offset future fees." In addition, as set forth in Article VIII of the CAT NMS Plan, the Company "intends to operate in a manner such that it qualifies as a 'business league' within the meaning of Section 501(c)(6) of the [Internal Revenue] Code." To qualify as a business league, an organization must "not [be] organized for profit and no

part of the net earnings of [the organization can] inure[] to the benefit of any private shareholder or individual."⁴⁶ As the SEC stated when approving the CAT NMS Plan, "the Commission believes that the Company's application for Section 501(c)(6) business league status addresses issues raised by commenters about the Plan's proposed allocation of profit and loss by mitigating concerns that the Company's earnings could be used to benefit individual Participants."⁴⁷ The Internal Revenue Service recently has determined that the Company is exempt from federal income tax under Section 501(c)(6) of the Internal Revenue Code.

The funding model also is structured to take into account distinctions in the securities trading operations of Participants and Industry Members. For example, the Operating Committee designed the model to address the different trading characteristics in the OTC Equity Securities market. Specifically, the Operating Committee proposes to discount the OTC Equity Securities market share of Execution Venue ATSSs trading OTC Equity Securities as well as the market share of the FINRA ORF by the average shares per trade ratio between NMS Stocks and OTC Equity Securities to adjust for the greater number of shares being traded in the OTC Equity Securities market, which is generally a function of a lower per share price for OTC Equity Securities when compared to NMS Stocks. In addition, the Operating Committee also proposes to discount Options Market Maker and equity market maker message traffic in recognition of their role in the securities markets. Furthermore, the funding model creates separate tiers for Equity Execution Venues and Options Execution Venues due to the different trading characteristics of those markets.

Finally, by adopting a CAT-specific fee, the Operating Committee will be fully transparent regarding the costs of the CAT. Charging a general regulatory fee, which would be used to cover CAT costs as well as other regulatory costs, would be less transparent than the selected approach of charging a fee designated to cover CAT costs only.

A full description of the funding model is set forth below. This description includes the framework for the funding model as set forth in the CAT NMS Plan, as well as the details as to how the funding model will be applied in practice, including the number of fee tiers and the applicable

⁴⁰ Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85005.

⁴¹ Section 11.3(b) of the CAT NMS Plan.

⁴² The Operating Committee notes that this analysis did not place MIAx PEARL in Tier 1 or Tier 2 since the exchange commenced trading on February 6, 2017.

⁴³ Section 11.2(e) of the CAT NMS Plan.

⁴⁴ Approval Order at 84796.

⁴⁵ Approval Order at 84792.

⁴⁶ 26 U.S.C. 501(c)(6).

⁴⁷ Approval Order at 84793.

fees for each tier. The complete funding model is described below, including those fees that are to be paid by the Participants. The proposed Consolidated Audit Trail Funding Fees, however, do not apply to the Participants; the proposed Consolidated Audit Trail Funding Fees only apply to Industry Members. The CAT Fees for Participants will be imposed separately by the Operating Committee pursuant to the CAT NMS Plan.

(A) Funding Principles

Section 11.2 of the CAT NMS Plan sets forth the principles that the Operating Committee applied in establishing the funding for the Company. The Operating Committee has considered these funding principles as well as the other funding requirements set forth in the CAT NMS Plan and in Rule 613 in developing the proposed funding model. The following are the funding principles in Section 11.2 of the CAT NMS Plan:

- To create transparent, predictable revenue streams for the Company that are aligned with the anticipated costs to build, operate and administer the CAT and other costs of the Company;
- To establish an allocation of the Company's related costs among Participants and Industry Members that is consistent with the Exchange Act, taking into account the timeline for implementation of the CAT and distinctions in the securities trading operations of Participants and Industry Members and their relative impact upon the Company's resources and operations;
- To establish a tiered fee structure in which the fees charged to: (i) CAT Reporters that are Execution Venues, including ATSSs, are based upon the level of market share; (ii) Industry Members' non-ATS activities are based upon message traffic; (iii) the CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether Execution Venue and/or Industry Members);
- To provide for ease of billing and other administrative functions;
- To avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality; and
- To build financial stability to support the Company as a going concern.

(B) Industry Member Tiering

Under Section 11.3(b) of the CAT NMS Plan, the Operating Committee is required to establish fixed fees to be payable by Industry Members, based on message traffic generated by such Industry Member (except for Execution Venue ATSSs), with the Operating Committee establishing at least five and no more than nine tiers.

The CAT NMS Plan clarifies that the fixed fees payable by Industry Members pursuant to Section 11.3(b) shall, in addition to any other applicable message traffic, include message traffic generated by: (i) An ATS that does not execute orders that is sponsored by such Industry Member; and (ii) routing orders to and from any ATS sponsored by such Industry Member. In addition, the Industry Member fees will apply to Industry Members that act as routing broker-dealers for exchanges. The Industry Member fees will not be applicable, however, to an ATS that qualifies as an Execution Venue, as discussed in more detail in the section on Execution Venue tiering.

In accordance with Section 11.3(b), the Operating Committee approved a tiered fee structure for Industry Members (other than Execution Venue ATSSs) as described in this section. In determining the tiers, the Operating Committee considered the funding principles set forth in Section 11.2 of the CAT NMS Plan, seeking to create funding tiers that take into account the relative impact on CAT System resources of different Industry Members, and that establish comparable fees among the CAT Reporters with the most Reportable Events. The Operating Committee has determined that establishing seven tiers results in an allocation of fees that distinguishes between Industry Members with differing levels of message traffic in a way that is fair and equitable. Thus, each such Industry Member will be placed into one of seven tiers of fixed fees, based on "message traffic" for a defined period (as discussed below).

A seven tier structure was selected to provide a wide range of levels for tiering Industry Members such that Industry Members submitting significantly less message traffic to the CAT would be adequately differentiated from Industry Members submitting substantially more message traffic. The Operating Committee considered historical message traffic from multiple time periods, generated by Industry Members across all exchanges and as submitted to FINRA's Order Audit Trail System ("OATS"), and considered the distribution of firms with similar levels

of message traffic, grouping together firms with similar levels of message traffic. Based on this, the Operating Committee determined that seven tiers would group firms with similar levels of message traffic, charging those firms with higher impact on the CAT more, while lowering the burden on Industry Members that have less CAT-related activity. Furthermore, the selection of seven tiers establishes comparable fees among the largest CAT Reporters.

Each Industry Member (other than Execution Venue ATSSs) will be ranked by message traffic and tiered by predefined Industry Member percentages (the "Industry Member Percentages"). The Operating Committee determined to use predefined percentages rather than fixed volume thresholds to ensure that the total CAT Fees collected recover the expected CAT costs regardless of changes in the total level of message traffic. To determine the fixed percentage of Industry Members in each tier, the Operating Committee analyzed historical message traffic generated by Industry Members across all exchanges and as submitted to OATS, and considered the distribution of firms with similar levels of message traffic, grouping together firms with similar levels of message traffic. Based on this, the Operating Committee identified seven tiers that would group firms with similar levels of message traffic.

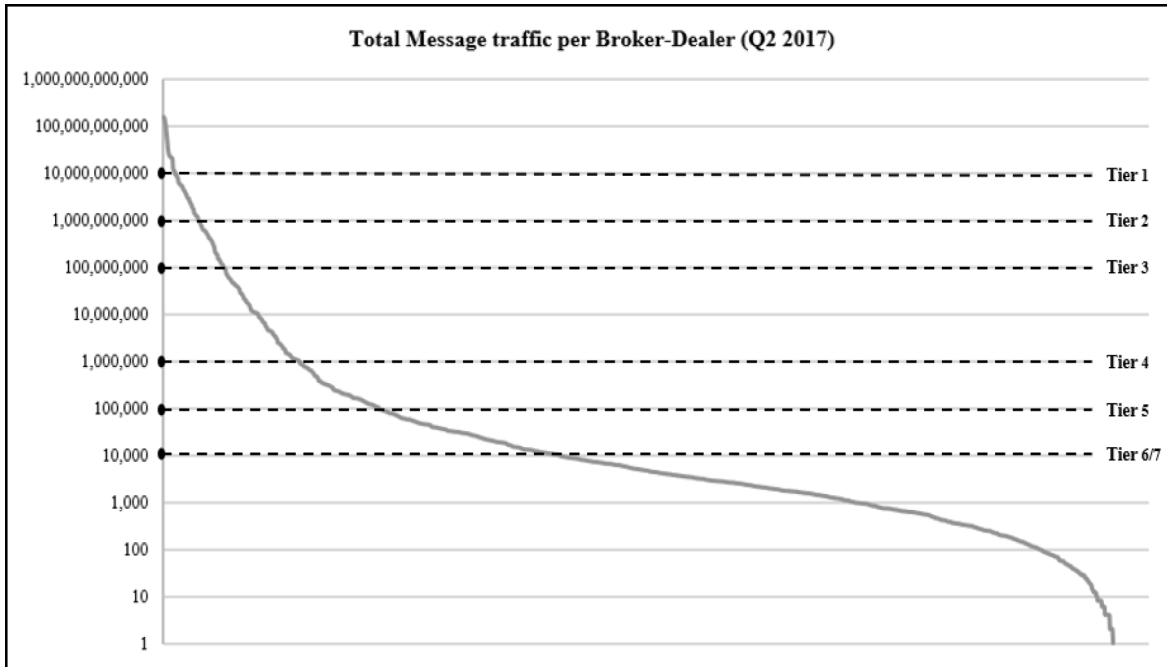
The percentage of costs recovered by each Industry Member tier will be determined by predefined percentage allocations (the "Industry Member Recovery Allocation"). In determining the fixed percentage allocation of costs recovered for each tier, the Operating Committee considered the impact of CAT Reporter message traffic on the CAT System as well as the distribution of total message volume across Industry Members while seeking to maintain comparable fees among the largest CAT Reporters. Accordingly, following the determination of the percentage of Industry Members in each tier, the Operating Committee identified the percentage of total market volume for each tier based on the historical message traffic upon which Industry Members had been initially ranked. Taking this into account along with the resulting percentage of total recovery, the percentage allocation of costs recovered for each tier were assigned, allocating higher percentages of recovery to tiers with higher levels of message traffic while avoiding any inappropriate burden on competition. Furthermore, by using percentages of Industry Members and costs recovered per tier, the Operating Committee sought to include

elasticity within the funding model, allowing the funding model to respond to changes in either the total number of Industry Members or the total level of message traffic.

The following chart illustrates the breakdown of seven Industry Member tiers across the monthly average of total equity and equity options orders, cancels, quotes and executions in the second quarter of 2017 as well as message traffic thresholds between the largest of Industry Member message traffic gaps. The Operating Committee referenced similar distribution illustrations to determine the

appropriate division of Industry Member percentages in each tier by considering the grouping of firms with similar levels of message traffic and seeking to identify relative breakpoints in the message traffic between such groupings. In reviewing the chart and its corresponding table, note that while these distribution illustrations were referenced to help differentiate between Industry Member tiers, the proposed funding model is driven by fixed percentages of Industry Members across tiers to account for fluctuating levels of message traffic over time. This approach also provides financial stability for the

CAT by ensuring that the funding model will recover the required amounts regardless of changes in the number of Industry Members or the amount of message traffic. Actual messages in any tier will vary based on the actual traffic in a given measurement period, as well as the number of firms included in the measurement period. The Industry Member Percentages and Industry Member Recovery Allocation for each tier will remain fixed with each Industry Member's tier to be reassigned periodically, as described below in Section 3(a)(2)(I).



Industry Member tier	Approximate message traffic per industry member (Q2 2017) (orders, quotes, cancels and executions)
Tier 1	> 10,000,000,000
Tier 2	1,000,000,000–10,000,000,000
Tier 3	100,000,000–1,000,000,000
Tier 4	1,000–100,000,000
Tier 5	100,000–1,000,000
Tier 6	10,000–100,000
Tier 7	< 10,000

Based on the above analysis, the Operating Committee approved the following Industry Member Percentages

and Industry Member Recovery Allocations:

Industry Member tier	Percentage of Industry Members	Percentage of Industry Member recovery	Percentage of total recovery
Tier 1	0.900	12.00	9.00
Tier 2	2.150	20.50	15.38
Tier 3	2.800	18.50	13.88

Industry Member tier	Percentage of Industry Members	Percentage of Industry Member recovery	Percentage of total recovery
Tier 4	7.750	32.00	24.00
Tier 5	8.300	10.00	7.50
Tier 6	18.800	6.00	4.50
Tier 7	59.300	1.00	0.75
Total	100	100	75

For the purposes of creating these tiers based on message traffic, the Operating Committee determined to define the term “message traffic” separately for the period before the commencement of CAT reporting and for the period after the start of CAT reporting. The different definition for message traffic is necessary, as there will be no Reportable Events as defined in the Plan, prior to the commencement of CAT reporting. Accordingly, prior to the start of CAT reporting, “message traffic” will be comprised of historical equity and equity options orders, cancels, quotes and executions provided by each exchange and FINRA over the previous three months. Prior to the start of CAT reporting, orders would be comprised of the total number of equity and equity options orders received and originated by a member of an exchange or FINRA over the previous three-month period, including principal orders, cancel/replace orders, market maker orders originated by a member of an exchange, and reserve (iceberg) orders as well as executions originated by a member of FINRA, and excluding order rejects, system-modified orders, order routes and implied orders.⁴⁸ In addition, prior to the start of CAT reporting, cancels would be comprised of the total number of equity and equity option cancels received and originated by a member of an exchange or FINRA over a three-month period, excluding order modifications (*e.g.*, order updates, order splits, partial cancels) and multiple cancels of a complex order. Furthermore, prior to the start of CAT reporting, quotes would be comprised of information readily available to the exchanges and FINRA, such as the total number of historical equity and equity options quotes received and originated by a member of an exchange or FINRA over the prior three-month period. Additionally, prior to the start of CAT reporting, executions would be comprised of the total number of equity

⁴⁸ Consequently, firms that do not have “message traffic” reported to an exchange or OATS before they are reporting to the CAT would not be subject to a fee until they begin to report information to CAT.

and equity option executions received or originated by a member of an exchange or FINRA over a three-month period. After an Industry Member begins reporting to the CAT, “message traffic” will be calculated based on the Industry Member’s Reportable Events reported to the CAT as will be defined in the Technical Specifications.⁴⁹

Quotes of Options Market Makers and equity market makers will be included in the calculation of total message traffic for those market makers for purposes of tiering under the CAT funding model both prior to CAT reporting and once CAT reporting commences.⁵⁰ To address potential concerns regarding burdens on competition or market quality of including quotes in the calculation of message traffic, however, the Operating Committee determined to discount the Options Market Maker quotes by the trade to quote ratio for options when calculating message traffic for Options Market Makers. Based on available data for June 2016 through June 2017, the trade to quote ratio for options is 0.01%. Similarly, to avoid disincentives to quoting behavior on the equities side, the Operating Committee determined to discount equity market maker quotes by the trade to quote ratio for equities. Based on available data for June 2016 through June 2017, the trade to quote ratio for equities is 5.43%.⁵¹

⁴⁹ If an Industry Member (other than an Execution Venue ATS) has no orders, cancels, quotes and executions prior to the commencement of CAT Reporting, or no Reportable Events after CAT reporting commences, then the Industry Member would not have a CAT Fee obligation.

⁵⁰ The SEC approved exemptive relief permitting Options Market Maker quotes to be reported to the Central Repository by the relevant Options Exchange in lieu of requiring that such reporting be done by both the Options Exchange and the Options Market Maker, as required by Rule 613 of Regulation NMS. See Securities Exchange Act Release No. 77265 (March 1, 2016), 81 FR 11856 (March 7, 2016). This exemption applies to Options Market Maker quotes for CAT reporting purposes only. Therefore, notwithstanding the reporting exemption provided for Options Market Maker quotes, Options Market Maker quotes will be included in the calculation of total message traffic for Options Market Makers for purposes of tiering under the CAT funding model both prior to CAT reporting and once CAT reporting commences.

⁵¹ The trade to quote ratios were calculated based on the inverse of the average of the monthly equity

The trade to quote ratio for options and the trade to quote ratio for equities will be calculated every three months when tiers are recalculated (as discussed below).

The Operating Committee has determined to calculate fee tiers every three months, on a calendar quarter basis, based on message traffic from the prior three months. Based on its analysis of historical data, the Operating Committee believes that calculating tiers based on three months of data will provide the best balance between reflecting changes in activity by Industry Members while still providing predictability in the tiering for Industry Members. Because fee tiers will be calculated based on message traffic from the prior three months, the Operating Committee will begin calculating message traffic based on an Industry Member’s Reportable Events reported to the CAT once the Industry Member has been reporting to the CAT for three months. Prior to that, fee tiers will be calculated as discussed above with regard to the period prior to CAT reporting.

(C) Execution Venue Tiering

Under Section 11.3(a) of the CAT NMS Plan, the Operating Committee is required to establish fixed fees payable by Execution Venues. Section 1.1 of the CAT NMS Plan defines an Execution Venue as “a Participant or an alternative trading system (“ATS”) (as defined in Rule 300 of Regulation ATS) that operates pursuant to Rule 301 of Regulation ATS (excluding any such ATS that does not execute orders).”⁵²

The Operating Committee determined that ATSs should be included within the definition of Execution Venue. The Operating Committee believes that it is appropriate to treat ATSs as Execution Venues under the proposed funding model since ATSs have business models

SIP and OPRA quote to trade ratios from June 2016–June 2017 that were compiled by the Financial Information Forum using data from NASDAQ and SIAC.

⁵² Although FINRA does not operate an execution venue, because it is a Participant, it is considered an “Execution Venue” under the Plan for purposes of determining fees.

that are similar to those of exchanges, and ATs also compete with exchanges.

Given the differences between Execution Venues that trade NMS Stocks and/or OTC Equity Securities and Execution Venues that trade Listed Options, Section 11.3(a) addresses Execution Venues that trade NMS Stocks and/or OTC Equity Securities separately from Execution Venues that trade Listed Options. Equity Execution Venues and Options Execution Venues are treated separately for two reasons. First, the differing quoting behavior of Equity Execution Venues and Options Execution Venues makes comparison of activity between Execution Venues difficult. Second, Execution Venue tiers are calculated based on market share of share volume, and it is therefore difficult to compare market share between asset classes (*i.e.*, equity shares versus options contracts). Discussed below is how the funding model treats the two types of Execution Venues.

(I) NMS Stocks and OTC Equity Securities

Section 11.3(a)(i) of the CAT NMS Plan states that each Execution Venue that (i) executes transactions or, (ii) in the case of a national securities association, has trades reported by its members to its trade reporting facility or facilities for reporting transactions effected otherwise than on an exchange, in NMS Stocks or OTC Equity Securities will pay a fixed fee depending on the market share of that Execution Venue in NMS Stocks and OTC Equity Securities, with the Operating Committee establishing at least two and not more than five tiers of fixed fees, based on an Execution Venue's NMS Stocks and OTC Equity Securities market share. For these purposes, market share for Execution Venues that execute transactions will be calculated by share volume, and market share for a national securities association that has trades reported by its members to its trade reporting facility or facilities for reporting transactions effected otherwise than on an exchange in NMS Stocks or OTC Equity Securities will be calculated based on share volume of trades reported, provided, however, that the share volume reported to such national securities association by an Execution Venue shall not be included in the calculation of such national security association's market share.

In accordance with Section 11.3(a)(i) of the CAT NMS Plan, the Operating Committee approved a tiered fee structure for Equity Execution Venues and Option Execution Venues. In determining the Equity Execution Venue Tiers, the Operating Committee

considered the funding principles set forth in Section 11.2 of the CAT NMS Plan, seeking to create funding tiers that take into account the relative impact on system resources of different Equity Execution Venues, and that establish comparable fees among the CAT Reporters with the most Reportable Events. Each Equity Execution Venue will be placed into one of four tiers of fixed fees, based on the Execution Venue's NMS Stocks and OTC Equity Securities market share. In choosing four tiers, the Operating Committee performed an analysis similar to that discussed above with regard to the non-Execution Venue Industry Members to determine the number of tiers for Equity Execution Venues. The Operating Committee determined to establish four tiers for Equity Execution Venues, rather than a larger number of tiers as established for non-Execution Venue Industry Members, because the four tiers were sufficient to distinguish between the smaller number of Equity Execution Venues based on market share. Furthermore, the selection of four tiers serves to help establish comparability among the largest CAT Reporters.

Each Equity Execution Venue will be ranked by market share and tiered by predefined Execution Venue percentages, (the "Equity Execution Venue Percentages"). In determining the fixed percentage of Equity Execution Venues in each tier, the Operating Committee reviewed historical market share of share volume for Execution Venues. Equity Execution Venue market shares of share volume were sourced from market statistics made publicly available by Bats Global Markets, Inc. ("Bats"). ATS market shares of share volume was sourced from market statistics made publicly available by FINRA. FINRA trade reporting facility ("TRF") and ORF market share of share volume was sourced from market statistics made publicly available by FINRA. Based on data from FINRA and otcmarts.com, ATs accounted for 39.12% of the share volume across the TRFs and ORFs during the recent tiering period. A 39.12/60.88 split was applied to the ATS and non-ATS breakdown of FINRA market share, with FINRA tiered based only on the non-ATS portion of its market share of share volume.

The Operating Committee determined to discount the OTC Equity Securities market share of Execution Venue ATs trading OTC Equity Securities as well as the market share of the FINRA ORF in recognition of the different trading characteristics of the OTC Equity Securities market as compared to the market in NMS Stocks. Many OTC

Equity Securities are priced at less than one dollar—and a significant number at less than one penny—per share and low-priced shares tend to trade in larger quantities. Accordingly, a disproportionately large number of shares are involved in transactions involving OTC Equity Securities versus NMS Stocks. Because the proposed fee tiers are based on market share calculated by share volume, Execution Venue ATs trading OTC Equity Securities and FINRA would likely be subject to higher tiers than their operations may warrant. To address this potential concern, the Operating Committee determined to discount the OTC Equity Securities market share of Execution Venue ATs trading OTC Equity Securities and the market share of the FINRA ORF by multiplying such market share by the average shares per trade ratio between NMS Stocks and OTC Equity Securities in order to adjust for the greater number of shares being traded in the OTC Equity Securities market. Based on available data for the second quarter of 2017, the average shares per trade ratio between NMS Stocks and OTC Equity Securities is 0.17%.⁵³ The average shares per trade ratio between NMS Stocks and OTC Equity Securities will be recalculated every three months when tiers are recalculated.

Based on this, the Operating Committee considered the distribution of Execution Venues, and grouped together Execution Venues with similar levels of market share. The percentage of costs recovered by each Equity Execution Venue tier will be determined by predefined percentage allocations (the "Equity Execution Venue Recovery Allocation"). In determining the fixed percentage allocation of costs to be recovered from each tier, the Operating Committee considered the impact of CAT Reporter market share activity on the CAT System as well as the distribution of total market volume across Equity Execution Venues while seeking to maintain comparable fees among the largest CAT Reporters. Accordingly, following the determination of the percentage of Execution Venues in each tier, the Operating Committee identified the percentage of total market volume for each tier based on the historical market share upon which Execution Venues had been initially ranked. Taking this

⁵³ The average shares per trade ratio for both NMS Stocks and OTC Equity Securities from the second quarter of 2017 was calculated using publicly available market volume data from Bats and OTC Markets Group, and the totals were divided to determine the average number of shares per trade between NMS Stocks and OTC Equity Securities.

into account along with the resulting percentage of total recovery, the percentage allocation of cost recovery for each tier were assigned, allocating higher percentages of recovery to the tier with a higher level of market share while avoiding any inappropriate

burden on competition. Furthermore, by using percentages of Equity Execution Venues and cost recovery per tier, the Operating Committee sought to include elasticity within the funding model, allowing the funding model to respond to changes in either the total number of

Equity Execution Venues or changes in market share.

Based on this analysis, the Operating Committee approved the following Equity Execution Venue Percentages and Recovery Allocations:

Equity Execution Venue tier	Percentage of Equity Execution Venues	Percentage of Execution Venue recovery	Percentage of total recovery
Tier 1	25.00	33.25	8.31
Tier 2	42.00	25.73	6.43
Tier 3	23.00	8.00	2.00
Tier 4	10.00	0.02	0.01
Total	100	67	16.75

(II) Listed Options

Section 11.3(a)(ii) of the CAT NMS Plan states that each Execution Venue that executes transactions in Listed Options will pay a fixed fee depending on the Listed Options market share of that Execution Venue, with the Operating Committee establishing at least two and no more than five tiers of fixed fees, based on an Execution Venue's Listed Options market share. For these purposes, market share will be calculated by contract volume.

In accordance with Section 11.3(a)(ii) of the CAT NMS Plan, the Operating Committee approved a tiered fee structure for Options Execution Venues. In determining the tiers, the Operating Committee considered the funding principles set forth in Section 11.2 of the CAT NMS Plan, seeking to create funding tiers that take into account the relative impact on system resources of different Options Execution Venues, and that establish comparable fees among the CAT Reporters with the most Reportable Events. Each Options Execution Venue will be placed into one of two tiers of fixed fees, based on the Execution Venue's Listed Options market share. In choosing two tiers, the Operating Committee performed an analysis similar to that discussed above with regard to Industry Members (other than Execution Venue ATSs) to

determine the number of tiers for Options Execution Venues. The Operating Committee determined to establish two tiers for Options Execution Venues, rather than a larger number, because the two tiers were sufficient to distinguish between the smaller number of Options Execution Venues based on market share. Furthermore, due to the smaller number of Options Execution Venues, the incorporation of additional Options Execution Venue tiers would result in significantly higher fees for Tier 1 Options Execution Venues and reduce comparability between Execution Venues and Industry Members. Furthermore, the selection of two tiers served to establish comparable fees among the largest CAT Reporters.

Each Options Execution Venue will be ranked by market share and tiered by predefined Execution Venue percentages, (the "Options Execution Venue Percentages"). To determine the fixed percentage of Options Execution Venues in each tier, the Operating Committee analyzed the historical and publicly available market share of Options Execution Venues to group Options Execution Venues with similar market shares across the tiers. Options Execution Venue market share of share volume were sourced from market statistics made publicly available by

Bats. The process for developing the Options Execution Venue Percentages was the same as discussed above with regard to Equity Execution Venues.

The percentage of costs to be recovered from each Options Execution Venue tier will be determined by predefined percentage allocations (the "Options Execution Venue Recovery Allocation"). In determining the fixed percentage allocation of cost recovery for each tier, the Operating Committee considered the impact of CAT Reporter market share activity on the CAT System as well as the distribution of total market volume across Options Execution Venues while seeking to maintain comparable fees among the largest CAT Reporters. Furthermore, by using percentages of Options Execution Venues and cost recovery per tier, the Operating Committee sought to include elasticity within the funding model, allowing the funding model to respond to changes in either the total number of Options Execution Venues or changes in market share. The process for developing the Options Execution Venue Recovery Allocation was the same as discussed above with regard to Equity Execution Venues.

Based on this analysis, the Operating Committee approved the following Options Execution Venue Percentages and Recovery Allocations:

Options Execution Venue tier	Percentage of Options Execution Venues	Percentage of Execution Venue recovery	Percentage of total recovery
Tier 1	75.00	28.25	7.06
Tier 2	25.00	4.75	1.19
Total	100	33	8.25

(III) Market Share/Tier Assignments

The Operating Committee determined that, prior to the start of CAT reporting, market share for Execution Venues would be sourced from publicly available market data. Options and equity volumes for Participants will be sourced from market data made publicly available by Bats while Execution Venue ATS volumes will be sourced from market data made publicly available by FINRA and OTC Markets. Set forth in the Exhibit 3 of the proposed rule change are two charts, one listing the current Equity Execution Venues, each with its rank and tier, and one listing the current Options Execution Venues, each with its rank and tier.

After the commencement of CAT reporting, market share for Execution Venues will be sourced from data reported to the CAT. Equity Execution Venue market share will be determined by calculating each Equity Execution Venue's proportion of the total volume of NMS Stock and OTC Equity shares reported by all Equity Execution Venues during the relevant time period (with the discounting of OTC Equity Securities market share of Execution Venue ATSs trading OTC Equity Securities as well as the market share of the FINRA ORF, as described above). Similarly, market share for Options Execution Venues will be determined by calculating each Options Execution Venue's proportion of the total volume of Listed Options contracts reported by all Options Execution Venues during the relevant time period.

The Operating Committee has determined to calculate fee tiers for Execution Venues every three months based on market share from the prior three months. Based on its analysis of historical data, the Operating Committee believes calculating tiers based on three months of data will provide the best balance between reflecting changes in activity by Execution Venues while still providing predictability in the tiering for Execution Venues.

(D) Allocation of Costs

In addition to the funding principles discussed above, including comparability of fees, Section 11.1(c) of the CAT NMS Plan also requires expenses to be fairly and reasonably shared among the Participants and Industry Members. Accordingly, in developing the proposed fee schedules pursuant to the funding model, the Operating Committee calculated how the CAT costs would be allocated between Industry Members and Execution Venues, and how the portion

of CAT costs allocated to Execution Venues would be allocated between Equity Execution Venues and Options Execution Venues. These determinations are described below.

(I) Allocation Between Industry Members and Execution Venues

In determining the cost allocation between Industry Members (other than Execution Venue ATSs) and Execution Venues, the Operating Committee analyzed a range of possible splits for revenue recovery from such Industry Members and Execution Venues, including 80%/20%, 75%/25%, 70%/30% and 65%/35% allocations. Based on this analysis, the Operating Committee determined that 75 percent of total costs recovered would be allocated to Industry Members (other than Execution Venue ATSs) and 25 percent would be allocated to Execution Venues. The Operating Committee determined that this 75%/25% division maintained the greatest level of comparability across the funding model. For example, the cost allocation establishes fees for the largest Industry Members (*i.e.*, those Industry Members in Tiers 1) that are comparable to the largest Equity Execution Venues and Options Execution Venues (*i.e.*, those Execution Venues in Tier 1).

Furthermore, the allocation of total CAT cost recovery recognizes the difference in the number of CAT Reporters that are Industry Members versus CAT Reporters that are Execution Venues. Specifically, the cost allocation takes into consideration that there are approximately 23 times more Industry Members expected to report to the CAT than Execution Venues (*e.g.*, an estimated 1541 Industry Members versus 67 Execution Venues as of June 2017).

(II) Allocation Between Equity Execution Venues and Options Execution Venues

The Operating Committee also analyzed how the portion of CAT costs allocated to Execution Venues would be allocated between Equity Execution Venues and Options Execution Venues. In considering this allocation of costs, the Operating Committee analyzed a range of alternative splits for revenue recovered between Equity Execution Venues and Options Execution Venues, including a 70%/30%, 67%/33%, 65%/35%, 50%/50% and 25%/75% split. Based on this analysis, the Operating Committee determined to allocate 67 percent of Execution Venue costs recovered to Equity Execution Venues and 33 percent to Options Execution Venues. The Operating Committee

determined that a 67%/33% allocation between Equity Execution Venues and Options Execution Venues maintained the greatest level of fee equitability and comparability based on the current number of Equity Execution Venues and Options Execution Venues. For example, the allocation establishes fees for the larger Equity Execution Venues that are comparable to the larger Options Execution Venues. Specifically, Tier 1 Equity Execution Venues would pay a quarterly fee of \$81,047 and Tier 1 Options Execution Venues would pay a quarterly fee of \$81,379. In addition to fee comparability between Equity Execution Venues and Options Execution Venues, the allocation also establishes equitability between larger (Tier 1) and smaller (Tier 2) Execution Venues based upon the level of market share. Furthermore, the allocation is intended to reflect the relative levels of current equity and options order events.

(E) Fee Levels

The Operating Committee determined to establish a CAT-specific fee to collectively recover the costs of building and operating the CAT. Accordingly, under the funding model, the sum of the CAT Fees is designed to recover the total cost of the CAT. The Operating Committee has determined overall CAT costs to be comprised of Plan Processor costs and non-Plan Processor costs, which are estimated to be \$50,700,000 in total for the year beginning November 21, 2016.⁵⁴

The Plan Processor costs relate to costs incurred and to be incurred through November 21, 2017 by the Plan Processor and consist of the Plan Processor's current estimates of average yearly ongoing costs, including development costs, which total \$37,500,000. This amount is based upon the fees due to the Plan Processor pursuant to the Company's agreement with the Plan Processor.

The non-Plan Processor estimated costs incurred and to be incurred by the Company through November 21, 2017 consist of three categories of costs. The first category of such costs are third party support costs, which include legal fees, consulting fees and audit fees from November 21, 2016 until the date of filing as well as estimated third party support costs for the rest of the year. These amount to an estimated \$5,200,000. The second category of non-Plan Processor costs are estimated cyber-insurance costs for the year. Based on discussions with potential cyber-

⁵⁴ It is anticipated that CAT-related costs incurred prior to November 21, 2016 will be addressed via a separate filing.

insurance providers, assuming \$2–5 million cyber-insurance premium on \$100 million coverage, the Company has estimated \$3,000,000 for the annual cost. The final cost figures will be determined following receipt of final underwriter quotes. The third category of non-Plan Processor costs is the CAT operational reserve, which is comprised of three months of ongoing Plan

Processor costs (\$9,375,000), third party support costs (\$1,300,000) and cyber-insurance costs (\$750,000). The Operating Committee aims to accumulate the necessary funds to establish the three-month operating reserve for the Company through the CAT Fees charged to CAT Reporters for the year. On an ongoing basis, the Operating Committee will account for

any potential need to replenish the operating reserve or other changes to total cost during its annual budgeting process. The following table summarizes the Plan Processor and non-Plan Processor cost components which comprise the total estimated CAT costs of \$50,700,000 for the covered period.

Cost category	Cost component	Amount
Plan Processor	Operational Costs	\$37,500,000
Non-Plan Processor	Third Party Support Costs	5,200,000
	Operational Reserve	⁵⁵ 5,000,000
	Cyber-insurance Costs	3,000,000
Estimated Total		50,700,000

Based on these estimated costs and the calculations for the funding model

described above, the Operating Committee determined to impose the following fees:⁵⁶

For Industry Members (other than Execution Venue ATs):

Tier	Percentage of Industry Members	Quarterly CAT fee
1	0.900	\$81,483
2	2.150	59,055
3	2.800	40,899
4	7.750	25,566
5	8.300	7,428
6	18.800	1,968
7	59.300	105

For Execution Venues for NMS Stocks and OTC Equity Securities:

Tier	Percentage of Equity Execution Venues	Quarterly CAT fee
1	25.00	\$81,048
2	42.00	37,062
3	23.00	21,126
4	10.00	129

For Execution Venues for Listed Options:

Tier	Percentage of Options Execution Venues	Quarterly CAT fee
1	75.00	\$81,381
2	25.00	37,629

The Operating Committee has calculated the schedule of effective fees for Industry Members (other than Execution Venue ATs) and Execution

Venues in the following manner. Note that the calculation of CAT Fees assumes 52 Equity Execution Venues, 15 Options Execution Venues and 1,541

Industry Members (other than Execution Venue ATs) as of June 2017.

⁵⁵ This \$5,000,000 represents the gradual accumulation of the funds for a target operating reserve of \$11,425,000.

⁵⁶ Note that all monthly, quarterly and annual CAT Fees have been rounded to the nearest dollar.

CALCULATION OF ANNUAL TIER FEES FOR INDUSTRY MEMBERS ("IM")

Industry Member tier	Percentage of Industry Members	Percentage of Industry Member Recovery	Percentage of total recovery
Tier 1	0.900	12.00	9.00
Tier 2	2.150	20.50	15.38
Tier 3	2.800	18.50	13.88
Tier 4	7.750	32.00	24.00
Tier 5	8.300	10.00	7.50
Tier 6	18.800	6.00	4.50
Tier 7	59.300	1.00	0.75
Total	100	100	75

Industry Member tier	Estimated number of Industry Members
Tier 1	14
Tier 2	33
Tier 3	43
Tier 4	119
Tier 5	128
Tier 6	290
Tier 7	914
Total	1,541

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Calculation 1.1 (Calculation of a Tier 1 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot.IMs]} \times 0.9\% \text{ [% of Tier 1 IMs]} = 14 \text{ [Estimated Tier 1 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot.Ann.CAT Costs]} \times 75\% \text{ [IM \% of Tot.Ann.CAT Costs]} \times 12\% \text{ [% of Tier 1 IM Recovery]}}{14 \text{ [Estimated Tier 1 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$27,161}$$

Calculation 1.2 (Calculation of a Tier 2 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot.IMs]} \times 2.15\% \text{ [% of Tier 2 IMs]} = 33 \text{ [Estimated Tier 2 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot.Ann.CAT Costs]} \times 75\% \text{ [IM \% of Tot.Ann.CAT Costs]} \times 20.5\% \text{ [% of Tier 2 IM Recovery]}}{33 \text{ [Estimated Tier 2 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$19,685}$$

Calculation 1.3 (Calculation of a Tier 3 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot.IMs]} \times 2.125\% \text{ [% of Tier 3 IMs]} = 43 \text{ [Estimated Tier 3 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot.Ann.CAT Costs]} \times 75\% \text{ [IM \% of Tot.Ann.CAT Costs]} \times 18.5\% \text{ [% of Tier 3 IM Recovery]}}{43 \text{ [Estimated Tier 3 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$13,633}$$

Calculation 1.4 (Calculation of a Tier 4 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot.IMs]} \times 7.75\% \text{ [% of Tier 4 IMs]} = 119 \text{ [Estimated Tier 4 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot.Ann.CAT Costs]} \times 75\% \text{ [IM \% of Tot.Ann.CAT Costs]} \times 32\% \text{ [% of Tier 4 IM Recovery]}}{119 \text{ [Estimated Tier 4 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$8522}$$

Calculation 1.5 (Calculation of a Tier 5 Industry Member Annual Fee)

$$1,541 \text{ [Estimated Tot.IMs]} \times 8.3\% \text{ [% of Tier 5 IMs]} = 128 \text{ [Estimated Tier 5 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot.Ann.CAT Costs]} \times 75\% \text{ [IM \% of Tot.Ann.CAT Costs]} \times 7.75\% \text{ [% of Tier 5 IM Recovery]}}{128 \text{ [Estimated Tier 5 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$2476}$$

Calculation 1.6 (Calculation of a Tier 6 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot.IMs]} \times 18.8\% \text{ [% of Tier 6 IMs]} = 290 \text{ [Estimated Tier 6 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot.Ann.CAT Costs]} \times 75\% \text{ [IM \% of Tot.Ann.CAT Costs]} \times 6\% \text{ [% of Tier 6 IM Recovery]}}{290 \text{ [Estimated Tier 6 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$656}$$

Calculation 1.7 (Calculation of a Tier 7 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot.IMs]} \times 59.3\% \text{ [% of Tier 7 IMs]} = 914 \text{ [Estimated Tier 7 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot.Ann.CAT Costs]} \times 75\% \text{ [IM \% of Tot.Ann.CAT Costs]} \times 1\% \text{ [% of Tier 7 IM Recovery]}}{914 \text{ [Estimated Tier 7 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$35}$$

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CALCULATION OF ANNUAL TIER FEES FOR EQUITY EXECUTION VENUES (“EV”)

Equity Execution Venue tier	Percentage of Equity Execution Venues	Percentage of Execution Venue Recovery	Percentage of total recovery
Tier 1	25.00	33.25	8.31
Tier 2	42.00	25.73	6.43
Tier 3	23.00	8.00	2.00

CALCULATION OF ANNUAL TIER FEES FOR EQUITY EXECUTION VENUES (“EV”)—Continued

Equity Execution Venue tier	Percentage of Equity Execution Venues	Percentage of Execution Venue Recovery	Percentage of total recovery
Tier 4	10.00	49.00	0.01
Total	100	67	16.75

Equity Execution Venue tier	Estimated number of Equity Execution Venues
Tier 1	13
Tier 2	22
Tier 3	12
Tier 4	5
Total	52

Calculation 2.1 (Calculation of a Tier 1 Equity Execution Venue Monthly Fee)

$$52 \text{ [Estimated Tot. Equity EVs]} \times 25\% \text{ [% of Tier 1 Equity EVs]} = 13 \text{ [Estimated Tier 1 Equity EVs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 33.25\% \text{ [EV \% of Tot. Ann. CAT Costs]} \times 26\% \text{ [% of Tier 1 Equity EV Recovery]}}{13 \text{ [Estimated Tier 1 Equity EVs]}} \right) \div 12 \text{ [Months per year]} = \$27,016$$

Calculation 2.2 (Calculation of a Tier 2 Equity Execution Venue Monthly Fee)

$$52 \text{ [Estimated Tot. Equity EVs]} \times 42\% \text{ [% of Tier 2 Equity EVs]} = 22 \text{ [Estimated Tier 2 Equity EVs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 25\% \text{ [EV \% of Tot. Ann. CAT Costs]} \times 25.73\% \text{ [% of Tier 2 Equity EV Recovery]}}{22 \text{ [Estimated Tier 2 Equity EVs]}} \right) \div 12 \text{ [Months per year]} = \$12,353$$

Calculation 2.3 (Calculation of a Tier 3 Equity Execution Venue Monthly Fee)

$$52 \text{ [Estimated Tot. Equity EVs]} \times 23\% \text{ [% of Tier 2 Equity EVs]} = 12 \text{ [Estimated Tier 2 Equity EVs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 25\% \text{ [EV \% of Tot. Ann. CAT Costs]} \times 8\% \text{ [% of Tier 2 Equity EV Recovery]}}{12 \text{ [Estimated Tier 2 Equity EVs]}} \right) \div 12 \text{ [Months per year]} = \$7,042$$

Calculation 2.4 (Calculation of a Tier 4 Equity Execution Venue Monthly Fee)

$$52 \text{ [Estimated Tot. Equity EVs]} \times 10\% \text{ [% of Tier 2 Equity EVs]} = 5 \text{ [Estimated Tier 2 Equity EVs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 25\% \text{ [EV \% of Tot. Ann. CAT Costs]} \times 0.02\% \text{ [% of Tier 2 Equity EV Recovery]}}{5 \text{ [Estimated Tier 2 Equity EVs]}} \right) \div 12 \text{ [Months per year]} = \$42$$

CALCULATION OF ANNUAL TIER FEES FOR OPTIONS EXECUTION VENUES (“EV”)

Options Execution Venue tier	Percentage of Options Execution Venues	Percentage of Execution Venue Recovery	Percentage of total recovery
Tier 1	75.00	28.25	7.06
Tier 2	25.00	4.75	1.19
Total	100	33	8.25

Options Execution Venue Tier	Estimated number of Options Execution Venues
Tier 1	11
Tier 2	4
Total	15

Calculation 3.1 (Calculation of a Tier 1 Options Execution Venue Monthly Fee)

15 [Estimated Tot.Options EVs] × 75% [% of Tier 1 Options EVs] = 11 [Estimated Tier 1 Options EVs]

$$\left(\frac{\$50,700,000 \text{ [Tot.Ann.CAT Costs]} \times 25\% \text{ [EV \% of Tot.Ann.CAT Costs]} \times 28.25\% \text{ [% of Tier 1 Options EV Recovery]}}{11 \text{ [Estimated Tier 1 Options EVs]}} \right) + 12 \text{ [Months per year]} = \$27,127$$

Calculation 3.2 (Calculation of a Tier 2 Options Execution Venue Annual Fee)

15 [Estimated Tot.Options EVs] × 25% [% of Tier 2 Options EVs] = 4 [Estimated Tier 2 Options EVs]

$$\left(\frac{\$50,700,000 \text{ [Tot.Ann.CAT Costs]} \times 25\% \text{ [EV \% of Tot.Ann.CAT Costs]} \times 4.75\% \text{ [% of Tier 2 Options EV Recovery]}}{4 \text{ [Estimated Tier 2 Options EVs]}} \right) + 12 \text{ [Months per year]} = \$12,543$$

TRACEABILITY OF TOTAL CAT FEES

Type	Industry Member tier	Estimated number of members	CAT fees paid annually	Total recovery
Industry Members	Tier 1	14	\$325,932	\$4,563,048
	Tier 2	33	236,220	7,795,260
	Tier 3	43	163,596	7,034,628
	Tier 4	119	102,264	12,169,416
	Tier 5	128	29,712	3,803,136
	Tier 6	290	7,872	2,282,880
	Tier 7	914	420	383,880
Total		1,541		38,032,248
Equity Execution Venues	Tier 1	13	324,192	4,214,496
	Tier 2	22	148,248	3,261,456
	Tier 3	12	84,504	1,014,048
	Tier 4	5	516	2,580
Total		52		8,492,580
Options Execution Venues	Tier 1	11	325,524	3,580,764
	Tier 2	4	150,516	602,064
Total		15		4,182,828
Total				50,700,000
Excess ⁵⁷				7,656

(F) Comparability of Fees

The funding principles require a funding model in which the fees charged to the CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between

or among CAT Reporters, whether Execution Venue and/or Industry Members). Accordingly, in creating the model, the Operating Committee sought to establish comparable fees for the top tier of Industry Members (other than Execution Venue ATSS), Equity Execution Venues and Options Execution Venues. Specifically, each Tier 1 CAT Reporter would be required to pay a quarterly fee of approximately \$81,000.

(G) Billing Onset

Under Section 11.1(c) of the CAT NMS Plan, to fund the development and implementation of the CAT, the Company shall time the imposition and collection of all fees on Participants and Industry Members in a manner reasonably related to the timing when the Company expects to incur such development and implementation costs. The Company is currently incurring such development and implementation costs and will continue to do so prior to the commencement of CAT reporting

⁵⁷The amount in excess of the total CAT costs will contribute to the gradual accumulation of the target operating reserve of \$11.425 million.

and thereafter. In accordance with the CAT NMS Plan, all CAT Reporters, including both Industry Members and Execution Venues (including Participants), will be invoiced as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Participants and the operative date of the Plan amendment adopting CAT Fees for Participants.

(H) Changes to Fee Levels and Tiers

Section 11.3(d) of the CAT NMS Plan states that “[t]he Operating Committee shall review such fee schedule on at least an annual basis and shall make any changes to such fee schedule that it deems appropriate. The Operating Committee is authorized to review such fee schedule on a more regular basis, but shall not make any changes on more than a semi-annual basis unless, pursuant to a Supermajority Vote, the Operating Committee concludes that such change is necessary for the adequate funding of the Company.” With such reviews, the Operating Committee will review the distribution of Industry Members and Execution Venues across tiers, and make any updates to the percentage of CAT Reporters allocated to each tier as may be necessary. In addition, the reviews will evaluate the estimated ongoing CAT costs and the level of the operating reserve. To the extent that the total CAT costs decrease, the fees would be adjusted downward, and to the extent that the total CAT costs increase, the fees would be adjusted upward.⁵⁸ Furthermore, any surplus of the Company’s revenues over its expenses is

to be included within the operational reserve to offset future fees. The limitations on more frequent changes to the fee, however, are intended to provide budgeting certainty for the CAT Reporters and the Company.⁵⁹ To the extent that the Operating Committee approves changes to the number of tiers in the funding model or the fees assigned to each tier, then the Operating Committee will file such changes with the SEC pursuant to Rule 608 of the Exchange Act, and the Participants will file such changes with the Commission pursuant to Section 19(b) of the Exchange Act and Rule 19b-4 thereunder, and any such changes will become effective in accordance with the requirements of those provisions.

(I) Initial and Periodic Tier Reassignments

The Operating Committee has determined to calculate fee tiers every three months based on market share or message traffic, as applicable, from the prior three months. For the initial tier assignments, the Company will calculate the relevant tier for each CAT Reporter using the three months of data prior to the commencement date. As with the initial tier assignment, for the tri-monthly reassignments, the Company will calculate the relevant tier using the three months of data prior to the relevant tri-monthly date. Any movement of CAT Reporters between tiers will not change the criteria for each tier or the fee amount corresponding to each tier.

In performing the tri-monthly reassignments, the assignment of CAT Reporters in each assigned tier is

relative. Therefore, a CAT Reporter’s assigned tier will depend, not only on its own message traffic or market share, but also on the message traffic/market share across all CAT Reporters. For example, the percentage of Industry Members (other than Execution Venue ATs) in each tier is relative such that such Industry Member’s assigned tier will depend on message traffic generated across all CAT Reporters as well as the total number of CAT Reporters. The Operating Committee will inform CAT Reporters of their assigned tier every three months following the periodic tiering process, as the funding model will compare an individual CAT Reporter’s activity to that of other CAT Reporters in the marketplace.

The following demonstrates a tier reassignment. In accordance with the funding model, the top 75% of Options Execution Venues in market share are categorized as Tier 1 while the bottom 25% of Options Execution Venues in market share are categorized as Tier 2. In the sample scenario below, Options Execution Venue L is initially categorized as a Tier 2 Options Execution Venue in Period A due to its market share. When market share is recalculated for Period B, the market share of Execution Venue L increases, and it is therefore subsequently reranked and reassigned to Tier 1 in Period B. Correspondingly, Options Execution Venue K, initially a Tier 1 Options Execution Venue in Period A, is reassigned to Tier 2 in Period B due to decreases in its market share.

Period A			Period B		
Options Execution Venue	Market share rank	Tier	Options Execution Venue	Market share rank	Tier
Options Execution Venue A	1	1	Options Execution Venue A	1	1
Options Execution Venue B	2	1	Options Execution Venue B	2	1
Options Execution Venue C	3	1	Options Execution Venue C	3	1
Options Execution Venue D	4	1	Options Execution Venue D	4	1
Options Execution Venue E	5	1	Options Execution Venue E	5	1
Options Execution Venue F	6	1	Options Execution Venue F	6	1
Options Execution Venue G	7	1	Options Execution Venue I	7	1
Options Execution Venue H	8	1	Options Execution Venue H	8	1
Options Execution Venue I	9	1	Options Execution Venue G	9	1
Options Execution Venue J	10	1	Options Execution Venue J	10	1
Options Execution Venue K	11	1	Options Execution Venue L	11	1
Options Execution Venue L	12	2	Options Execution Venue K	12	2
Options Execution Venue M	13	2	Options Execution Venue N	13	2
Options Execution Venue N	14	2	Options Execution Venue M	14	2
Options Execution Venue O	15	2	Options Execution Venue O	15	2

⁵⁸The CAT Fees are designed to recover the costs associated with the CAT. Accordingly, CAT Fees would not be affected by increases or decreases in other non-CAT expenses incurred by the

Participants, such as any changes in costs related to the retirement of existing regulatory systems, such as OATS.

⁵⁹Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85006.

For each periodic tier reassignment, the Operating Committee will review the new tier assignments, particularly those assignments for CAT Reporters that shift from the lowest tier to a higher tier. This review is intended to evaluate whether potential changes to the market or CAT Reporters (e.g., dissolution of a large CAT Reporter) adversely affect the tier reassignments.

(J) Sunset Provision

The Operating Committee developed the proposed funding model by analyzing currently available historical data. Such historical data, however, is not as comprehensive as data that will be submitted to the CAT. Accordingly, the Operating Committee believes that it will be appropriate to revisit the funding model once CAT Reporters have actual experience with the funding model. Accordingly, the Operating Committee determined to include an automatic sunset provision for the proposed fees. Specifically, the Operating Committee determined that the CAT Fees should automatically expire two years after the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. The Operating Committee intends to monitor the operation of the funding model during this two year period and to evaluate its effectiveness during that period. Such a process will inform the Operating Committee's approach to funding the CAT after the two year period.

(3) Proposed CAT Fee Schedule

FINRA proposes the Consolidated Audit Trail Funding Fees to impose the CAT Fees determined by the Operating Committee on FINRA's members. The proposed fee schedule has four sections, covering definitions, the fee schedule for CAT Fees, the timing and manner of payments, and the automatic sunset of the CAT Fees. Each of these sections is discussed in detail below.

(A) Definitions

Paragraph (a) of the proposed fee schedule sets forth the definitions for the proposed fee schedule. Paragraph (a)(1) states that, for purposes of the Consolidated Audit Trail Funding Fees, the terms "CAT", "CAT NMS Plan," "Industry Member," "NMS Stock," "OTC Equity Security", "Options Market Maker", and "Participant" are defined as set forth in Rule 6897 (Consolidated Audit Trail—Definitions).

The proposed fee schedule imposes different fees on Equity ATSs and Industry Members that are not Equity ATSs. Accordingly, the proposed fee schedule defines the term "Equity

ATS." First, paragraph (a)(2) defines an "ATS" to mean an alternative trading system as defined in Rule 300(a) of SEC Regulation ATS under the Securities Exchange Act that operates pursuant to Rule 301 of SEC Regulation ATS. This is the same definition of an ATS as set forth in Section 1.1 of the CAT NMS Plan in the definition of an "Execution Venue." Then, paragraph (a)(4) defines an "Equity ATS" as an ATS that executes transactions in NMS Stocks and/or OTC Equity Securities.

Paragraph (a)(3) of the proposed fee schedule defines the term "CAT Fee" to mean the Consolidated Audit Trail Funding Fee(s) to be paid by Industry Members as set forth in paragraph (b) in the proposed fee schedule.

Finally, Paragraph (a)(6) defines an "Execution Venue" as a Participant or an ATS (excluding any such ATS that does not execute orders). This definition is the same substantive definition as set forth in Section 1.1 of the CAT NMS Plan. Paragraph (a)(5) defines an "Equity Execution Venue" as an Execution Venue that trades NMS Stocks and/or OTC Equity Securities.

(B) Fee Schedule

FINRA proposes to impose the CAT Fees applicable to its Industry Members through paragraph (b) of the proposed fee schedule. Paragraph (b)(1) of the proposed fee schedule sets forth the CAT Fees applicable to Industry Members other than Equity ATSs. Specifically, paragraph (b)(1) states that the Company will assign each Industry Member (other than an Equity ATS) to a fee tier once every quarter, where such tier assignment is calculated by ranking each Industry Member based on its total message traffic (with discounts for equity market maker quotes and Options Market Maker quotes based on the trade to quote ratio for equities and options, respectively) for the three months prior to the quarterly tier calculation day and assigning each Industry Member to a tier based on that ranking and predefined Industry Member percentages. The Industry Members with the highest total quarterly message traffic will be ranked in Tier 1, and the Industry Members with lowest quarterly message traffic will be ranked in Tier 7. Each quarter, each Industry Member (other than an Equity ATS) shall pay the following CAT Fee corresponding to the tier assigned by the Company for such Industry Member for that quarter:

Tier	Percentage of Industry Members	Quarterly CAT fee
1	0.900	\$81,483
2	2.150	59,055

Tier	Percentage of Industry Members	Quarterly CAT fee
3	2.800	40,899
4	7.750	25,566
5	8.300	7,428
6	18.800	1,968
7	59.300	105

Paragraph (b)(2) of the proposed fee schedule sets forth the CAT Fees applicable to Equity ATSs.⁶⁰ These are the same fees that Participants that trade NMS Stocks and/or OTC Equity Securities will pay. Specifically, paragraph (b)(2) states that the Company will assign each Equity ATS to a fee tier once every quarter, where such tier assignment is calculated by ranking each Equity Execution Venue based on its total market share of NMS Stocks and OTC Equity Securities (with a discount for the OTC Equity Securities market share of Equity ATSs trading OTC Equity Securities based on the average shares per trade ratio between NMS Stocks and OTC Equity Securities) for the three months prior to the quarterly tier calculation day and assigning each Equity ATS to a tier based on that ranking and predefined Equity Execution Venue percentages. The Equity ATSs with the higher total quarterly market share will be ranked in Tier 1, and the Equity ATSs with the lowest quarterly market share will be ranked in Tier 4. Specifically, paragraph (b)(2) states that, each quarter, each Equity ATS shall pay the following CAT Fee corresponding to the tier assigned by the Company for such Equity ATS for that quarter:

Tier	Percentage of Equity Execution Venues	Quarterly CAT fee
1	25.00	\$81,048
2	42.00	37,062
3	23.00	21,126
4	10.00	129

(C) Timing and Manner of Payment

Section 11.4 of the CAT NMS Plan states that the Operating Committee shall establish a system for the collection of fees authorized under the CAT NMS Plan. The Operating Committee may include such collection responsibility as a function of the Plan Processor or another administrator. To implement the payment process to be

⁶⁰ Note that no fee schedule is provided for Execution Venue ATSs that execute transactions in Listed Options, as no such Execution Venue ATSs currently exist due to trading restrictions related to Listed Options.

adopted by the Operating Committee, paragraph (c)(1) of the proposed fee schedule states that the Company will provide each Industry Member with one invoice each quarter for its CAT Fees as determined pursuant to paragraph (b) of the proposed fee schedule, regardless of whether the Industry Member is a member of multiple self-regulatory organizations. Paragraph (c)(1) further states that each Industry Member will pay its CAT Fees to the Company via the centralized system for the collection of CAT Fees established by the Company in the manner prescribed by the Company. FINRA will issue a notice to its members with details regarding the manner of payment of CAT Fees.

All CAT fees will be billed and collected centrally through the Company via the Plan Processor. Although each Participant will adopt its own fee schedule regarding CAT Fees, no CAT Fees or portion thereof will be collected by the individual Participants. Each Industry Member will receive from the Company one invoice for its applicable CAT fees, not separate invoices from each Participant of which it is a member. The Industry Members will pay the CAT Fees to the Company via the centralized system for the collection of CAT fees established by the Company.⁶¹

Section 11.4 of the CAT NMS Plan also states that Participants shall require each Industry Member to pay all applicable authorized CAT Fees within thirty days after receipt of an invoice or other notice indicating payment is due (unless a longer payment period is otherwise indicated). Section 11.4 further states that, if an Industry Member fails to pay any such fee when due, such Industry Member shall pay interest on the outstanding balance from such due date until such fee is paid at a per annum rate equal to the lesser of: (i) The Prime Rate plus 300 basis points; or (ii) the maximum rate permitted by applicable law. Therefore, in accordance with Section 11.4 of the CAT NMS Plan, FINRA proposed to adopt paragraph (c)(2) of the proposed fee schedule. Paragraph (c)(2) of the proposed fee schedule states that each Industry Member shall pay CAT Fees within thirty days after receipt of an invoice or other notice indicating payment is due (unless a longer payment period is otherwise indicated). If an Industry Member fails to pay any such fee when due, such Industry Member shall pay interest on the outstanding balance from such due date until such fee is paid at a per annum rate equal to the lesser of: (i) the Prime Rate plus 300 basis points;

or (ii) the maximum rate permitted by applicable law.

(D) Sunset Provision

The Operating Committee has determined to require that the CAT Fees automatically sunset two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. Accordingly, FINRA proposes paragraph (d) of the fee schedule, which states that “[t]hese Consolidated Audit Trailing Funding Fees will automatically expire two years after the operative date of the amendment of the CAT NMS Plan that adopts CAT fees for the Participants.”

(4) Changes to Prior CAT Fee Plan Amendment

The proposed funding model set forth in this Amendment is a revised version of the Original Proposal. The Commission received a number of comment letters in response to the Original Proposal.⁶² The SEC suspended the Original Proposal and instituted proceedings to determine whether to approve or disapprove it.⁶³ Pursuant to those proceedings, additional comment letters were submitted regarding the proposed funding model.⁶⁴ In developing this Amendment, the Operating Committee carefully considered these comments and made a number of changes to the Original Proposal to address these comments where appropriate.

This Amendment makes the following changes to the Original Proposal: (1) Adds two additional CAT Fee tiers for Equity Execution Venues; (2) discounts the OTC Equity Securities market share of Execution Venue ATSS trading OTC Equity Securities as well as the market share of the FINRA ORF by the average shares per trade ratio between NMS Stocks and OTC Equity Securities (calculated as 0.17% based on available data from the second quarter of June 2017) when calculating the market share of Execution Venue ATSS trading OTC Equity Securities and FINRA; (3) discounts the Options Market Maker quotes by the trade to quote ratio for options (calculated as 0.01% based on available data for June 2016 through June 2017) when calculating message traffic for Options Market Makers; (4) discounts equity market maker quotes by the trade to quote ratio for equities (calculated as 5.43% based on available

data for June 2016 through June 2017) when calculating message traffic for equity market makers; (5) decreases the number of tiers for Industry Members (other than the Execution Venue ATSS) from nine to seven; (6) changes the allocation of CAT costs between Equity Execution Venues and Options Execution Venues from 75%/25% to 67%/33%; (7) adjusts tier percentages and recovery allocations for Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSS); (8) focuses the comparability of CAT Fees on the individual entity level, rather than primarily on the comparability of affiliated entities; (9) commences invoicing of CAT Reporters as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Participants and the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants; and (10) requires the proposed fees to automatically expire two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for the Participants.

(A) Equity Execution Venues

(i) Small Equity Execution Venues

In the Original Proposal, the Operating Committee proposed to establish two fee tiers for Equity Execution Venues. The Commission and commenters raised the concern that, by establishing only two tiers, smaller Equity Execution Venues (*e.g.*, those Equity ATSS representing less than 1% of NMS market share) would be placed in the same fee tier as larger Equity Execution Venues, thereby imposing an undue or inappropriate burden on competition.⁶⁵ To address this concern, the Operating Committee proposes to add two additional tiers for Equity Execution Venues, a third tier for smaller Equity Execution Venues and a fourth tier for the smallest Equity Execution Venues.

Specifically, the Original Proposal had two tiers of Equity Execution Venues. Tier 1 required the largest Equity Execution Venues to pay a quarterly fee of \$63,375. Based on available data, these largest Equity Execution Venues were those that had equity market share of share volume greater than or equal to 1%.⁶⁶ Tier 2

⁶⁵ See Suspension Order at 31664; SIFMA Letter at 3.

⁶⁶ Note that while these equity market share thresholds were referenced as data points to help differentiate between Equity Execution Venue tiers, the proposed funding model is directly driven not by market share thresholds, but rather by fixed

⁶² For a description of the comments submitted in response to the Original Proposal, see Suspension Order.

⁶³ See Suspension Order.

⁶⁴ See MFA Letter; SIFMA Letter; FIA Principal Traders Group Letter; Belvedere Letter; Sidley Letter; Group One Letter; and Virtu Financial Letter.

⁶¹ Section 11.4 of the CAT NMS Plan.

required the remaining smaller Equity Execution Venues to pay a quarterly fee of \$38,820.

To address concerns about the potential for the \$38,820 quarterly fee to impose an undue burden on smaller Equity Execution Venues, the Operating Committee determined to move to a four tier structure for Equity Execution Venues. Tier 1 would continue to include the largest Equity Execution Venues by share volume (that is, based on currently available data, those with market share of equity share volume greater than or equal to one percent), and these Equity Execution Venues would be required to pay a quarterly fee of \$81,048. The Operating Committee determined to divide the original Tier 2 into three tiers. The new Tier 2 Equity Execution Venues, which would include the next largest Equity Execution Venues by equity share volume, would be required to pay a quarterly fee of \$37,062. The new Tier 3 Equity Execution Venues would be required to pay a quarterly fee of \$21,126. The new Tier 4 Equity Execution Venues, which would include the smallest Equity Execution Venues by share volume, would be required to pay a quarterly fee of \$129.

In developing the proposed four tier structure, the Operating Committee considered keeping the existing two tiers, as well as shifting to three, four or five Equity Execution Venue tiers (the maximum number of tiers permitted under the Plan), to address the concerns regarding small Equity Execution Venues. For each of the two, three, four and five tier alternatives, the Operating Committee considered the assignment of various percentages of Equity Execution Venues to each tier as well as various percentage of Equity Execution Venue recovery allocations for each alternative. As discussed below in more detail, each of these options was considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined that the four tier alternative addressed the spectrum of different Equity Execution Venues. The Operating Committee determined that neither a two tier structure nor a three tier structure sufficiently accounted for the range of market shares of smaller Equity Execution Venues. The

percentages of Equity Execution Venues across tiers to account for fluctuating levels of market share across time. Actual market share in any tier will vary based on the actual market activity in a given measurement period, as well as the number of Equity Execution Venues included in the measurement period.

Operating Committee also determined that, given the limited number of Equity Execution Venues, that a fifth tier was unnecessary to address the range of market shares of the Equity Execution Venues.

By increasing the number of tiers for Equity Execution Venues and reducing the proposed CAT Fees for the smaller Equity Execution Venues, the Operating Committee believes that the proposed fees for Equity Execution Venues would not impose an undue or inappropriate burden on competition under Section 6 or Section 15A of the Exchange Act. Moreover, the Operating Committee believes that the proposed fees appropriately take into account the distinctions in the securities trading operations of different Equity Execution Venues, as required under the funding principles of the CAT NMS Plan.⁶⁷ The larger number of tiers more closely tracks the variety of sizes of equity share volume of Equity Execution Venues. In addition, the reduction in the fees for the smaller Equity Execution Venues recognizes the potential burden of larger fees on smaller entities. In particular, the very small quarterly fee of \$129 for Tier 4 Equity Execution Venues reflects the fact that certain Equity Execution Venues have a very small share volume due to their typically more focused business models.

Accordingly, with this Amendment, FINRA proposes to amend paragraph (b)(2) of the proposed fee schedule to add the two additional tiers for Equity Execution Venues, to establish the percentages and fees for Tiers 3 and 4 as described, and to revise the percentages and fees for Tiers 1 and 2 as described.

(ii) Execution Venues for OTC Equity Securities

In the Original Proposal, Execution Venues for OTC Equity Securities and Execution Venues for NMS Stocks were grouped in the same tier structure. The Commission and commenters raised concerns as to whether this determination to place Execution Venues for OTC Equity Securities in the same tier structure as Execution Venues for NMS Stocks would result in an undue or inappropriate burden on competition, recognizing that the application of share volume may lead to different outcomes as applied to OTC Equity Securities and NMS Stocks.⁶⁸ To address this concern, the Operating Committee proposes to discount the OTC Equity Securities market share of Execution Venue ATSS trading OTC

Equity Securities as well as the market share of the FINRA ORF by the average shares per trade ratio between NMS Stocks and OTC Equity Securities (0.17% for the second quarter of 2017) in order to adjust for the greater number of shares being traded in the OTC Equity Securities market, which is generally a function of a lower per share price for OTC Equity Securities when compared to NMS Stocks.

As commenters noted, many OTC Equity Securities are priced at less than one dollar—and a significant number at less than one penny—and low-priced shares tend to trade in larger quantities. Accordingly, a disproportionately large number of shares are involved in transactions involving OTC Equity Securities versus NMS Stocks, which has the effect of overstating an Execution Venue's true market share when the Execution Venue is involved in the trading of OTC Equity Securities. Because the proposed fee tiers are based on market share calculated by share volume, Execution Venue ATSS trading OTC Equity Securities and FINRA may be subject to higher tiers than their operations may warrant.⁶⁹ The Operating Committee proposes to address this concern in two ways. First, the Operating Committee proposes to increase the number of Equity Execution Venue tiers, as discussed above. Second, the Operating Committee determined to discount the OTC Equity Securities market share of Execution Venue ATSS trading OTC Equity Securities as well as the market share of the FINRA ORF when calculating their tier placement. Because the disparity in share volume between Execution Venues trading in OTC Equity Securities and NMS Stocks is based on the different number of shares per trade for OTC Equity Securities and NMS Stocks, the Operating Committee believes that discounting the OTC Equity Securities share volume of such Execution Venue ATSS as well as the market share of the FINRA ORF would address the difference in shares per trade for OTC Equity Securities and NMS Stocks. Specifically, the Operating Committee proposes to impose a discount based on the objective measure of the average shares per trade ratio between NMS Stocks and OTC Equity Securities. Based on available data from the second quarter of 2017, the average shares per trade ratio between NMS Stocks and OTC Equity Securities is 0.17%.

The practical effect of applying such a discount for trading in OTC Equity Securities is to shift Execution Venue ATSS trading OTC Equity Securities to

⁶⁷ Section 11.2(b) of the CAT NMS Plan.

⁶⁸ See Suspension Order at 31664–5.

⁶⁹ Suspension Order at 31664–5.

tiers for smaller Execution Venues and with lower fees. For example, under the Original Proposal, one Execution Venue ATS trading OTC Equity Securities was placed in the first CAT Fee tier, which had a quarterly fee of \$63,375. With the imposition of the proposed tier changes and the discount, this ATS would be ranked in Tier 3 and would owe a quarterly fee of \$21,126.

In developing the proposed discount for Equity Execution Venue ATSS trading OTC Equity Securities and FINRA, the Operating Committee evaluated different alternatives to address the concerns related to OTC Equity Securities, including creating a separate tier structure for Execution Venues trading OTC Equity Securities (like the separate tier for Options Execution Venues) as well as the proposed discounting method for Execution Venue ATSS trading OTC Equity Securities and FINRA. For these alternatives, the Operating Committee considered how each alternative would affect the recovery allocations. In addition, each of these options was considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee did not adopt a separate tier structure for Equity Execution Venues trading OTC Equity Securities as they determined that the proposed discount approach appropriately addresses the concern. The Operating Committee determined to adopt the proposed discount because it directly relates to the concern regarding the trading patterns and operations in the OTC Equity Securities markets, and is an objective discounting method.

By increasing the number of tiers for Equity Execution Venues and imposing a discount on the market share of share volume calculation for trading in OTC Equity Securities, the Operating Committee believes that the proposed fees for Equity Execution Venues would not impose an undue or inappropriate burden on competition under Section 6 or Section 15A of the Exchange Act. Moreover, the Operating Committee believes that the proposed fees appropriately take into account the distinctions in the securities trading operations of different Equity Execution Venues, as required under the funding principles of the CAT NMS Plan.⁷⁰ As discussed above, the larger number of tiers more closely tracks the variety of sizes of equity share volume of Equity Execution Venues. In addition, the proposed discount recognizes the

different types of trading operations at Equity Execution Venues trading OTC Equity Securities versus those trading NMS Stocks, thereby more closely matching the relative revenue generation by Equity Execution Venues trading OTC Equity Securities to their CAT Fees.

Accordingly, with this Amendment, FINRA proposes to amend paragraph (b)(2) of the proposed fee schedule to indicate that the OTC Equity Securities market share for Equity ATSS trading OTC Equity Securities as well as the market share of the FINRA ORF would be discounted. In addition, as discussed above, to address concerns related to smaller ATSS, including those that trade OTC Equity Securities, FINRA proposes to amend paragraph (b)(2) of the proposed fee schedule to add two additional tiers for Equity Execution Venues, to establish the percentages and fees for Tiers 3 and 4 as described, and to revise the percentages and fees for Tiers 1 and 2 as described.

(B) Market Makers

In the Original Proposal, the Operating Committee proposed to include both Options Market Maker quotes and equities market maker quotes in the calculation of total message traffic for such market makers for purposes of tiering for Industry Members (other than Execution Venue ATSS). The Commission and commenters raised questions as to whether the proposed treatment of Options Market Maker quotes may result in an undue or inappropriate burden on competition or may lead to a reduction in market quality.⁷¹ To address this concern, the Operating Committee determined to discount the Options Market Maker quotes by the trade to quote ratio for options when calculating message traffic for Options Market Makers. Similarly, to avoid disincentives to quoting behavior on the equities side as well, the Operating Committee determined to discount equity market maker quotes by the trade to quote ratio for equities when calculating message traffic for equities market makers.

In the Original Proposal, market maker quotes were treated the same as other message traffic for purposes of tiering for Industry Members (other than Execution Venue ATSS). Commenters noted, however, that charging Industry Members on the basis of message traffic will impact market makers

disproportionately because of their continuous quoting obligations. Moreover, in the context of options market makers, message traffic would include bids and offers for every listed options strikes and series, which are not an issue for equities.⁷² The Operating Committee proposes to address this concern in two ways. First, the Operating Committee proposes to discount Options Market Maker quotes when calculating the Options Market Makers' tier placement. Specifically, the Operating Committee proposes to impose a discount based on the objective measure of the trade to quote ratio for options. Based on available data from June 2016 through June 2017, the trade to quote ratio for options is 0.01%. Second, the Operating Committee proposes to discount equities market maker quotes when calculating the equities market makers' tier placement. Specifically, the Operating Committee proposes to impose a discount based on the objective measure of the trade to quote ratio for equities. Based on available data for June 2016 through June 2017, this trade to quote ratio for equities is 5.43%.

The practical effect of applying such discounts for quoting activity is to shift market makers' calculated message traffic lower, leading to the potential shift to tiers for lower message traffic and reduced fees. Such an approach would move sixteen Industry Member CAT Reporters that are market makers to a lower tier than in the Original Proposal. For example, under the Original Proposal, Broker-Dealer Firm ABC was placed in the first CAT Fee tier, which had a quarterly fee of \$101,004. With the imposition of the proposed tier changes and the discount, Broker-Dealer Firm ABC, an options market maker, would be ranked in Tier 3 and would owe a quarterly fee of \$40,899.

In developing the proposed market maker discounts, the Operating Committee considered various discounts for Options Market Makers and equity market makers, including discounts of 50%, 25%, 0.00002%, as well as the 5.43% for option market makers and 0.01% for equity market makers. Each of these options were considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined to adopt the proposed discount because it directly relates to the concern regarding

⁷¹ See Suspension Order at 31663-4; SIFMA Letter at 4-5; FIA Principal Traders Group Letter at 3; Sidley Letter at 2-6; Group One Letter at 2-5; and Belvedere Letter at 2.

⁷² Suspension Order at 31664.

⁷⁰ Section 11.2(b) of the CAT NMS Plan.

the quoting requirement, is an objective discounting method, and has the desired potential to shift market makers to lower fee tiers.

By imposing a discount on Options Market Makers and equities market makers' quoting traffic for the calculation of message traffic, the Operating Committee believes that the proposed fees for market makers would not impose an undue or inappropriate burden on competition under Section 6 or Section 15A of the Exchange Act. Moreover, the Operating Committee believes that the proposed fees appropriately take into account the distinctions in the securities trading operations of different Industry Members, and avoid disincentives, such as a reduction in market quality, as required under the funding principles of the CAT NMS Plan.⁷³ The proposed discounts recognize the different types of trading operations presented by Options Market Makers and equities market makers, as well as the value of the market makers' quoting activity to the market as a whole. Accordingly, the Operating Committee believes that the proposed discounts will not impact the ability of small Options Market Makers or equities market makers to provide liquidity.

Accordingly, with this Amendment, FINRA proposes to amend paragraph (b)(1) of the proposed fee schedule to indicate that the message traffic related to equity market maker quotes and Options Market Maker quotes would be discounted. In addition, FINRA proposes to define the term "Options Market Maker" in paragraph (a)(1) of the proposed fee schedule.

(C) Comparability/Allocation of Costs

Under the Original Proposal, 75% of CAT costs were allocated to Industry Members (other than Execution Venue ATs) and 25% of CAT costs were allocated to Execution Venues. This cost allocation sought to maintain the greatest level of comparability across the funding model, where comparability considered affiliations among or between CAT Reporters. The Commission and commenters expressed concerns regarding whether the proposed 75%/25% allocation of CAT costs is consistent with the Plan's funding principles and the Exchange Act, including whether the allocation places a burden on competition or reduces market quality. The Commission and commenters also questioned whether the approach of accounting for affiliations among CAT Reporters in setting CAT Fees

disadvantages non-affiliated CAT Reporters or otherwise burdens competition in the market for trading services.⁷⁴

In response to these concerns, the Operating Committee determined to revise the proposed funding model to focus the comparability of CAT Fees on the individual entity level, rather than primarily on the comparability of affiliated entities. In light of the interconnected nature of the various aspects of the funding model, the Operating Committee determined to revise various aspects of the model to enhance comparability at the individual entity level. Specifically, to achieve such comparability, the Operating Committee determined to (1) decrease the number of tiers for Industry Members (other than Execution Venue ATs) from nine to seven; (2) change the allocation of CAT costs between Equity Execution Venues and Options Execution Venues from 75%/25% to 67%/33%; and (3) adjust tier percentages and recovery allocations for Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATs). With these changes, the proposed funding model provides fee comparability for the largest individual entities, with the largest Industry Members (other than Execution Venue ATs), Equity Execution Venues and Options Execution Venues each paying a CAT Fee of approximately \$81,000 each quarter.

(i) Number of Industry Member Tiers

In the Original Proposal, the proposed funding model had nine tiers for Industry Members (other than Execution Venue ATs). The Operating Committee determined that reducing the number of tiers from nine tiers to seven tiers (and adjusting the predefined Industry Member Percentages as well) continues to provide a fair allocation of fees among Industry Members and appropriately distinguishes between Industry Members with differing levels of message traffic. In reaching this conclusion, the Operating Committee considered historical message traffic generated by Industry Members across all exchanges and as submitted to FINRA's OATS, and considered the distribution of firms with similar levels of message traffic, grouping together firms with similar levels of message traffic. Based on this, the Operating Committee determined that seven tiers would group firms with similar levels of

message traffic, while also achieving greater comparability in the model for the individual CAT Reporters with the greatest market share or message traffic.

In developing the proposed seven tier structure, the Operating Committee considered remaining at nine tiers, as well as reducing the number of tiers down to seven when considering how to address the concerns raised regarding comparability. For each of the alternatives, the Operating Committee considered the assignment of various percentages of Industry Members to each tier as well as various percentages of Industry Member recovery allocations for each alternative. Each of these options was considered in the context of its effects on the full funding model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined that the seven tier alternative provided the most fee comparability at the individual entity level for the largest CAT Reporters, while both providing logical breaks in tiering for Industry Members with different levels of message traffic and a sufficient number of tiers to provide for the full spectrum of different levels of message traffic for all Industry Members.

(ii) Allocation of CAT Costs Between Equity Execution Venues and Options Execution Venues

The Operating Committee also determined to adjust the allocation of CAT costs between Equity Execution Venues and Options Execution Venues to enhance comparability at the individual entity level. In the Original Proposal, 75% of Execution Venue CAT costs were allocated to Equity Execution Venues, and 25% of Execution Venue CAT costs were allocated to Options Execution Venues. To achieve the goal of increased comparability at the individual entity level, the Operating Committee analyzed a range of alternative splits for revenue recovery between Equity Execution Venues and Options Execution Venues, along with other changes in the proposed funding model. Based on this analysis, the Operating Committee determined to allocate 67 percent of Execution Venue costs recovered to Equity Execution Venues and 33 percent to Options Execution Venues. The Operating Committee determined that a 67/33 allocation between Equity Execution Venues and Options Execution Venues enhances the level of fee comparability for the largest CAT Reporters. Specifically, the largest Equity Execution Venues and Options

⁷⁴ See Suspension Order at 31662-3; SIFMA Letter at 3; Sidley Letter at 6-7; Group One Letter at 2; and Belvedere Letter at 2.

⁷³ Section 11.2(b) of the CAT NMS Plan.

Execution Venues would pay a quarterly CAT Fee of approximately \$81,000.

In developing the proposed allocation of CAT costs between Equity Execution Venues and Options Execution Venues, the Operating Committee considered various different options for such allocation, including keeping the original 75%/25% allocation, as well as shifting to a 70%/30%, 67%/33%, or 57.75%/42.25% allocation. For each of the alternatives, the Operating Committee considered the effect each allocation would have on the assignment of various percentages of Equity Execution Venues to each tier as well as various percentages of Equity Execution Venue recovery allocations for each alternative. Moreover, each of these options was considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined that the 67%/33% allocation between Equity Execution Venues and Options Execution Venues provided the greatest level of fee comparability at the individual entity level for the largest CAT Reporters, while still providing for appropriate fee levels across all tiers for all CAT Reporters.

(iii) Allocation of Costs Between Execution Venues and Industry Members

The Operating Committee determined to allocate 25% of CAT costs to Execution Venues and 75% to Industry Members (other than Execution Venue ATs), as it had in the Original Proposal. The Operating Committee determined that this 75%/25% allocation, along with the other changes proposed above, led to the most comparable fees for the largest Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATs). The largest Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATs) would each pay a quarterly CAT Fee of approximately \$81,000.

As a preliminary matter, the Operating Committee determined that it is appropriate to allocate most of the costs to create, implement and maintain the CAT to Industry Members for several reasons. First, there are many more broker-dealers expected to report to the CAT than Participants (*i.e.*, 1,541 broker-dealer CAT Reporters versus 22 Participants). Second, since most of the costs to process CAT reportable data is generated by Industry Members, Industry Members could be expected to

contribute toward such costs. Finally, as noted by the SEC, the CAT “substantially enhance[s] the ability of the SROs and the Commission to oversee today’s securities markets,”⁷⁵ thereby benefitting all market participants. After making this determination, the Operating Committee analyzed several different cost allocations, as discussed further below, and determined that an allocation where 75% of the CAT costs should be borne by the Industry Members (other than Execution Venue ATs) and 25% should be paid by Execution Venues was most appropriate and led to the greatest comparability of CAT Fees for the largest CAT Reporters.

In developing the proposed allocation of CAT costs between Execution Venues and Industry Members (other than Execution Venue ATs), the Operating Committee considered various different options for such allocation, including keeping the original 75%/25% allocation, as well as shifting to an 80%/20%, 70%/30%, or 65%/35% allocation. Each of these options was considered in the context of the full model, including the effect on each of the changes discussed above, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. In particular, for each of the alternatives, the Operating Committee considered the effect each allocation had on the assignment of various percentages of Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATs) to each relevant tier as well as various percentages of recovery allocations for each tier. The Operating Committee determined that the 75%/25% allocation between Execution Venues and Industry Members (other than Execution Venue ATs) provided the greatest level of fee comparability at the individual entity level for the largest CAT Reporters, while still providing for appropriate fee levels across all tiers for all CAT Reporters.

(iv) Affiliations

The funding principles set forth in Section 11.2 of the Plan require that the fees charged to CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether

Execution Venue and/or Industry Members). The proposed funding model satisfies this requirement. As discussed above, under the proposed funding model, the largest Equity Execution Venues, Options Execution Venues, and Industry Members (other than Execution Venue ATs) pay approximately the same fee. Moreover, the Operating Committee believes that the proposed funding model takes into consideration affiliations between or among CAT Reporters as complexes with multiple CAT Reporters will pay the appropriate fee based on the proposed fee schedule for each of the CAT Reporters in the complex. For example, a complex with a Tier 1 Equity Execution Venue and Tier 2 Industry Member will pay the same as another complex with a Tier 1 Equity Execution Venue and Tier 2 Industry Member.

(v) Fee Schedule Changes

Accordingly, with this Amendment, FINRA proposes to amend paragraphs (b)(1) and (2) of the proposed fee schedule to reflect the changes discussed in this section. Specifically, FINRA proposes to amend paragraph (b)(1) and (2) of the proposed fee schedule to update the number of tiers, and the fees and percentages assigned to each tier to reflect the described changes.

(D) Market Share/Message Traffic

In the Original Proposal, the Operating Committee proposed to charge Execution Venues based on market share and Industry Members (other than Execution Venue ATs) based on message traffic. Commenters questioned the use of the two different metrics for calculating CAT Fees.⁷⁶ The Operating Committee continues to believe that the proposed use of market share and message traffic satisfies the requirements of the Exchange Act and the funding principles set forth in the CAT NMS Plan. Accordingly, the proposed funding model continues to charge Execution Venues based on market share and Industry Members (other than Execution Venue ATs) based on message traffic.

In drafting the Plan and the Original Proposal, the Operating Committee expressed the view that the correlation between message traffic and size does not apply to Execution Venues, which they described as producing similar amounts of message traffic regardless of size. The Operating Committee believed that charging Execution Venues based on message traffic would result in both

⁷⁵ Securities Exchange Act Release No. 67457 (July 18, 2012), 77 FR 45722, 45726 (August 1, 2012) (“Rule 613 Adopting Release”).

⁷⁶ Suspension Order at 31663; FIA Principal Traders Group Letter at 2.

large and small Execution Venues paying comparable fees, which would be inequitable, so the Operating Committee determined that it would be more appropriate to treat Execution Venues differently from Industry Members in the funding model. Upon a more detailed analysis of available data, however, the Operating Committee noted that Execution Venues have varying levels of message traffic. Nevertheless, the Operating Committee continues to believe that a bifurcated funding model—where Industry Members (other than Execution Venue ATs) are charged fees based on message traffic and Execution Venues are charged based on market share—complies with the Plan and meets the standards of the Exchange Act for the reasons set forth below.

Charging Industry Members based on message traffic is the most equitable means for establishing fees for Industry Members (other than Execution Venue ATs). This approach will assess fees to Industry Members that create larger volumes of message traffic that are relatively higher than those fees charged to Industry Members that create smaller volumes of message traffic. Since message traffic, along with fixed costs of the Plan Processor, is a key component of the costs of operating the CAT, message traffic is an appropriate criterion for placing Industry Members in a particular fee tier.

The Operating Committee also believes that it is appropriate to charge Execution Venues CAT Fees based on their market share. In contrast to Industry Members (other than Execution Venue ATs), which determine the degree to which they produce the message traffic that constitutes CAT Reportable Events, the CAT Reportable Events of Execution Venues are largely derivative of quotations and orders received from Industry Members that the Execution Venues are required to display. The business model for Execution Venues, however, is focused on executions in their markets. As a result, the Operating Committee believes that it is more equitable to charge Execution Venues based on their market share rather than their message traffic.

Similarly, focusing on message traffic would make it more difficult to draw distinctions between large and small exchanges, including options exchanges in particular. For instance, the Operating Committee analyzed the message traffic of Execution Venues and Industry Members for the period of April 2017 to June 2017 and placed all CAT Reporters into a nine-tier framework (*i.e.*, a single tier may

include both Execution Venues and Industry Members). The Operating Committee's analysis found that the majority of exchanges (15 total) were grouped in Tiers 1 and 2. Moreover, virtually all of the options exchanges were in Tiers 1 and 2.⁷⁷ Given the concentration of options exchanges in Tiers 1 and 2, the Operating Committee believes that using a funding model based purely on message traffic would make it more difficult to distinguish between large and small options exchanges, as compared to the proposed bifurcated fee approach.

In addition, the Operating Committee also believes that it is appropriate to treat ATs as Execution Venues under the proposed funding model since ATs have business models that are similar to those of exchanges, and ATs also compete with exchanges. For these reasons, the Operating Committee believes that charging Execution Venues based on market share is more appropriate and equitable than charging Execution Venues based on message traffic.

(E) Time Limit

In the Original Proposal, the Operating Committee did not impose any time limit on the application of the proposed CAT Fees. As discussed above, the Operating Committee developed the proposed funding model by analyzing currently available historical data. Such historical data, however, is not as comprehensive as data that will be submitted to the CAT. Accordingly, the Operating Committee believes that it will be appropriate to revisit the funding model once CAT Reporters have actual experience with the funding model. Accordingly, the Operating Committee proposes to include a sunset provision in the proposed fee model. The proposed CAT Fees will sunset two years after the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. Specifically, FINRA proposes to add paragraph (d) of the proposed fee schedule to include this sunset provision. Such a provision will provide the Operating Committee and other market participants with the opportunity to reevaluate the performance of the proposed funding model.

(F) Tier Structure/Decreasing Cost per Unit

In the Original Proposal, the Operating Committee determined to use

⁷⁷ The Participants note that this analysis did not place MIAx PEARL in Tier 1 or Tier 2 since the exchange commenced trading on February 6, 2017.

a tiered fee structure. The Commission and commenters questioned whether the decreasing cost per additional unit (of message traffic in the case of Industry Members, or of share volume in the case of Execution Venues) in the proposed fee schedules burdens competition by disadvantaging small Industry Members and Execution Venues and/or by creating barriers to entry in the market for trading services and/or the market for broker-dealer services.⁷⁸

The Operating Committee does not believe that decreasing cost per additional unit in the proposed fee schedules places an unfair competitive burden on Small Industry Members and Execution Venues. While the cost per unit of message traffic or share volume necessarily will decrease as volume increases in any tiered fee model using fixed fee percentages and, as a result, Small Industry Members and small Execution Venues may pay a larger fee per message or share, this comment fails to take account of the substantial differences in the absolute fees paid by Small Industry Members and small Execution Venues as opposed to large Industry Members and large Execution Venues. For example, under the fee proposals, Tier 7 Industry Members would pay a quarterly fee of \$105, while Tier 1 Industry Members would pay a quarterly fee of \$81,483. Similarly, a Tier 4 Equity Execution Venue would pay a quarterly fee of \$129, while a Tier 1 Equity Execution Venue would pay a quarterly fee of \$81,048. Thus, Small Industry Members and small Execution Venues are not disadvantaged in terms of the total fees that they actually pay. In contrast to a tiered model using fixed fee percentages, the Operating Committee believes that strictly variable or metered funding models based on message traffic or share volume would be more likely to affect market behavior and may present administrative challenges (*e.g.*, the costs to calculate and monitor fees may exceed the fees charged to the smallest CAT Reporters).

(G) Other Alternatives Considered

In addition to the various funding model alternatives discussed above regarding discounts, number of tiers and allocation percentages, the Operating Committee also discussed other possible funding models. For example, the Operating Committee considered allocating the total CAT costs equally among each of the Participants, and then permitting each Participant to charge its own members as it deems

⁷⁸ Suspension Order at 31667.

appropriate.⁷⁹ The Operating Committee determined that such an approach raised a variety of issues, including the likely inconsistency of the ensuing charges, potential for lack of transparency, and the impracticality of multiple SROs submitting invoices for CAT charges. The Operating Committee therefore determined that the proposed funding model was preferable to this alternative.

(H) Industry Member Input

Commenters expressed concern regarding the level of Industry Member input into the development of the proposed funding model, and certain commenters have recommended a greater role in the governance of the CAT.⁸⁰ The Participants previously addressed this concern in their letters responding to comments on the Plan and the CAT Fees.⁸¹ As discussed in those letters, the Participants discussed the funding model with the Development Advisory Group (“DAG”), the advisory group formed to assist in the development of the Plan, during its original development.⁸² Moreover, Industry Members currently have a voice in the affairs of the Operating Committee and operation of the CAT generally through the Advisory Committee established pursuant to Rule 613(b)(7) and Section 4.13 of the Plan. The Advisory Committee attends all meetings of the Operating Committee, as well as meetings of various subcommittees and working groups, and provides valuable and critical input for the Participants’ and Operating Committee’s consideration. The Operating Committee continues to believe that Industry Members have an appropriate voice regarding the funding of the Company.

(I) Conflicts of Interest

Commenters also raised concerns regarding Participant conflicts of interest in setting the CAT Fees.⁸³ The Participants previously responded to this concern in both the Plan Response Letter and the Fee Rule Response Letter.⁸⁴ As discussed in those letters,

⁷⁹ See FIA Principal Traders Group Letter at 2; Belvedere Letter at 4.

⁸⁰ See Suspension Order at 31662; MFA Letter at 1–3.

⁸¹ Letter from Participants to Brent J. Fields, Secretary, SEC, dated Sept. 23, 2016 (“Plan Response Letter”); Letter from CAT NMS Plan Participants to Brent J. Fields, Secretary, SEC, dated June 29, 2017 (“Fee Rule Response Letter”).

⁸² Fee Rule Response Letter at 2; Plan Response Letter at 18.

⁸³ See Suspension Order at 31662; FIA Principal Traders Group at 3.

⁸⁴ See Plan Response Letter at 16, 18; Fee Rule Response Letter at 11–12.

the Plan, as approved by the SEC, adopts various measures to protect against the potential conflicts issues raised by the Participants’ fee-setting authority. Such measures include the operation of the Company as a not for profit business league and on a break-even basis, and the requirement that the Participants file all CAT Fees under Section 19(b) of the Exchange Act. The Operating Committee continues to believe that these measures adequately protect against concerns regarding conflicts of interest in setting fees, and that additional measures, such as an independent third party to evaluate an appropriate CAT Fee, are unnecessary.

(J) Fee Transparency

Commenters also argued that they could not adequately assess whether the CAT Fees were fair and equitable because the Operating Committee has not provided details as to what the Participants are receiving in return for the CAT Fees.⁸⁵ The Operating Committee provided a detailed discussion of the proposed funding model in the Plan, including the expenses to be covered by the CAT Fees. In addition, the agreement between the Company and the Plan Processor sets forth a comprehensive set of services to be provided to the Company with regard to the CAT. Such services include, without limitation: User support services (e.g., a help desk); tools to allow each CAT Reporter to monitor and correct their submissions; a comprehensive compliance program to monitor CAT Reporters’ adherence to Rule 613; publication of detailed Technical Specifications for Industry Members and Participants; performing data linkage functions; creating comprehensive data security and confidentiality safeguards; creating query functionality for regulatory users (i.e., the Participants, and the SEC and SEC staff); and performing billing and collection functions. The Operating Committee further notes that the services provided by the Plan Processor and the costs related thereto were subject to a bidding process.

(K) Funding Authority

Commenters also questioned the authority of the Operating Committee to impose CAT Fees on Industry Members.⁸⁶ The Participants previously responded to this same comment in the Plan Response Letter and the Fee Rule

⁸⁵ See FIA Principal Traders Group at 3; SIFMA Letter at 3.

⁸⁶ See Suspension Order at 31661–2; SIFMA Letter at 2.

Response Letter.⁸⁷ As the Participants previously noted, SEC Rule 613 specifically contemplates broker-dealers contributing to the funding of the CAT. In addition, as noted by the SEC, the CAT “substantially enhance[s] the ability of the SROs and the Commission to oversee today’s securities markets,”⁸⁸ thereby benefitting all market participants. Therefore, the Operating Committee continues to believe that it is equitable for both Participants and Industry Members to contribute to funding the cost of the CAT.

FINRA has filed the proposed rule change for immediate effectiveness. FINRA will announce the implementation date of the proposed rule change in a *Regulatory Notice* to be published no later than 120 days following Commission approval. The effective date will be no later than 180 days following publication of the *Regulatory Notice* announcing Commission approval.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,⁸⁹ which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest, and not designed to permit unfair discrimination between customers, issuers, brokers and dealers, and Section 15A(b)(5) of the Act,⁹⁰ which requires, among other things, that FINRA rules provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system that FINRA operates or controls.

FINRA believes that this proposal is consistent with the Act because it implements, interprets or clarifies the provisions of the Plan, and is designed to assist FINRA and its Industry Members in meeting regulatory obligations pursuant to the Plan. In approving the Plan, the SEC noted that the Plan “is necessary and appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanism of a national market system, or is otherwise in furtherance of the

⁸⁷ See Plan Response Letter at 9; Fee Rule Response Letter at 3–4.

⁸⁸ Rule 613 Adopting Release at 45726.

⁸⁹ 15 U.S.C. 78o-3(b)(6).

⁹⁰ 15 U.S.C. 78o-3(b)(5).

purposes of the Act.”⁹¹ To the extent that this proposal implements, interprets or clarifies the Plan and applies specific requirements to Industry Members, FINRA believes that this proposal furthers the objectives of the Plan, as identified by the SEC, and is therefore consistent with the Act.

FINRA believes that the proposed tiered fees are reasonable. First, the total CAT Fees to be collected would be directly associated with the costs of establishing and maintaining the CAT, where such costs include Plan Processor costs and costs related to insurance, third party services and the operational reserve. The CAT Fees would not cover Participant services unrelated to the CAT. In addition, any surplus CAT Fees cannot be distributed to the individual Participants; such surpluses must be used as a reserve to offset future fees. Given the direct relationship between the fees and the CAT costs, FINRA believes that the total level of the CAT Fees is reasonable.

In addition, FINRA believes that the proposed CAT Fees are reasonably designed to allocate the total costs of the CAT equitably between and among the Participants and Industry Members, and are therefore not unfairly discriminatory. As discussed in detail above, the proposed tiered fees impose comparable fees on similarly situated CAT Reporters. For example, those with a larger impact on the CAT (measured via message traffic or market share) pay higher fees, whereas CAT Reporters with a smaller impact pay lower fees. Correspondingly, the tiered structure lessens the impact on smaller CAT Reporters by imposing smaller fees on those CAT Reporters with less market share or message traffic. In addition, the funding model takes into consideration affiliations between CAT Reporters, imposing comparable fees on such affiliated entities.

Moreover, FINRA believes that the division of the total CAT costs between Industry Members and Execution Venues, and the division of the Execution Venue portion of total costs between Equity Execution Venues and Options Execution Venues, is reasonably designed to allocate CAT costs among CAT Reporters. The 75/25 division between Industry Members and Execution Venues maintains the greatest level of comparability across the funding model, keeping in view that comparability should consider affiliations among or between CAT Reporters (e.g., firms with multiple Industry Members or exchange licenses). Similarly, the 75/25 division

between Equity Execution Venues and Options Execution Venues maintains elasticity across the funding model as well as the greatest level of fee equitability and comparability based on the current number of Equity Execution Venues and Options Execution Venues.

Finally, FINRA believes that the proposed fees are reasonable because they would provide ease of calculation, ease of billing and other administrative functions, and predictability of a fixed fee. Such factors are crucial to estimating a reliable revenue stream for the Company and for permitting CAT Reporters to reasonably predict their payment obligations for budgeting purposes.

B. Self-Regulatory Organization's Statement on Burden on Competition

Section 15A(b)(9) of the Act,⁹² requires that FINRA rules not impose any burden on competition that is not necessary or appropriate. FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. FINRA notes that the proposed rule change implements Section 11.5 of the CAT NMS Plan approved by the Commission, and is designed to assist FINRA in meeting its regulatory obligations pursuant to the Plan. Similarly, all national securities exchanges and FINRA are proposing this proposed rule to implement the requirements of the CAT NMS Plan. Therefore, this is not a competitive rule filing and, therefore, it does not raise competition issues between and among the exchanges and FINRA.

Moreover, as previously described, FINRA believes that the proposed rule change fairly and equitably allocates costs among CAT Reporters. In particular, the proposed fee schedule is structured to impose comparable fees on similarly situated CAT Reporters, and lessen the impact on smaller CAT Reporters. CAT Reporters with similar levels of CAT activity will pay similar fees. For example, Industry Members (other than Execution Venue ATSS) with higher levels of message traffic will pay higher fees, and those with lower levels of message traffic will pay lower fees. Similarly, Execution Venue ATSS and other Execution Venues with larger market share will pay higher fees, and those with lower levels of market share will pay lower fees. Therefore, given that there is generally a relationship between message traffic and/or market share to the CAT Reporter's size, smaller CAT Reporters generally pay less than

larger CAT Reporters. Accordingly, FINRA does not believe that the CAT Fees would have a disproportionate effect on smaller or larger CAT Reporters. In addition, ATSS and exchanges will pay the same fees based on market share. Therefore, FINRA does not believe that the fees will impose any burden on the competition between ATSS and exchanges. Accordingly, FINRA believes that the proposed fees will minimize the potential for adverse effects on competition between CAT Reporters in the market.

Furthermore, the tiered, fixed fee funding model limits the disincentives to providing liquidity to the market. Therefore, the proposed fees are structured to limit burdens on competitive quoting and other liquidity provision in the market.

In addition, the Operating Committee believes that the proposed changes to the Original Proposal, as discussed above in detail, address certain competitive concerns raised by commenters, including concerns related to, among other things, smaller ATSS, ATSS trading OTC Equity Securities, market making quoting and fee comparability. As discussed above, the Operating Committee believes that the proposals address the competitive concerns raised by commenters.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

On May 23, 2017, the Original Proposal was published for comment in the **Federal Register** and the Participants collectively received five comments. On June 30, 2017, the Commission suspended, and instituted proceedings to determine whether to approve or disapprove, the Original Proposal.⁹³ The Commission received seven comment letters in response to those proceedings, which are summarized above.⁹⁴

III. Solicitation of Comments on Amendment No. 1

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment No. 1 is consistent with the Act. In particular, the Commission seeks comment on the following:

Allocation of Costs

(1) Commenters' views as to whether the allocation of CAT costs is consistent with the funding principle expressed in

⁹¹ Approval Order at 84697.

⁹² 15 U.S.C. 78o-3(b)(9).

⁹³ Suspension Order.

⁹⁴ *Supra* note 22.

the CAT NMS Plan that requires the Operating Committee to “avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality.”⁹⁵

(2) Commenters’ views as to whether the allocation of 25% of CAT costs to the Execution Venues (including all the Participants) and 75% to Industry Members, will incentivize or disincentivize the Participants to effectively and efficiently manage the CAT costs incurred by the Participants since they will only bear 25% of such costs.

(3) Commenters’ views on the determination to allocate 75% of all costs incurred by the Participants from November 21, 2016 to November 21, 2017 to Industry Members (other than Execution Venue ATSSs), when such costs are development and build costs and when Industry Member reporting is scheduled to commence a year later, including views on whether such “fees, costs and expenses . . . [are] fairly and reasonably shared among the Participants and Industry Members” in accordance with the CAT NMS Plan.⁹⁶

(4) Commenters’ views on whether an analysis of the ratio of the expected Industry Member-reported CAT messages to the expected SRO-reported CAT messages should be the basis for determining the allocation of costs between Industry Members and Execution Venues.⁹⁷

(5) Any additional data analysis on the allocation of CAT costs, including any existing supporting evidence.

Comparability

(6) Commenters’ views on the shift in the standard used to assess the comparability of CAT Fees, with the emphasis now on comparability of individual entities instead of affiliated entities, including views as to whether this shift is consistent with the funding principle expressed in the CAT NMS Plan that requires the Operating Committee to establish a fee structure in which the fees charged to “CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration

affiliations between or among CAT Reporters, whether Execution Venues and/or Industry Members).”⁹⁸

(7) Commenters’ views as to whether the reduction in the number of tiers for Industry Members (other than Execution Venue ATSSs) from nine to seven, the revised allocation of CAT costs between Equity Execution Venues and Options Execution Venues from a 75%/25% split to a 67%/33% split, and the adjustment of all tier percentages and recovery allocations achieves comparability across individual entities, and whether these changes should have resulted in a change to the allocation of 75% of total CAT costs to Industry Members (other than Execution Venue ATSSs) and 25% of such costs to Execution Venues.

Discounts

(8) Commenters’ views as to whether the discounts for options market-makers, equities market-makers, and Equity ATSSs trading OTC Equity Securities are clear, reasonable, and consistent with the funding principle expressed in the CAT NMS Plan that requires the Operating Committee to “avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality,”⁹⁹ including views as to whether the discounts for market-makers limit any potential disincentives to act as a market-maker and/or to provide liquidity due to CAT fees.

Calculation of Costs and Imposition of CAT Fees

(9) Commenters’ views as to whether the amendment provides sufficient information regarding the amount of costs incurred from November 21, 2016 to November 21, 2017, particularly, how those costs were calculated, how those costs relate to the proposed CAT Fees, and how costs incurred after November 21, 2017 will be assessed upon Industry Members and Execution Venues;

(10) Commenters’ views as to whether the timing of the imposition and collection of CAT Fees on Execution Venues and Industry Members is reasonably related to the timing of when the Company expects to incur such development and implementation costs.¹⁰⁰

(11) Commenters’ views on dividing CAT costs equally among each of the Participants, and then each Participant charging its own members as it deems appropriate, taking into consideration the possibility of inconsistency in

charges, the potential for lack of transparency, and the impracticality of multiple SROs submitting invoices for CAT charges.

Burden on Competition and Barriers to Entry

(12) Commenters’ views as to whether the allocation of 75% of CAT costs to Industry Members (other than Execution Venue ATSSs) imposes any burdens on competition to Industry Members, including views on what baseline competitive landscape the Commission should consider when analyzing the proposed allocation of CAT costs.

(13) Commenters’ views on the burdens on competition, including the relevant markets and services and the impact of such burdens on the baseline competitive landscape in those relevant markets and services.

(14) Commenters’ views on any potential burdens imposed by the fees on competition between and among CAT Reporters, including views on which baseline markets and services the fees could have competitive effects on and whether the fees are designed to minimize such effects.

(15) Commenters’ general views on the impact of the proposed fees on economies of scale and barriers to entry.

(16) Commenters’ views on the baseline economies of scale and barriers to entry for Industry Members and Execution Venues and the relevant markets and services over which these economies of scale and barriers to entry exist.

(17) Commenters’ views as to whether a tiered fee structure necessarily results in less active tiers paying more per unit than those in more active tiers, thus creating economies of scale, with supporting information if possible.

(18) Commenters’ views as to how the level of the fees for the least active tiers would or would not affect barriers to entry.

(19) Commenters’ views on whether the difference between the cost per unit (messages or market share) in less active tiers compared to the cost per unit in more active tiers creates regulatory economies of scale that favor larger competitors and, if so:

(a) How those economies of scale compare to operational economies of scale; and

(b) Whether those economies of scale reduce or increase the current advantages enjoyed by larger competitors or otherwise alter the competitive landscape.

(20) Commenters’ views on whether the fees could affect competition between and among national securities exchanges and FINRA, in light of the

⁹⁵ Section 11.2(e) of the CAT NMS Plan.

⁹⁶ Section 11.1(c) of the CAT NMS Plan.

⁹⁷ The Notice for the CAT NMS Plan did not provide a comprehensive count of audit trail message traffic from different regulatory data sources, but the Commission did estimate the ratio of all SRO audit trail messages to OATS audit trail messages to be 1.9431. See Securities Exchange Act Release No. 77724 (April 27, 2016), 81 FR 30613, 30721 n.919 and accompanying text (May 17, 2016).

⁹⁸ Section 11.2(c) of the CAT NMS Plan.

⁹⁹ Section 11.2(e) of the CAT NMS Plan.

¹⁰⁰ Section 11.1(c) of the CAT NMS Plan.

fact that implementation of the fees does not require the unanimous consent of all such entities, and, specifically:

(a) Whether any of the national securities exchanges or FINRA are disadvantaged by the fees; and

(b) If so, whether any such disadvantages would be of a magnitude that would alter the competitive landscape.

(21) Commenters' views on any potential burden imposed by the fees on competitive quoting and other liquidity provision in the market, including, specifically:

(a) Commenters' views on the kinds of disincentives that discourage liquidity provision and/or disincentives that the Commission should consider in its analysis;

(b) Commenters' views as to whether the fees could disincentivize the provision of liquidity; and

(c) Commenters' views as to whether the fees limit any disincentives to provide liquidity.

(22) Commenters' views as to whether the amendment adequately responds to and/or addresses comments received on related filings.

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-FINRA-2017-011 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-FINRA-2017-011*. 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 website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official

business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number *SR-FINRA-2017-011*, and should be submitted on or before January 4, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁰¹

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2017-26917 Filed 12-13-17; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-82268; File No. SR-BatsEDGA-2017-13]

Self-Regulatory Organizations; Cboe EDGA Exchange, Inc.; Notice of Filing of Amendment No. 1 to a Proposed Rule Change To Establish the Fees for Industry Members Related to the National Market System Plan Governing the Consolidated Audit Trail

December 11, 2017.

On May 16, 2017, Bats EDGA Exchange, Inc., n/k/a Cboe EDGA Exchange, Inc., ("Exchange" or "SRO") 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 adopt a fee schedule to establish the fees for Industry Members related to the National Market System Plan Governing the Consolidated Audit Trail ("CAT NMS Plan"). The proposed rule change was published in the **Federal Register** for comment on June 1, 2017.³ The Commission received seven comment letters on the proposed rule change,⁴ and a response to comments

from the Participants.⁵ On June 30, 2017, the Commission temporarily suspended and initiated proceedings to determine whether to approve or disapprove the proposed rule change.⁶ The Commission thereafter received seven comment letters,⁷ and a response

notes 13-16 *infra*, for a list of the CAT NMS Plan Participants. See Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, to Brent J. Fields, Secretary, Commission (dated June 6, 2017), available at: <https://www.sec.gov/comments/sr-batsbzx-2017-38/batsbzx201738-1788188-153228.pdf>; Letter from Patricia L. Cerny and Steven O'Malley, Compliance Consultants, to Brent J. Fields, Secretary, Commission (dated June 12, 2017), available at: <https://www.sec.gov/comments/sr-cboe-2017-040/cboe2017040-1799253-153675.pdf>; Letter from Daniel Zinn, General Counsel, OTC Markets Group Inc., to Eduardo A. Aleman, Assistant Secretary, Commission (dated June 13, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-1801717-153703.pdf>; Letter from Joanna Mallers, Secretary, FIA Principal Traders Group, to Brent J. Fields, Secretary, Commission (dated June 22, 2017), available at: <https://www.sec.gov/comments/sr-cboe-2017-040/cboe2017040-1819670-154195.pdf>; Letter from Stuart J. Kaswell, Executive Vice President and Managing Director, General Counsel, Managed Funds Association, to Brent J. Fields, Secretary, Commission (dated June 23, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-1822454-154283.pdf>; and Letter from Suzanne H. Shatto, Investor, to Commission (dated June 27, 2017), available at: <https://www.sec.gov/comments/sr-batsedgx-2017-22/batsedgx201722-154443.pdf>. The Commission also received a comment letter which is not pertinent to these proposed rule changes. See Letter from Christina Crouch, Smart Ltd., to Brent J. Fields, Secretary, Commission (dated June 5, 2017), available at: <https://www.sec.gov/comments/sr-batsbzx-2017-38/batsbzx201738-1785545-153152.htm>.

⁵ See Letter from CAT NMS Plan Participants to Brent J. Fields, Secretary, Commission (dated June 29, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-1832632-154584.pdf>.

⁶ See Securities Exchange Act Release No. 81067 (June 30, 2017), 82 FR 31656 (July 7, 2017).

⁷ See Letter from W. Hardy Callcott, Partner, Sidley Austin LLP, to Brent J. Fields, Secretary, Commission (dated July 27, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2148338-157737.pdf>; Letter from Kevin Coleman, General Counsel and Chief Compliance Officer, Belvedere Trading LLC, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2151228-157745.pdf>; Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2150977-157744.pdf>; Letter from Stuart J. Kaswell, Executive Vice President and Managing Director, General Counsel, Managed Funds Association, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2150818-157743.pdf>; Letter from John Kinahan, Chief Executive Officer, Group One Trading, L.P., to Brent J. Fields, Secretary,

¹⁰¹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 80784 (May 26, 2017), 82 FR 25448 (June 1, 2017) ("Original Proposal").

⁴ Since the CAT NMS Plan Participants' proposed rule changes to adopt fees to be charged to Industry Members to fund the consolidated audit trail are substantively identical, the Commission is considering all comments received on the proposed rule changes regardless of the comment file to which they were submitted. See text accompanying

to comments from the Participants.⁸ On November 3, 2017, the Exchange filed Amendment No. 1 to the proposed rule change, as described in Items I and II below, which Items have been prepared by the Exchange.⁹ On November 9, 2017, the Commission extended the time period within which to approve the proposed rule change or disapprove the proposed rule change to January 14, 2018.¹⁰ The Commission is publishing this notice to solicit comments from interested persons on Amendment No. 1.¹¹

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposed rule change SR-BatsEDGA-2017-13 (the "Original Proposal"), pursuant to which SRO proposed to amend its Fee Schedule to establish the fees for Industry Members related to the National Market System Plan Governing the Consolidated Audit Trail (the "CAT NMS Plan" or "Plan").¹² SRO files this proposed rule change (the "Amendment") to amend the Original Proposal. This Amendment replaces the Original Proposal in its entirety, and also describes the changes from the Original Proposal.

The text of the proposed rule change is available at the Exchange's website at

Commission (dated August 10, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-2214568-160619.pdf>; Letter from Joseph Molluso, Executive Vice President and CFO, Virtu Financial, to Brent J. Fields, Commission (dated August 18, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-2238648-160830.pdf>.

⁸ See Letter from Michael Simon, Chair, CAT NMS Plan Operating Committee, to Brent J. Fields, Commission, Secretary (dated November 2, 2017), available at <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2674608-161412.pdf>.

⁹ Amendment No. 1 to the proposed rule change replaces and supersedes the Original Proposal in its entirety.

¹⁰ See Securities Exchange Act Release No. 82049 (November 9, 2017), 82 FR 53549 (November 16, 2017).

¹¹ The Commission notes that on December 7, 2017, the Exchange filed Amendment No. 2 to the proposed rule change. Amendment No. 2 is a partial amendment to the proposed rule change, as amended by Amendment No. 1. Amendment No. 2 proposes to change the parenthetical regarding the OTC Equity Securities discount in paragraph (b)(2) of the proposed fee schedule from "with a discount for Equity ATSs exclusively trading OTC Equity Securities based on the average shares per trade ratio between NMS Stocks and OTC Equity Securities" to "with a discount for OTC Equity Securities market share of Equity ATSs trading OTC Equity Securities based on the average shares per trade ratio between NMS Stocks and OTC Equity Securities." See Securities Exchange Act Release No. 82269 (December 11, 2017).

¹² Unless otherwise specified, capitalized terms used in this fee filing are defined as set forth herein, the CAT Compliance Rule Series, in the CAT NMS Plan, or the Original Proposal.

www.markets.cboe.com, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

BOX Options Exchange LLC, Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe C2 Exchange, Inc., Cboe Exchange, Inc.,¹³ Chicago Stock Exchange, Inc., Financial Industry Regulatory Authority, Inc. ("FINRA"), Investors' Exchange LLC, Miami International Securities Exchange, LLC, MIAIX PEARL, LLC, NASDAQ BX, Inc., Nasdaq GEMX, LLC, Nasdaq ISE, LLC, Nasdaq MRX, LLC,¹⁴ NASDAQ PHLX LLC, The NASDAQ Stock Market LLC, New York Stock Exchange LLC, NYSE American LLC,¹⁵ NYSE Arca, Inc. and NYSE National, Inc.¹⁶ (collectively, the "Participants") filed with the Commission, pursuant to Section 11A of

¹³ Note that Bats BYX Exchange, Inc., Bats BZX Exchange, Inc., Bats EDGA Exchange, Inc., Bats EDGX Exchange, Inc., LLC, C2 Options Exchange, Incorporated, and Chicago Board Options Exchange, Incorporated, have been renamed Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe C2 Exchange, Inc., Cboe Exchange, Inc., respectively.

¹⁴ ISE Gemini, LLC, ISE Mercury, LLC and International Securities Exchange, LLC have been renamed Nasdaq GEMX, LLC, Nasdaq MRX, LLC, and Nasdaq ISE, LLC, respectively. See Securities Exchange Act Rel. No. 80248 (Mar. 15, 2017), 82 FR 14547 (Mar. 21, 2017); Securities Exchange Act Rel. No. 80326 (Mar. 29, 2017), 82 FR 16460 (Apr. 4, 2017); and Securities Exchange Act Rel. No. 80325 (Mar. 29, 2017), 82 FR 16445 (Apr. 4, 2017).

¹⁵ NYSE MKT LLC has been renamed NYSE American LLC. See Securities Exchange Act Rel. No. 80283 (Mar. 21, 2017), 82 FR 15244 (Mar. 27, 2017).

¹⁶ National Stock Exchange, Inc. has been renamed NYSE National, Inc. See Securities Exchange Act Rel. No. 79902 (Jan. 30, 2017), 82 FR 9258 (Feb. 3, 2017).

the Exchange Act¹⁷ and Rule 608 of Regulation NMS thereunder,¹⁸ the CAT NMS Plan.¹⁹ The Participants filed the Plan to comply with Rule 613 of Regulation NMS under the Exchange Act. The Plan was published for comment in the **Federal Register** on May 17, 2016,²⁰ and approved by the Commission, as modified, on November 15, 2016.²¹ The Plan is designed to create, implement and maintain a consolidated audit trail ("CAT") that would capture customer and order event information for orders in NMS Securities and OTC Equity Securities, across all markets, from the time of order inception through routing, cancellation, modification, or execution in a single consolidated data source. The Plan accomplishes this by creating CAT NMS, LLC (the "Company"), of which each Participant is a member, to operate the CAT.²² Under the CAT NMS Plan, the Operating Committee of the Company ("Operating Committee") has discretion to establish funding for the Company to operate the CAT, including establishing fees that the Participants will pay, and establishing fees for Industry Members that will be implemented by the Participants ("CAT Fees").²³ The Participants are required to file with the SEC under Section 19(b) of the Exchange Act any such CAT Fees applicable to Industry Members that the Operating Committee approves.²⁴ Accordingly, SRO submitted the Original Proposal to propose the Consolidated Audit Trail Funding Fees, which would require Industry Members that are SRO members to pay the CAT Fees determined by the Operating Committee.

The Commission published the Original Proposal for public comment in the **Federal Register** on June 1, 2017,²⁵ and received comments in response to the Original Proposal or similar fee

¹⁷ 15 U.S.C. 78k-1.

¹⁸ 17 CFR 242.608.

¹⁹ See Letter from the Participants to Brent J. Fields, Secretary, Commission, dated September 30, 2014; and Letter from Participants to Brent J. Fields, Secretary, Commission, dated February 27, 2015. On December 24, 2015, the Participants submitted an amendment to the CAT NMS Plan. See Letter from Participants to Brent J. Fields, Secretary, Commission, dated December 23, 2015.

²⁰ Securities Exchange Act Rel. No. 77724 (Apr. 27, 2016), 81 FR 30614 (May 17, 2016).

²¹ Securities Exchange Act Rel. No. 79318 (Nov. 15, 2016), 81 FR 84696 (Nov. 23, 2016) ("Approval Order").

²² The Plan also serves as the limited liability company agreement for the Company.

²³ Section 11.1(b) of the CAT NMS Plan.

²⁴ *Id.*

²⁵ Securities Exchange Act Rel. No. 80784 (May 26, 2017), 82 FR 25448 (June 1, 2017) (SR-BatsEDGX-2017-13).

filings by other Participants.²⁶ On June 30, 2017, the Commission suspended, and instituted proceedings to determine whether to approve or disapprove, the Original Proposal.²⁷ The Commission received seven comment letters in response to those proceedings.²⁸

In response to the comments on the Original Proposal, the Operating Committee determined to make the following changes to the funding model: (1) Adds two additional CAT Fee tiers for Equity Execution Venues; (2) discounts the market share of Execution Venue ATSs exclusively trading OTC Equity Securities as well as the market share of the FINRA over-the-counter reporting facility (“ORF”) by the average shares per trade ratio between NMS Stocks and OTC Equity Securities (calculated as 0.17% based on available data from the second quarter of 2017) when calculating the market share of Execution Venue ATS exclusively trading OTC Equity Securities and FINRA; (3) discounts the Options Market Maker quotes by the trade to quote ratio for options (calculated as 0.01% based on available data for June 2016 through June 2017) when calculating message traffic for Options Market Makers; (4) discounts equity market maker quotes by the trade to quote ratio for equities (calculated as 5.43% based on available data for June 2016 through June 2017) when calculating message traffic for equity market makers; (5) decreases the number of tiers for Industry Members (other than the Execution Venue ATSs) from nine to seven; (6) changes the allocation of CAT costs between Equity Execution Venues and Options Execution Venues from 75%/25% to 67%/33%; (7) adjusts tier percentages

and recovery allocations for Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSs); (8) focuses the comparability of CAT Fees on the individual entity level, rather than primarily on the comparability of affiliated entities; (9) commences invoicing of CAT Reporters as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Participants and the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants; and (10) requires the proposed fees to automatically expire two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. As discussed in detail below, SRO proposes to amend the Original Proposal to reflect these changes.

(1) Executive Summary

The following provides an executive summary of the CAT funding model approved by the Operating Committee, as well as Industry Members’ rights and obligations related to the payment of CAT Fees calculated pursuant to the CAT funding model, as amended by this Amendment. A detailed description of the CAT funding model and the CAT Fees, as amended by this Amendment, as well as the changes made to the Original Proposal follows this executive summary.

(A) CAT Funding Model

- *CAT Costs.* The CAT funding model is designed to establish CAT-specific fees to collectively recover the costs of building and operating the CAT from all CAT Reporters, including Industry Members and Participants. The overall CAT costs used in calculating the CAT Fees in this fee filing are comprised of Plan Processor CAT costs and non-Plan Processor CAT costs incurred, and estimated to be incurred, from November 21, 2016 through November 21, 2017. Although the CAT costs from November 21, 2016 through November 21, 2017 were used in calculating the CAT Fees, the CAT Fees set forth in this fee filing would be in effect until the automatic sunset date, as discussed below. (See Section 3(a)(2)(E) below)

- *Bifurcated Funding Model.* The CAT NMS Plan requires a bifurcated funding model, where costs associated with building and operating the CAT would be borne by (1) Participants and Industry Members that are Execution Venues for Eligible Securities through fixed tier fees based on market share, and (2) Industry Members (other than alternative trading systems (“ATSs”)

that execute transactions in Eligible Securities (“Execution Venue ATSs”) through fixed tier fees based on message traffic for Eligible Securities. (See Section 3(a)(2) below)

- *Industry Member Fees.* Each Industry Member (other than Execution Venue ATSs) will be placed into one of seven tiers of fixed fees, based on “message traffic” in Eligible Securities for a defined period (as discussed below). Prior to the start of CAT reporting, “message traffic” will be comprised of historical equity and equity options orders, cancels, quotes and executions provided by each exchange and FINRA over the previous three months. After an Industry Member begins reporting to the CAT, “message traffic” will be calculated based on the Industry Member’s Reportable Events reported to the CAT. Industry Members with lower levels of message traffic will pay a lower fee and Industry Members with higher levels of message traffic will pay a higher fee. To avoid disincentives to quoting behavior, Options Market Maker and equity market maker quotes will be discounted when calculating message traffic. (See Section 3(a)(2)(B) below)

- *Execution Venue Fees.* Each Equity Execution Venue will be placed in one of four tiers of fixed fees based on market share, and each Options Execution Venue will be placed in one of two tiers of fixed fees based on market share. Equity Execution Venue market share will be determined by calculating each Equity Execution Venue’s proportion of the total volume of NMS Stock and OTC Equity shares reported by all Equity Execution Venues during the relevant time period. For purposes of calculating market share, the market share of Execution Venue ATSs exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF will be discounted. Similarly, market share for Options Execution Venues will be determined by calculating each Options Execution Venue’s proportion of the total volume of Listed Options contracts reported by all Options Execution Venues during the relevant time period. Equity Execution Venues with a larger market share will pay a larger CAT Fee than Equity Execution Venues with a smaller market share. Similarly, Options Execution Venues with a larger market share will pay a larger CAT Fee than Options Execution Venues with a smaller market share. (See Section 3(a)(2)(C) below)

- *Cost Allocation.* For the reasons discussed below, in designing the model, the Operating Committee determined that 75 percent of total costs

²⁶ For a summary of comments, see generally Securities Exchange Act Rel. No. 81067 (June 30, 2017), 82 FR 31656 (July 7, 2017) (“Suspension Order”).

²⁷ Suspension Order.

²⁸ See Letter from Stuart J. Kaswell, Executive Vice President, Managing Director and General Counsel, Managed Funds Association, to Brent J. Fields, Secretary, SEC (July 28, 2017) (“MFA Letter”); Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA, to Brent J. Fields, Secretary, SEC (July 28, 2017) (“SIFMA Letter”); Joanna Mallers, Secretary, FIA Principal Traders Group, to Brent J. Fields, Secretary, SEC (July 28, 2017) (“FIA Principal Traders Group Letter”); Letter from Kevin Coleman, General Counsel & Chief Compliance Officer, Belvedere Trading LLC, to Brent J. Fields, Secretary, SEC (July 28, 2017) (“Belvedere Letter”); Letter from W. Hardy Callcott, Sidley Austin LLP, to Brent J. Fields, Secretary, SEC (July 27, 2017) (“Sidley Letter”); Letter from John Kinahan, Chief Executive Officer, Group One Trading, L.P., to Brent J. Fields, Secretary, SEC (Aug. 10, 2017) (“Group One Letter”); and Letter from Joseph Molluso, Executive Vice President, Virtu Financial, to Brent J. Fields, Secretary, SEC (Aug. 18, 2017) (“Virtu Financial Letter”).

recovered would be allocated to Industry Members (other than Execution Venue ATs) and 25 percent would be allocated to Execution Venues. In addition, the Operating Committee determined to allocate 67 percent of Execution Venue costs recovered to Equity Execution Venues and 33 percent to Options Execution Venues. (See Section 3(a)(2)(D) below)

- *Comparability of Fees.* The CAT funding model charges CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) comparable CAT Fees. (See Section 3(a)(2)(F) below)

(B) CAT Fees for Industry Members

- *Fee Schedule.* The quarterly CAT Fees for each tier for Industry Members are set forth in the two fee schedules in the Consolidated Audit Trail Funding Fees, one for Equity ATs and one for Industry Members other than Equity ATs. (See Section 3(a)(3)(B) below)

- *Quarterly Invoices.* Industry Members will be billed quarterly for CAT Fees, with the invoices payable within 30 days. The quarterly invoices will identify within which tier the Industry Member falls. (See Section 3(a)(3)(C) below)

- *Centralized Payment.* Each Industry Member will receive from the Company one invoice for its applicable CAT Fees, not separate invoices from each Participant of which it is a member. Each Industry Member will pay its CAT Fees to the Company via the centralized system for the collection of CAT Fees established by the Operating Committee. (See Section 3(a)(3)(C) below)

- *Billing Commencement.* Industry Members will begin to receive invoices for CAT Fees as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Participants and the operative date of the Plan amendment adopting CAT Fees for Participants. (See Section 3(a)(2)(G) below)

- *Sunset Provision.* The Consolidated Audit Trail Funding Fees will sunset automatically two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. (See Section 3(a)(2)(I) below)

(2) Description of the CAT Funding Model

Article XI of the CAT NMS Plan requires the Operating Committee to approve the operating budget, including projected costs of developing and operating the CAT for the upcoming year. In addition to a budget, Article XI of the CAT NMS Plan provides that the

Operating Committee has discretion to establish funding for the Company, consistent with a bifurcated funding model, where costs associated with building and operating the Central Repository would be borne by (1) Participants and Industry Members that are Execution Venues through fixed tier fees based on market share, and (2) Industry Members (other than Execution Venue ATs) through fixed tier fees based on message traffic. In its order approving the CAT NMS Plan, the Commission determined that the proposed funding model was “reasonable”²⁹ and “reflects a reasonable exercise of the Participants’ funding authority to recover the Participants’ costs related to the CAT.”³⁰

More specifically, the Commission stated in approving the CAT NMS Plan that “[t]he Commission believes that the proposed funding model is reasonably designed to allocate the costs of the CAT between the Participants and Industry Members.”³¹ The Commission further noted the following:

The Commission believes that the proposed funding model reflects a reasonable exercise of the Participants’ funding authority to recover the Participants’ costs related to the CAT. The CAT is a regulatory facility jointly owned by the Participants and . . . the Exchange Act specifically permits the Participants to charge their members fees to fund their self-regulatory obligations. The Commission further believes that the proposed funding model is designed to impose fees reasonably related to the Participants’ self-regulatory obligations because the fees would be directly associated with the costs of establishing and maintaining the CAT, and not unrelated SRO services.³²

Accordingly, the funding model approved by the Operating Committee imposes fees on both Participants and Industry Members.

As discussed in Appendix C of the CAT NMS Plan, in developing and approving the approved funding model, the Operating Committee considered the advantages and disadvantages of a variety of alternative funding and cost allocation models before selecting the proposed model.³³ After analyzing the various alternatives, the Operating Committee determined that the proposed tiered, fixed fee funding model provides a variety of advantages in comparison to the alternatives.

In particular, the fixed fee model, as opposed to a variable fee model,

provides transparency, ease of calculation, ease of billing and other administrative functions, and predictability of a fixed fee. Such factors are crucial to estimating a reliable revenue stream for the Company and for permitting CAT Reporters to reasonably predict their payment obligations for budgeting purposes. Additionally, a strictly variable or metered funding model based on message volume would be far more likely to affect market behavior and place an inappropriate burden on competition.

In addition, reviews from varying time periods of current broker-dealer order and trading data submitted under existing reporting requirements showed a wide range in activity among broker-dealers, with a number of broker-dealers submitting fewer than 1,000 orders per month and other broker-dealers submitting millions and even billions of orders in the same period. Accordingly, the CAT NMS Plan includes a tiered approach to fees. The tiered approach helps ensure that fees are equitably allocated among similarly situated CAT Reporters and furthers the goal of lessening the impact on smaller firms.³⁴ In addition, in choosing a tiered fee structure, the Operating Committee concluded that the variety of benefits offered by a tiered fee structure, discussed above, outweighed the fact that CAT Reporters in any particular tier would pay different rates per message traffic order event or per market share (e.g., an Industry Member with the largest amount of message traffic in one tier would pay a smaller amount per order event than an Industry Member in the same tier with the least amount of message traffic). Such variation is the natural result of a tiered fee structure.³⁵ The Operating Committee considered several approaches to developing a tiered model, including defining fee tiers based on such factors as size of firm, message traffic or trading dollar volume. After analyzing the alternatives, it was concluded that the tiering should be based on message traffic which will reflect the relative impact of CAT Reporters on the CAT System.

Accordingly, the CAT NMS Plan contemplates that costs will be allocated across the CAT Reporters on a tiered basis in order to allocate higher costs to those CAT Reporters that contribute more to the costs of creating, implementing and maintaining the CAT

²⁹ Approval Order at 84796.

³⁰ *Id.* at 84794.

³¹ *Id.* at 84795.

³² *Id.* at 84794.

³³ Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85006.

³⁴ Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85006.

³⁵ Moreover, as the SEC noted in approving the CAT NMS Plan, “[t]he Participants also have offered a reasonable basis for establishing a funding model based on broad tiers, in that it may be easier to implement.” Approval Order at 84796.

and lower costs to those that contribute less.³⁶ The fees to be assessed at each tier are calculated so as to recoup a proportion of costs appropriate to the message traffic or market share (as applicable) from CAT Reporters in each tier. Therefore, Industry Members generating the most message traffic will be in the higher tiers, and will be charged a higher fee. Industry Members with lower levels of message traffic will be in lower tiers and will be assessed a smaller fee for the CAT.³⁷

Correspondingly, Execution Venues with the highest market shares will be in the top tier, and will be charged higher fees. Execution Venues with the lowest market shares will be in the lowest tier and will be assessed smaller fees for the CAT.³⁸

The CAT NMS Plan states that Industry Members (other than Execution Venue ATs) will be charged based on message traffic, and that Execution Venues will be charged based on market share.³⁹ While there are multiple factors that contribute to the cost of building, maintaining and using the CAT, processing and storage of incoming message traffic is one of the most significant cost drivers for the CAT.⁴⁰ Thus, the CAT NMS Plan provides that the fees payable by Industry Members (other than Execution Venue ATs) will be based on the message traffic generated by such Industry Member.⁴¹

In contrast to Industry Members, which determine the degree to which they produce message traffic that constitute CAT Reportable Events, the CAT Reportable Events of the Execution Venues are largely derivative of quotations and orders received from Industry Members that they are required to display. The business model for Execution Venues (other than FINRA), however, is focused on executions in their markets. As a result, the Operating Committee believes that it is more equitable to charge Execution Venues based on their market share rather than their message traffic.

Focusing on message traffic would make it more difficult to draw distinctions between large and small Execution Venues and, in particular, between large and small options exchanges. For instance, the Operating Committee analyzed the message traffic of Execution Venues and Industry Members for the period of April 2017 to

June 2017 and placed all CAT Reporters into a nine-tier framework (*i.e.*, a single tier may include both Execution Venues and Industry Members). The Operating Committee's analysis found that the majority of exchanges (15 total) were grouped in Tiers 1 and 2. Moreover, virtually all of the options exchanges were in Tiers 1 and 2.⁴² Given the resulting concentration of options exchanges in Tiers 1 and 2 under this approach, the analysis shows that a funding model for Execution Venues based on message traffic would make it more difficult to distinguish between large and small options exchanges, as compared to the proposed fee approach that bases fees for Execution Venues on market share.

The CAT NMS Plan's funding model also is structured to avoid a "reduction in market quality."⁴³ The tiered, fixed fee funding model is designed to limit the disincentives to providing liquidity to the market. For example, the Operating Committee expects that a firm that has a large volume of quotes would likely be categorized in one of the upper tiers, and would not be assessed a fee for this traffic directly as they would under a more directly metered model. In contrast, strictly variable or metered funding models based on message volume are far more likely to affect market behavior. In approving the CAT NMS Plan, the SEC stated that "[t]he Participants also offered a reasonable basis for establishing a funding model based on broad tiers, in that it may be . . . less likely to have an incremental deterrent effect on liquidity provision."⁴⁴

The funding model also is structured to avoid a reduction market quality because it discounts Options Market Maker and equity market maker quotes when calculating message traffic for Options Market Makers and equity market makers, respectively. As discussed in more detail below, the Operating Committee determined to discount the Options Market Maker quotes by the trade to quote ratio for options when calculating message traffic for Options Market Makers. Similarly, to avoid disincentives to quoting behavior on the equities side as well, the Operating Committee determined to discount equity market maker quotes by the trade to quote ratio for equities when calculating message traffic for equity market makers. The proposed discounts recognize the value of the

market makers' quoting activity to the market as a whole.

The CAT NMS Plan is further structured to avoid potential conflicts raised by the Operating Committee determining fees applicable to its own members—the Participants. First, the Company will operate on a "break-even" basis, with fees imposed to cover costs and an appropriate reserve. Any surpluses will be treated as an operational reserve to offset future fees and will not be distributed to the Participants as profits.⁴⁵ To ensure that the Participants' operation of the CAT will not contribute to the funding of their other operations, Section 11.1(c) of the CAT NMS Plan specifically states that "[a]ny surplus of the Company's revenues over its expenses shall be treated as an operational reserve to offset future fees." In addition, as set forth in Article VIII of the CAT NMS Plan, the Company "intends to operate in a manner such that it qualifies as a 'business league' within the meaning of Section 501(c)(6) of the [Internal Revenue] Code." To qualify as a business league, an organization must "not [be] organized for profit and no part of the net earnings of [the organization can] inure[] to the benefit of any private shareholder or individual."⁴⁶ As the SEC stated when approving the CAT NMS Plan, "the Commission believes that the Company's application for Section 501(c)(6) business league status addresses issues raised by commenters about the Plan's proposed allocation of profit and loss by mitigating concerns that the Company's earnings could be used to benefit individual Participants."⁴⁷ The Internal Revenue Service recently has determined that the Company is exempt from federal income tax under Section 501(c)(6) of the Internal Revenue Code.

The funding model also is structured to take into account distinctions in the securities trading operations of Participants and Industry Members. For example, the Operating Committee designed the model to address the different trading characteristics in the OTC Equity Securities market. Specifically, the Operating Committee proposes to discount the market share of Execution Venue ATs exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF by the average shares per trade ratio between NMS Stocks and OTC Equity Securities to adjust for the greater number of shares being traded in the

³⁶ Approval Order at 85005.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Section 11.3(a) and (b) of the CAT NMS Plan.

⁴⁰ Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85005.

⁴¹ Section 11.3(b) of the CAT NMS Plan.

⁴² The Operating Committee notes that this analysis did not place MIAx PEARL in Tier 1 or Tier 2 since the exchange commenced trading on February 6, 2017.

⁴³ Section 11.2(e) of the CAT NMS Plan.

⁴⁴ Approval Order at 84796.

⁴⁵ *Id.* at 84792.

⁴⁶ 26 U.S.C. 501(c)(6).

⁴⁷ Approval Order at 84793.

OTC Equity Securities market, which is generally a function of a lower per share price for OTC Equity Securities when compared to NMS Stocks. In addition, the Operating Committee also proposes to discount Options Market Maker and equity market maker message traffic in recognition of their role in the securities markets. Furthermore, the funding model creates separate tiers for Equity and Options Execution Venues due to the different trading characteristics of those markets.

Finally, by adopting a CAT-specific fee, the Operating Committee will be fully transparent regarding the costs of the CAT. Charging a general regulatory fee, which would be used to cover CAT costs as well as other regulatory costs, would be less transparent than the selected approach of charging a fee designated to cover CAT costs only.

A full description of the funding model is set forth below. This description includes the framework for the funding model as set forth in the CAT NMS Plan, as well as the details as to how the funding model will be applied in practice, including the number of fee tiers and the applicable fees for each tier. The complete funding model is described below, including those fees that are to be paid by the Participants. The proposed Consolidated Audit Trail Funding Fees, however, do not apply to the Participants; the proposed Consolidated Audit Trail Funding Fees only apply to Industry Members. The CAT Fees for Participants will be imposed separately by the Operating Committee pursuant to the CAT NMS Plan.

(A) Funding Principles

Section 11.2 of the CAT NMS Plan sets forth the principles that the Operating Committee applied in establishing the funding for the Company. The Operating Committee has considered these funding principles as well as the other funding requirements set forth in the CAT NMS Plan and in Rule 613 in developing the proposed funding model. The following are the funding principles in Section 11.2 of the CAT NMS Plan:

- To create transparent, predictable revenue streams for the Company that are aligned with the anticipated costs to build, operate and administer the CAT and other costs of the Company;
- To establish an allocation of the Company's related costs among Participants and Industry Members that is consistent with the Exchange Act, taking into account the timeline for implementation of the CAT and distinctions in the securities trading operations of Participants and Industry

Members and their relative impact upon the Company's resources and operations;

- To establish a tiered fee structure in which the fees charged to: (i) CAT Reporters that are Execution Venues, including ATSS, are based upon the level of market share; (ii) Industry Members' non-ATS activities are based upon message traffic; (iii) the CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether Execution Venue and/or Industry Members);
- To provide for ease of billing and other administrative functions;
- To avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality; and
- To build financial stability to support the Company as a going concern.

(B) Industry Member Tiering

Under Section 11.3(b) of the CAT NMS Plan, the Operating Committee is required to establish fixed fees to be payable by Industry Members, based on message traffic generated by such Industry Member, with the Operating Committee establishing at least five and no more than nine tiers.

The CAT NMS Plan clarifies that the fixed fees payable by Industry Members pursuant to Section 11.3(b) shall, in addition to any other applicable message traffic, include message traffic generated by: (i) An ATS that does not execute orders that is sponsored by such Industry Member; and (ii) routing orders to and from any ATS sponsored by such Industry Member. In addition, the Industry Member fees will apply to Industry Members that act as routing broker-dealers for exchanges. The Industry Member fees will not be applicable, however, to an ATS that qualifies as an Execution Venue, as discussed in more detail in the section on Execution Venue tiering.

In accordance with Section 11.3(b), the Operating Committee approved a tiered fee structure for Industry Members (other than Execution Venue ATSS) as described in this section. In determining the tiers, the Operating Committee considered the funding principles set forth in Section 11.2 of the CAT NMS Plan, seeking to create funding tiers that take into account the relative impact on CAT System resources of different Industry Members, and that establish comparable fees

among the CAT Reporters with the most Reportable Events. The Operating Committee has determined that establishing seven tiers results in an allocation of fees that distinguishes between Industry Members with differing levels of message traffic. Thus, each such Industry Member will be placed into one of seven tiers of fixed fees, based on "message traffic" for a defined period (as discussed below).

A seven tier structure was selected to provide a wide range of levels for tiering Industry Members such that Industry Members submitting significantly less message traffic to the CAT would be adequately differentiated from Industry Members submitting substantially more message traffic. The Operating Committee considered historical message traffic from multiple time periods, generated by Industry Members across all exchanges and as submitted to FINRA's Order Audit Trail System ("OATS"), and considered the distribution of firms with similar levels of message traffic, grouping together firms with similar levels of message traffic. Based on this, the Operating Committee determined that seven tiers would group firms with similar levels of message traffic, charging those firms with higher impact on the CAT more, while lowering the burden on Industry Members that have less CAT-related activity. Furthermore, the selection of seven tiers establishes comparable fees among the largest CAT Reporters.

Each Industry Member (other than Execution Venue ATSS) will be ranked by message traffic and tiered by predefined Industry Member percentages (the "Industry Member Percentages"). The Operating Committee determined to use predefined percentages rather than fixed volume thresholds to ensure that the total CAT Fees collected recover the expected CAT costs regardless of changes in the total level of message traffic. To determine the fixed percentage of Industry Members in each tier, the Operating Committee analyzed historical message traffic generated by Industry Members across all exchanges and as submitted to OATS, and considered the distribution of firms with similar levels of message traffic, grouping together firms with similar levels of message traffic. Based on this, the Operating Committee identified seven tiers that would group firms with similar levels of message traffic.

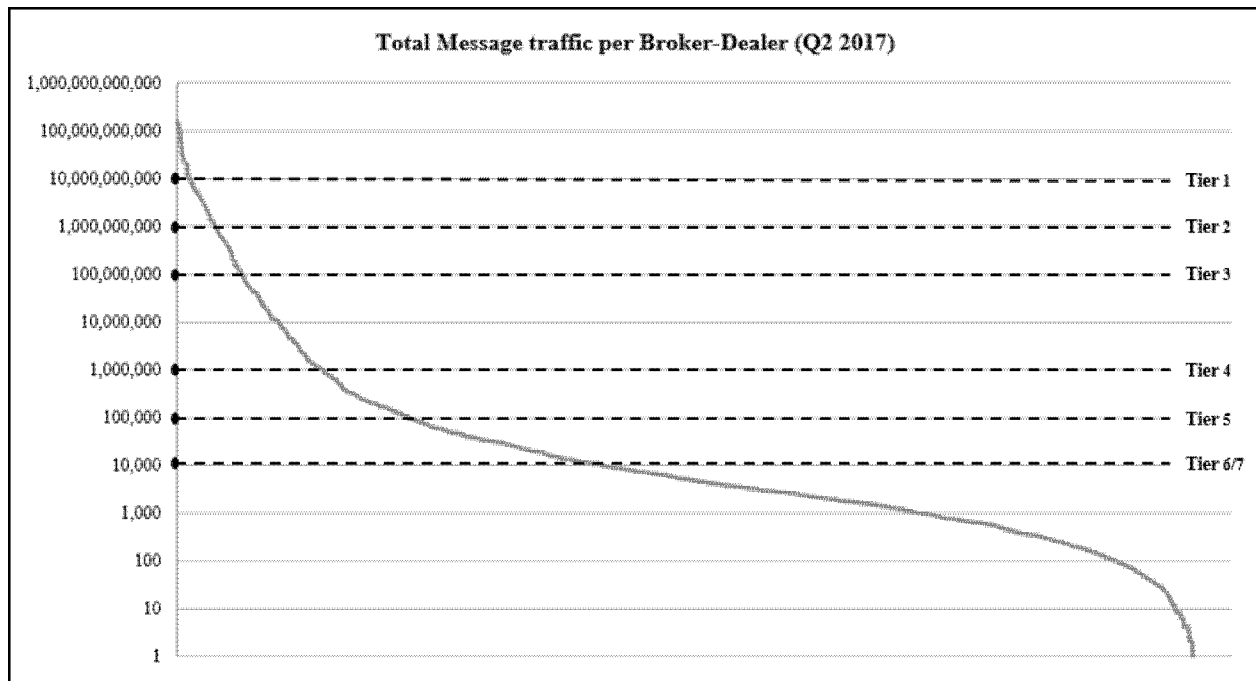
The percentage of costs recovered by each Industry Member tier will be determined by predefined percentage allocations (the "Industry Member Recovery Allocation"). In determining the fixed percentage allocation of costs

recovered for each tier, the Operating Committee considered the impact of CAT Reporter message traffic on the CAT System as well as the distribution of total message volume across Industry Members while seeking to maintain comparable fees among the largest CAT Reporters. Accordingly, following the determination of the percentage of Industry Members in each tier, the Operating Committee identified the percentage of total market volume for each tier based on the historical message traffic upon which Industry Members had been initially ranked. Taking this into account along with the resulting percentage of total recovery, the percentage allocation of costs recovered for each tier were assigned, allocating higher percentages of recovery to tiers with higher levels of message traffic while avoiding any inappropriate burden on competition. Furthermore, by using percentages of Industry Members and costs recovered per tier, the

Operating Committee sought to include elasticity within the funding model, allowing the funding model to respond to changes in either the total number of Industry Members or the total level of message traffic.

The following chart illustrates the breakdown of seven Industry Member tiers across the monthly average of total equity and equity options orders, cancels, quotes and executions in the second quarter of 2017 as well as message traffic thresholds between the largest of Industry Member message traffic gaps. The Operating Committee referenced similar distribution illustrations to determine the appropriate division of Industry Member percentages in each tier by considering the grouping of firms with similar levels of message traffic and seeking to identify relative breakpoints in the message traffic between such groupings. In reviewing the chart and its corresponding table, note that while

these distribution illustrations were referenced to help differentiate between Industry Member tiers, the proposed funding model is driven by fixed percentages of Industry Members across tiers to account for fluctuating levels of message traffic over time. This approach also provides financial stability for the CAT by ensuring that the funding model will recover the required amounts regardless of changes in the number of Industry Members or the amount of message traffic. Actual messages in any tier will vary based on the actual traffic in a given measurement period, as well as the number of firms included in the measurement period. The Industry Member Percentages and Industry Member Recovery Allocation for each tier will remain fixed with each Industry Member's tier to be reassigned periodically, as described below in Section 3(a)(2)(I).



Industry Member tier	Approximate message traffic per Industry Member (Q2 2017) (Orders, quotes, cancels and executions)
Tier 1	>10,000,000,000
Tier 2	1,000,000,000–10,000,000,000
Tier 3	100,000,000–1,000,000,000
Tier 4	1,000,000–100,000,000
Tier 5	100,000–1,000,000
Tier 6	10,000–100,000
Tier 7	<10,000

Based on the above analysis, the Operating Committee approved the following Industry Member Percentages

and Industry Member Recovery Allocations:

Industry Member tier	Percentage of Industry Members	Percentage of Industry Member recovery	Percentage of total recovery
Tier 1	0.900	12.00	9.00
Tier 2	2.150	20.50	15.38
Tier 3	2.800	18.50	13.88
Tier 4	7.750	32.00	24.00
Tier 5	8.300	10.00	7.50
Tier 6	18.800	6.00	4.50
Tier 7	59.300	1.00	0.75
Total	100	100	75

For the purposes of creating these tiers based on message traffic, the Operating Committee determined to define the term “message traffic” separately for the period before the commencement of CAT reporting and for the period after the start of CAT reporting. The different definition for message traffic is necessary as there will be no Reportable Events as defined in the Plan, prior to the commencement of CAT reporting. Accordingly, prior to the start of CAT reporting, “message traffic” will be comprised of historical equity and equity options orders, cancels, quotes and executions provided by each exchange and FINRA over the previous three months. Prior to the start of CAT reporting, orders would be comprised of the total number of equity and equity options orders received and originated by a member of an exchange or FINRA over the previous three-month period, including principal orders, cancel/replace orders, market maker orders originated by a member of an exchange, and reserve (iceberg) orders as well as executions originated by a member of FINRA, and excluding order rejects, system-modified orders, order routes and implied orders.⁴⁸ In addition, prior to the start of CAT reporting, cancels would be comprised of the total number of equity and equity option cancels received and originated by a member of an exchange or FINRA over a three-month period, excluding order modifications (e.g., order updates, order splits, partial cancels) and multiple cancels of a complex order. Furthermore, prior to the start of CAT reporting, quotes would be comprised of information readily available to the exchanges and FINRA, such as the total number of historical equity and equity options quotes received and originated by a member of an exchange or FINRA over the prior three-month period.

⁴⁸ Consequently, firms that do not have “message traffic” reported to an exchange or OATS before they are reporting to the CAT would not be subject to a fee until they begin to report information to CAT.

Additionally, prior to the start of CAT reporting, executions would be comprised of the total number of equity and equity option executions received or originated by a member of an exchange or FINRA over a three-month period.

After an Industry Member begins reporting to the CAT, “message traffic” will be calculated based on the Industry Member’s Reportable Events reported to the CAT as will be defined in the Technical Specifications.⁴⁹

Quotes of Options Market Makers and equity market makers will be included in the calculation of total message traffic for those market makers for purposes of tiering under the CAT funding model both prior to CAT reporting and once CAT reporting commences.⁵⁰ To address potential concerns regarding burdens on competition or market quality of including quotes in the calculation of message traffic, however, the Operating Committee determined to discount the Options Market Maker quotes by the trade to quote ratio for options when calculating message traffic for Options Market Makers. Based on available data for June 2016 through June 2017, the trade to quote ratio for options is 0.01%. Similarly, to avoid disincentives to quoting behavior on the equities side, the Operating Committee

⁴⁹ If an Industry Member (other than an Execution Venue ATS) has no orders, cancels, quotes and executions prior to the commencement of CAT Reporting, or no Reportable Events after CAT reporting commences, then the Industry Member would not have a CAT Fee obligation.

⁵⁰ The SEC approved exemptive relief permitting Options Market Maker quotes to be reported to the Central Repository by the relevant Options Exchange in lieu of requiring that such reporting be done by both the Options Exchange and the Options Market Maker, as required by Rule 613 of Regulation NMS. See Securities Exchange Act Rel. No. 77265 (Mar. 1, 2017, 81 FR 11856 (Mar. 7, 2016)). This exemption applies to Options Market Maker quotes for CAT reporting purposes only. Therefore, notwithstanding the reporting exemption provided for Options Market Maker quotes, Options Market Maker quotes will be included in the calculation of total message traffic for Options Market Makers for purposes of tiering under the CAT funding model both prior to CAT reporting and once CAT reporting commences.

determined to discount equity market maker quotes by the trade to quote ratio for equities. Based on available data for June 2016 through June 2017, the trade to quote ratio for equities is 5.43%.⁵¹ The trade to quote ratio for options and the trade to quote ratio for equities will be calculated every three months when tiers are recalculated (as discussed below).

The Operating Committee has determined to calculate fee tiers every three months, on a calendar quarter basis, based on message traffic from the prior three months. Based on its analysis of historical data, the Operating Committee believes that calculating tiers based on three months of data will provide the best balance between reflecting changes in activity by Industry Members while still providing predictability in the tiering for Industry Members. Because fee tiers will be calculated based on message traffic from the prior three months, the Operating Committee will begin calculating message traffic based on an Industry Member’s Reportable Events reported to the CAT once the Industry Member has been reporting to the CAT for three months. Prior to that, fee tiers will be calculated as discussed above with regard to the period prior to CAT reporting.

(C) Execution Venue Tiering

Under Section 11.3(a) of the CAT NMS Plan, the Operating Committee is required to establish fixed fees payable by Execution Venues. Section 1.1 of the CAT NMS Plan defines an Execution Venue as “a Participant or an alternative trading system (“ATS”) (as defined in Rule 300 of Regulation ATS) that operates pursuant to Rule 301 of

⁵¹ The trade to quote ratios were calculated based on the inverse of the average of the monthly equity SIP and OPRA quote to trade ratios from June 2016–June 2017 that were compiled by the Financial Information Forum using data from NASDAQ and SIAC.

Regulation ATS (excluding any such ATS that does not execute orders).”⁵²

The Operating Committee determined that ATSs should be included within the definition of Execution Venue. The Operating Committee believes that it is appropriate to treat ATSs as Execution Venues under the proposed funding model since ATSs have business models that are similar to those of exchanges, and ATSs also compete with exchanges.

Given the differences between Execution Venues that trade NMS Stocks and/or OTC Equity Securities and Execution Venues that trade Listed Options, Section 11.3(a) addresses Execution Venues that trade NMS Stocks and/or OTC Equity Securities separately from Execution Venues that trade Listed Options. Equity and Options Execution Venues are treated separately for two reasons. First, the differing quoting behavior of Equity and Options Execution Venues makes comparison of activity between such Execution Venues difficult. Second, Execution Venue tiers are calculated based on market share of share volume, and it is therefore difficult to compare market share between asset classes (*i.e.*, equity shares versus options contracts). Discussed below is how the funding model treats the two types of Execution Venues.

(I) NMS Stocks and OTC Equity Securities

Section 11.3(a)(i) of the CAT NMS Plan states that each Execution Venue that (i) executes transactions or, (ii) in the case of a national securities association, has trades reported by its members to its trade reporting facility or facilities for reporting transactions effected otherwise than on an exchange, in NMS Stocks or OTC Equity Securities will pay a fixed fee depending on the market share of that Execution Venue in NMS Stocks and OTC Equity Securities, with the Operating Committee establishing at least two and not more than five tiers of fixed fees, based on an Execution Venue’s NMS Stocks and OTC Equity Securities market share. For these purposes, market share for Execution Venues that execute transactions will be calculated by share volume, and market share for a national securities association that has trades reported by its members to its trade reporting facility or facilities for reporting transactions effected otherwise than on an exchange in NMS Stocks or OTC Equity Securities will be

calculated based on share volume of trades reported, provided, however, that the share volume reported to such national securities association by an Execution Venue shall not be included in the calculation of such national security association’s market share.

In accordance with Section 11.3(a)(i) of the CAT NMS Plan, the Operating Committee approved a tiered fee structure for Equity Execution Venues and Option Execution Venues. In determining the Equity Execution Venue Tiers, the Operating Committee considered the funding principles set forth in Section 11.2 of the CAT NMS Plan, seeking to create funding tiers that take into account the relative impact on system resources of different Equity Execution Venues, and that establish comparable fees among the CAT Reporters with the most Reportable Events. Each Equity Execution Venue will be placed into one of four tiers of fixed fees, based on the Execution Venue’s NMS Stocks and OTC Equity Securities market share. In choosing four tiers, the Operating Committee performed an analysis similar to that discussed above with regard to the non-Execution Venue Industry Members to determine the number of tiers for Equity Execution Venues. The Operating Committee determined to establish four tiers for Equity Execution Venues, rather than a larger number of tiers as established for non-Execution Venue Industry Members, because the four tiers were sufficient to distinguish between the smaller number of Equity Execution Venues based on market share. Furthermore, the selection of four tiers serves to help establish comparability among the largest CAT Reporters.

Each Equity Execution Venue will be ranked by market share and tiered by predefined Execution Venue percentages, (the “Equity Execution Venue Percentages”). In determining the fixed percentage of Equity Execution Venues in each tier, the Operating Committee reviewed historical market share of share volume for Execution Venues. Equity Execution Venue market shares of share volume were sourced from market statistics made publicly-available by Bats Global Markets, Inc. (“Bats”). ATS market shares of share volume was sourced from market statistics made publicly-available by FINRA. FINRA trade reporting facility (“TRF”) and ORF market share of share volume was sourced from market statistics made publicly available by FINRA. Based on data from FINRA and otcmartets.com, ATSs accounted for 39.12% of the share volume across the TRFs and ORFs during the recent tiering

period. A 39.12/60.88 split was applied to the ATS and non-ATS breakdown of FINRA market share, with FINRA tiered based only on the non-ATS portion of its market share of share volume.

The Operating Committee determined to discount the market share of Execution Venue ATSs exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF in recognition of the different trading characteristics of the OTC Equity Securities market as compared to the market in NMS Stocks. Many OTC Equity Securities are priced at less than one dollar—and a significant number at less than one penny—per share and low-priced shares tend to trade in larger quantities. Accordingly, a disproportionately large number of shares are involved in transactions involving OTC Equity Securities versus NMS Stocks. Because the proposed fee tiers are based on market share calculated by share volume, Execution Venue ATSs exclusively trading OTC Equity Securities and FINRA would likely be subject to higher tiers than their operations may warrant. To address this potential concern, the Operating Committee determined to discount the market share of Execution Venue ATSs exclusively trading OTC Equity Securities and the market share of the FINRA ORF by multiplying such market share by the average shares per trade ratio between NMS Stocks and OTC Equity Securities in order to adjust for the greater number of shares being traded in the OTC Equity Securities market. Based on available data for the second quarter of 2017, the average shares per trade ratio between NMS Stocks and OTC Equity Securities is 0.17%.⁵³ The average shares per trade ratio between NMS Stocks and OTC Equity Securities will be recalculated every three months when tiers are recalculated.

Based on this, the Operating Committee considered the distribution of Execution Venues, and grouped together Execution Venues with similar levels of market share. The percentage of costs recovered by each Equity Execution Venue tier will be determined by predefined percentage allocations (the “Equity Execution Venue Recovery Allocation”). In determining the fixed percentage allocation of costs to be recovered from each tier, the Operating Committee considered the impact of

⁵² Although FINRA does not operate an execution venue, because it is a Participant, it is considered an “Execution Venue” under the Plan for purposes of determining fees.

⁵³ The average shares per trade ratio for both NMS Stocks and OTC Equity Securities from the second quarter of 2017 was calculated using publicly available market volume data from Bats and OTC Markets Group, and the totals were divided to determine the average number of shares per trade between NMS Stocks and OTC Equity Securities.

CAT Reporter market share activity on the CAT System as well as the distribution of total market volume across Equity Execution Venues while seeking to maintain comparable fees among the largest CAT Reporters. Accordingly, following the determination of the percentage of Execution Venues in each tier, the Operating Committee identified the percentage of total market volume for each tier based on the historical market

share upon which Execution Venues had been initially ranked. Taking this into account along with the resulting percentage of total recovery, the percentage allocation of cost recovery for each tier were assigned, allocating higher percentages of recovery to the tier with a higher level of market share while avoiding any inappropriate burden on competition. Furthermore, by using percentages of Equity Execution Venues and cost recovery per tier, the

Operating Committee sought to include elasticity within the funding model, allowing the funding model to respond to changes in either the total number of Equity Execution Venues or changes in market share.

Based on this analysis, the Operating Committee approved the following Equity Execution Venue Percentages and Recovery Allocations:

Equity Execution Venue tier	Percentage of Equity Execution Venues	Percentage of Execution Venue recovery	Percentage of total recovery
Tier 1	25.00	33.25	8.31
Tier 2	42.00	25.73	6.43
Tier 3	23.00	8.00	2.00
Tier 4	10.00	0.02	0.01
Total	100	67	16.75

(II) Listed Options

Section 11.3(a)(ii) of the CAT NMS Plan states that each Execution Venue that executes transactions in Listed Options will pay a fixed fee depending on the Listed Options market share of that Execution Venue, with the Operating Committee establishing at least two and no more than five tiers of fixed fees, based on an Execution Venue's Listed Options market share. For these purposes, market share will be calculated by contract volume.

In accordance with Section 11.3(a)(ii) of the CAT NMS Plan, the Operating Committee approved a tiered fee structure for Options Execution Venues. In determining the tiers, the Operating Committee considered the funding principles set forth in Section 11.2 of the CAT NMS Plan, seeking to create funding tiers that take into account the relative impact on system resources of different Options Execution Venues, and that establish comparable fees among the CAT Reporters with the most Reportable Events. Each Options Execution Venue will be placed into one of two tiers of fixed fees, based on the Execution Venue's Listed Options market share. In choosing two tiers, the Operating Committee performed an analysis similar to that discussed above with regard to Industry Members (other than Execution Venue ATSs) to

determine the number of tiers for Options Execution Venues. The Operating Committee determined to establish two tiers for Options Execution Venues, rather than a larger number, because the two tiers were sufficient to distinguish between the smaller number of Options Execution Venues based on market share. Furthermore, due to the smaller number of Options Execution Venues, the incorporation of additional Options Execution Venue tiers would result in significantly higher fees for Tier 1 Options Execution Venues and reduce comparability between Execution Venues and Industry Members. Furthermore, the selection of two tiers served to establish comparable fees among the largest CAT Reporters.

Each Options Execution Venue will be ranked by market share and tiered by predefined Execution Venue percentages, (the "Options Execution Venue Percentages"). To determine the fixed percentage of Options Execution Venues in each tier, the Operating Committee analyzed the historical and publicly available market share of Options Execution Venues to group Options Execution Venues with similar market shares across the tiers. Options Execution Venue market share of share volume were sourced from market statistics made publicly-available by

Bats. The process for developing the Options Execution Venue Percentages was the same as discussed above with regard to Equity Execution Venues.

The percentage of costs to be recovered from each Options Execution Venue tier will be determined by predefined percentage allocations (the "Options Execution Venue Recovery Allocation"). In determining the fixed percentage allocation of cost recovery for each tier, the Operating Committee considered the impact of CAT Reporter market share activity on the CAT System as well as the distribution of total market volume across Options Execution Venues while seeking to maintain comparable fees among the largest CAT Reporters. Furthermore, by using percentages of Options Execution Venues and cost recovery per tier, the Operating Committee sought to include elasticity within the funding model, allowing the funding model to respond to changes in either the total number of Options Execution Venues or changes in market share. The process for developing the Options Execution Venue Recovery Allocation was the same as discussed above with regard to Equity Execution Venues.

Based on this analysis, the Operating Committee approved the following Options Execution Venue Percentages and Recovery Allocations:

Options Execution Venue tier	Percentage of Options Execution Venues	Percentage of Execution Venue recovery	Percentage of total recovery
Tier 1	75.0	28.2	7.0
Tier 2	25.0	4.7	1.1

Options Execution Venue tier	Percentage of Options Execution Venues	Percentage of Execution Venue recovery	Percentage of total recovery
Total	10	3	8.2

(III) Market Share/Tier Assignments

The Operating Committee determined that, prior to the start of CAT reporting, market share for Execution Venues would be sourced from publicly-available market data. Options and equity volumes for Participants will be sourced from market data made publicly available by Bats while Execution Venue ATS volumes will be sourced from market data made publicly available by FINRA and OTC Markets. Set forth in the Appendix are two charts, one listing the current Equity Execution Venues, each with its rank and tier, and one listing the current Options Execution Venues, each with its rank and tier.

After the commencement of CAT reporting, market share for Execution Venues will be sourced from data reported to the CAT. Equity Execution Venue market share will be determined by calculating each Equity Execution Venue's proportion of the total volume of NMS Stock and OTC Equity shares reported by all Equity Execution Venues during the relevant time period (with the discounting of market share of Execution Venue ATSs exclusively trading OTC Equity Securities, as described above). Similarly, market share for Options Execution Venues will be determined by calculating each Options Execution Venue's proportion of the total volume of Listed Options contracts reported by all Options Execution Venues during the relevant time period.

The Operating Committee has determined to calculate fee tiers for Execution Venues every three months based on market share from the prior three months. Based on its analysis of historical data, the Operating Committee believes calculating tiers based on three months of data will provide the best balance between reflecting changes in activity by Execution Venues while still providing predictability in the tiering for Execution Venues.

(D) Allocation of Costs

In addition to the funding principles discussed above, including comparability of fees, Section 11.1(c) of the CAT NMS Plan also requires expenses to be fairly and reasonably shared among the Participants and Industry Members. Accordingly, in developing the proposed fee schedules

pursuant to the funding model, the Operating Committee calculated how the CAT costs would be allocated between Industry Members and Execution Venues, and how the portion of CAT costs allocated to Execution Venues would be allocated between Equity Execution Venues and Options Execution Venues. These determinations are described below.

(I) Allocation Between Industry Members and Execution Venues

In determining the cost allocation between Industry Members (other than Execution Venue ATSs) and Execution Venues, the Operating Committee analyzed a range of possible splits for revenue recovery from such Industry Members and Execution Venues, including 80%/20%, 75%/25%, 70%/30% and 65%/35% allocations. Based on this analysis, the Operating Committee determined that 75 percent of total costs recovered would be allocated to Industry Members (other than Execution Venue ATSs) and 25 percent would be allocated to Execution Venues. The Operating Committee determined that this 75%/25% division maintained the greatest level of comparability across the funding model. For example, the cost allocation establishes fees for the largest Industry Members (*i.e.*, those Industry Members in Tiers 1) that are comparable to the largest Equity Execution Venues and Options Execution Venues (*i.e.*, those Execution Venues in Tier 1).

Furthermore, the allocation of total CAT cost recovery recognizes the difference in the number of CAT Reporters that are Industry Members versus CAT Reporters that are Execution Venues. Specifically, the cost allocation takes into consideration that there are approximately 23 times more Industry Members expected to report to the CAT than Execution Venues (*e.g.*, an estimated 1541 Industry Members versus 67 Execution Venues as of June 2017).

(II) Allocation Between Equity Execution Venues and Options Execution Venues

The Operating Committee also analyzed how the portion of CAT costs allocated to Execution Venues would be allocated between Equity Execution Venues and Options Execution Venues.

In considering this allocation of costs, the Operating Committee analyzed a range of alternative splits for revenue recovered between Equity and Options Execution Venues, including a 70%/30%, 67%/33%, 65%/35%, 50%/50% and 25%/75% split. Based on this analysis, the Operating Committee determined to allocate 67 percent of Execution Venue costs recovered to Equity Execution Venues and 33 percent to Options Execution Venues. The Operating Committee determined that a 67%/33% allocation between Equity and Options Execution Venues maintained the greatest level of fee equitability and comparability based on the current number of Equity and Options Execution Venues. For example, the allocation establishes fees for the larger Equity Execution Venues that are comparable to the larger Options Execution Venues. Specifically, Tier 1 Equity Execution Venues would pay a quarterly fee of \$81,047 and Tier 1 Options Execution Venues would pay a quarterly fee of \$81,379. In addition to fee comparability between Equity Execution Venues and Options Execution Venues, the allocation also establishes equitability between larger (Tier 1) and smaller (Tier 2) Execution Venues based upon the level of market share. Furthermore, the allocation is intended to reflect the relative levels of current equity and options order events.

(E) Fee Levels

The Operating Committee determined to establish a CAT-specific fee to collectively recover the costs of building and operating the CAT. Accordingly, under the funding model, the sum of the CAT Fees is designed to recover the total cost of the CAT. The Operating Committee has determined overall CAT costs to be comprised of Plan Processor costs and non-Plan Processor costs, which are estimated to be \$50,700,000 in total for the year beginning November 21, 2016.⁵⁴

The Plan Processor costs relate to costs incurred and to be incurred through November 21, 2017 by the Plan Processor and consist of the Plan Processor's current estimates of average yearly ongoing costs, including

⁵⁴ It is anticipated that CAT-related costs incurred prior to November 21, 2016 will be addressed via a separate filing.

development costs, which total \$37,500,000. This amount is based upon the fees due to the Plan Processor pursuant to the Company's agreement with the Plan Processor.

The non-Plan Processor estimated costs incurred and to be incurred by the Company through November 21, 2017 consist of three categories of costs. The first category of such costs are third party support costs, which include legal fees, consulting fees and audit fees from November 21, 2016 until the date of filing as well as estimated third party support costs for the rest of the year. These amount to an estimated

\$5,200,000. The second category of non-Plan Processor costs are estimated cyber-insurance costs for the year. Based on discussions with potential cyber-insurance providers, assuming \$2–5 million cyber-insurance premium on \$100 million coverage, the Company has estimated \$3,000,000 for the annual cost. The final cost figures will be determined following receipt of final underwriter quotes. The third category of non-Plan Processor costs is the CAT operational reserve, which is comprised of three months of ongoing Plan Processor costs (\$9,375,000), third party support costs (\$1,300,000) and cyber-

insurance costs (\$750,000). The Operating Committee aims to accumulate the necessary funds to establish the three-month operating reserve for the Company through the CAT Fees charged to CAT Reporters for the year. On an ongoing basis, the Operating Committee will account for any potential need to replenish the operating reserve or other changes to total cost during its annual budgeting process. The following table summarizes the Plan Processor and non-Plan Processor cost components which comprise the total estimated CAT costs of \$50,700,000 for the covered period.

Cost category	Cost component	Amount
Plan Processor	Operational Costs	\$37,500,000
	Third Party Support Costs	5,200,000
Non-Plan Processor	Operational Reserve	⁵⁵ 5,000,000
	Cyber-insurance Costs	3,000,000
Estimated Total		50,700,000

Based on these estimated costs and the calculations for the funding model described above, the Operating

Committee determined to impose the following fees:⁵⁶

For Industry Members (other than Execution Venue ATSS):

Tier	Percentage of Industry Members	Quarterly CAT fee
1	0.900	\$81,483
2	2.150	59,055
3	2.800	40,899
4	7.750	25,566
5	8.300	7,428
6	18.800	1,968
7	59.300	105

For Execution Venues for NMS Stocks and OTC Equity Securities:

Tier	Percentage of Equity Execution Venues	Quarterly CAT fee
1	25.00	\$81,048
2	42.00	37,062
3	23.00	21,126
4	10.00	129

For Execution Venues for Listed Options:

Tier	Percentage of Options Execution Venues	Quarterly CAT fee
1	75.00	\$81,381

⁵⁵ This \$5,000,000 represents the gradual accumulation of the funds for a target operating reserve of \$11,425,000.

⁵⁶ Note that all monthly, quarterly and annual CAT Fees have been rounded to the nearest dollar.

Tier	Percentage of Options Execution Venues	Quarterly CAT fee
2	25.00	37,629

The Operating Committee has calculated the schedule of effective fees for Industry Members (other than Execution Venue ATs) and Execution

Venues in the following manner. Note that the calculation of CAT Fees assumes 52 Equity Execution Venues, 15 Options Execution Venues and 1,541

Industry Members (other than Execution Venue ATs) as of June 2017.

CALCULATION OF ANNUAL TIER FEES FOR INDUSTRY MEMBERS ("IM")

Industry Member tier	Percentage of Industry Members	Percentage of Industry Member recovery	Percentage of total recovery
Tier 1	0.900	12.00	9.00
Tier 2	2.150	20.50	15.38
Tier 3	2.800	18.50	13.88
Tier 4	7.750	32.00	24.00
Tier 5	8.300	10.00	7.50
Tier 6	18.800	6.00	4.50
Tier 7	59.300	1.00	0.75
Total	100	100	75

Industry Member tier	Estimated number of Industry Members
Tier 1	14
Tier 2	33
Tier 3	43
Tier 4	119
Tier 5	128
Tier 6	290
Tier 7	914
Total	1,541

Calculation 1.1 (Calculation of a Tier 1 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 0.9\% \text{ [% of Tier 1 IMs]} = 14 \text{ [Estimated Tier 1 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 12\% \text{ [% of Tier 1 IM Recovery]}}{14 \text{ [Estimated Tier 1 IMs]}} \right) \div 12 \text{ [Months per year]} = \$27,161$$

Calculation 1.2 (Calculation of a Tier 2 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 2.15\% \text{ [% of Tier 2 IMs]} = 33 \text{ [Estimated Tier 2 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 20.5\% \text{ [% of Tier 2 IM Recovery]}}{33 \text{ [Estimated Tier 2 IMs]}} \right) \div 12 \text{ [Months per year]} = \$19,685$$

Calculation 1.3 (Calculation of a Tier 3 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 2.125\% \text{ [% of Tier 3 IMs]} = 43 \text{ [Estimated Tier 3 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 18.5\% \text{ [% of Tier 3 IM Recovery]}}{43 \text{ [Estimated Tier 3 IMs]}} \right) \div 12 \text{ [Months per year]} = \$13,633$$

Calculation 1.4 (Calculation of a Tier 4 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 7.75\% \text{ [% of Tier 4 IMs]} = 119 \text{ [Estimated Tier 4 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 32\% \text{ [% of Tier 4 IM Recovery]}}{119 \text{ [Estimated Tier 4 IMs]}} \right) \div 12 \text{ [Months per year]} = \$8522$$

Calculation 1.5 (Calculation of a Tier 5 Industry Member Annual Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 8.3\% \text{ [% of Tier 5 IMs]} = 128 \text{ [Estimated Tier 5 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 7.75\% \text{ [% of Tier 5 IM Recovery]}}{128 \text{ [Estimated Tier 5 IMs]}} \right) \div 12 \text{ [Months per year]} = \$2476$$

Calculation 1.6 (Calculation of a Tier 6 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 18.8\% \text{ [% of Tier 6 IMs]} = 290 \text{ [Estimated Tier 6 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 6\% \text{ [% of Tier 6 IM Recovery]}}{290 \text{ [Estimated Tier 6 IMs]}} \right) \div 12 \text{ [Months per year]} = \$656$$

Calculation 1.7 (Calculation of a Tier 7 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 59.3\% \text{ [% of Tier 7 IMs]} = 914 \text{ [Estimated Tier 7 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 1\% \text{ [% of Tier 7 IM Recovery]}}{914 \text{ [Estimated Tier 7 IMs]}} \right) \div 12 \text{ [Months per year]} = \$35$$

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CALCULATION OF ANNUAL TIER FEES FOR EQUITY EXECUTION VENUES ("EV")

Equity Execution Venue tier	Percentage of Equity Execution Venues	Percentage of Execution Venue recovery	Percentage of total recovery
Tier 1	25.00	33.25	8.31
Tier 2	42.00	25.73	6.43

CALCULATION OF ANNUAL TIER FEES FOR EQUITY EXECUTION VENUES (“EV”)—Continued

Equity Execution Venue tier	Percentage of Equity Execution Venues	Percentage of Execution Venue recovery	Percentage of total recovery
Tier 3	23.00	8.00	2.00
Tier 4	10.00	49.00	0.01
Total	100	67	16.75

Equity Execution Venue tier	Estimated number of Equity Execution Venues
Tier 1	13
Tier 2	22
Tier 3	12
Tier 4	5
Total	52

Calculation 2.1 (Calculation of a Tier 1 Equity Execution Venue Monthly Fee)

52 [Estimated Tot. Equity EVs] × 25% [9% of Tier 1 Equity EVs] = 13 [Estimated Tier 1 Equity EVs]

$$\left(\frac{\$20,700,000 [\text{Tot. Ann. CAT Costs}] \times 25\% [\text{EV \% of Tot. Ann. CAT Costs}] \times 9\% [\text{Tier 1 Equity EV Recovery}]}{13 [\text{Estimated Tier 1 Equity EVs}]} \right) \div 12 [\text{Months per year}] = \$27,016$$

Calculation 2.2 (Calculation of a Tier 2 Equity Execution Venue Monthly Fee)

52 [Estimated Tot. Equity EVs] × 42% [9% of Tier 2 Equity EVs] = 22 [Estimated Tier 2 Equity EVs]

$$\left(\frac{\$20,700,000 [\text{Tot. Ann. CAT Costs}] \times 42\% [\text{EV \% of Tot. Ann. CAT Costs}] \times 9\% [\text{Tier 2 Equity EV Recovery}]}{22 [\text{Estimated Tier 2 Equity EVs}]} \right) \div 12 [\text{Months per year}] = \$12,353$$

Calculation 2.3 (Calculation of a Tier 3 Equity Execution Venue Monthly Fee)

52 [Estimated Tot. Equity EVs] × 23% [9% of Tier 2 Equity EVs] = 12 [Estimated Tier 2 Equity EVs]

$$\left(\frac{\$20,700,000 [\text{Tot. Ann. CAT Costs}] \times 23\% [\text{EV \% of Tot. Ann. CAT Costs}] \times 9\% [\text{Tier 3 Equity EV Recovery}]}{12 [\text{Estimated Tier 3 Equity EVs}]} \right) \div 12 [\text{Months per year}] = \$7,047$$

Calculation 2.4 (Calculation of a Tier 4 Equity Execution Venue Monthly Fee)

52 [Estimated Tot. Equity EVs] × 10% [9% of Tier 2 Equity EVs] = 5 [Estimated Tier 2 Equity EVs]

$$\left(\frac{\$20,700,000 [\text{Tot. Ann. CAT Costs}] \times 10\% [\text{EV \% of Tot. Ann. CAT Costs}] \times 9\% [\text{Tier 4 Equity EV Recovery}]}{5 [\text{Estimated Tier 4 Equity EVs}]} \right) \div 12 [\text{Months per year}] = \$42$$

CALCULATION OF ANNUAL TIER FEES FOR OPTIONS EXECUTION VENUES (“EV”)

Options Execution Venue tier	Percentage of Options Execution Venues	Percentage of Execution Venue recovery	Percentage of total recovery
Tier 1	75.00	28.25	7.06
Tier 2	25.00	4.75	1.19
Total	100	33	8.25

Options Execution Venue tier	Estimated number of Options Execution Venues
Tier 1	11
Tier 2	4
Total	15

Calculation 3.1 (Calculation of a Tier 1 Options Execution Venue Monthly Fee)

$$15 \text{ [Estimated Tot. Options EVs]} \times 75\% \text{ [}\% \text{ of Tier 1 Options EVs]} = 11 \text{ [Estimated Tier 1 Options EVs]}$$

$$\left(\frac{\$10,000,000 \text{ [Estimated CAT Fees]} \times 25\% \text{ [}\% \text{ of Estimated CAT Fees]} \times 25\% \text{ [}\% \text{ of Tier 1 Options EV Recovery]}}{11 \text{ [Estimated Tier 1 Options EVs]}} \right) \div 12 \text{ [Months per year]} = \$27,127$$

Calculation 3.2 (Calculation of a Tier 2 Options Execution Venue Annual Fee)

$$15 \text{ [Estimated Tot. Options EVs]} \times 25\% \text{ [}\% \text{ of Tier 2 Options EVs]} = 4 \text{ [Estimated Tier 2 Options EVs]}$$

$$\left(\frac{\$20,000,000 \text{ [Estimated CAT Fees]} \times 25\% \text{ [}\% \text{ of Estimated CAT Fees]} \times 25\% \text{ [}\% \text{ of Tier 2 Options EV Recovery]}}{4 \text{ [Estimated Tier 2 Options EVs]}} \right) \div 12 \text{ [Months per year]} = \$12,543$$

TRACEABILITY OF TOTAL CAT FEES

Type	Industry Member tier	Estimated number of members	CAT fees paid annually	Total recovery
Industry Members	Tier 1	14	\$325,932	\$4,563,048
	Tier 2	33	236,220	7,795,260
	Tier 3	43	163,596	7,034,628
	Tier 4	119	102,264	12,169,416
	Tier 5	128	29,712	3,803,136
	Tier 6	290	7,872	2,282,880
	Tier 7	914	420	383,880
Total .....	.....	1,541	.....	38,032,248
Equity Execution Venues	Tier 1	13	324,192	4,214,496
	Tier 2	22	148,248	3,261,456
	Tier 3	12	84,504	1,014,048
	Tier 4	5	516	2,580
Total .....	.....	52	.....	8,492,580
Options Execution Venues	Tier 1	11	325,524	3,580,764
	Tier 2	4	150,516	602,064
Total .....	.....	15	.....	4,182,828
Total .....	.....	.....	.....	50,700,000
Excess ⁵⁷ .....	.....	.....	.....	7,656

(F) Comparability of Fees

The funding principles require a funding model in which the fees charged to the CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as

applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether Execution Venue and/or Industry Members). Accordingly, in creating the model, the Operating Committee sought to establish comparable fees for the top tier of Industry Members (other than

Execution Venue ATSS), Equity Execution Venues and Options Execution Venues. Specifically, each Tier 1 CAT Reporter would be required to pay a quarterly fee of approximately \$81,000.

(G) Billing Onset

Under Section 11.1(c) of the CAT NMS Plan, to fund the development and

⁵⁷ The amount in excess of the total CAT costs will contribute to the gradual accumulation of the target operating reserve of \$11.425 million.

implementation of the CAT, the Company shall time the imposition and collection of all fees on Participants and Industry Members in a manner reasonably related to the timing when the Company expects to incur such development and implementation costs. The Company is currently incurring such development and implementation costs and will continue to do so prior to the commencement of CAT reporting and thereafter. In accordance with the CAT NMS Plan, all CAT Reporters, including both Industry Members and Execution Venues (including Participants), will be invoiced as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Participants and the operative date of the Plan amendment adopting CAT Fees for Participants.

(H) Changes to Fee Levels and Tiers

Section 11.3(d) of the CAT NMS Plan states that “[t]he Operating Committee shall review such fee schedule on at least an annual basis and shall make any changes to such fee schedule that it deems appropriate. The Operating Committee is authorized to review such fee schedule on a more regular basis, but shall not make any changes on more than a semi-annual basis unless, pursuant to a Supermajority Vote, the Operating Committee concludes that such change is necessary for the adequate funding of the Company.” With such reviews, the Operating Committee will review the distribution of Industry Members and Execution Venues across tiers, and make any updates to the percentage of CAT Reporters allocated to each tier as may be necessary. In addition, the reviews will evaluate the estimated ongoing

CAT costs and the level of the operating reserve. To the extent that the total CAT costs decrease, the fees would be adjusted downward, and to the extent that the total CAT costs increase, the fees would be adjusted upward.⁵⁸ Furthermore, any surplus of the Company’s revenues over its expenses is to be included within the operational reserve to offset future fees. The limitations on more frequent changes to the fee, however, are intended to provide budgeting certainty for the CAT Reporters and the Company.⁵⁹ To the extent that the Operating Committee approves changes to the number of tiers in the funding model or the fees assigned to each tier, then the Operating Committee will file such changes with the SEC pursuant to Rule 608 of the Exchange Act, and the Participants will file such changes with the SEC pursuant to Section 19(b) of the Exchange Act and Rule 19b-4 thereunder, and any such changes will become effective in accordance with the requirements of those provisions.

(I) Initial and Periodic Tier Reassignments

The Operating Committee has determined to calculate fee tiers every three months based on market share or message traffic, as applicable, from the prior three months. For the initial tier assignments, the Company will calculate the relevant tier for each CAT Reporter using the three months of data prior to the commencement date. As with the initial tier assignment, for the tri-monthly reassignments, the Company will calculate the relevant tier using the three months of data prior to the relevant tri-monthly date. Any movement of CAT Reporters between tiers will not change the criteria for each

tier or the fee amount corresponding to each tier.

In performing the tri-monthly reassignments, the assignment of CAT Reporters in each assigned tier is relative. Therefore, a CAT Reporter’s assigned tier will depend, not only on its own message traffic or market share, but also on the message traffic/market share across all CAT Reporters. For example, the percentage of Industry Members (other than Execution Venue ATs) in each tier is relative such that such Industry Member’s assigned tier will depend on message traffic generated across all CAT Reporters as well as the total number of CAT Reporters. The Operating Committee will inform CAT Reporters of their assigned tier every three months following the periodic tiering process, as the funding model will compare an individual CAT Reporter’s activity to that of other CAT Reporters in the marketplace.

The following demonstrates a tier reassignment. In accordance with the funding model, the top 75% of Options Execution Venues in market share are categorized as Tier 1 while the bottom 25% of Options Execution Venues in market share are categorized as Tier 2. In the sample scenario below, Options Execution Venue L is initially categorized as a Tier 2 Options Execution Venue in Period A due to its market share. When market share is recalculated for Period B, the market share of Execution Venue L increases, and it is therefore subsequently reranked and reassigned to Tier 1 in Period B. Correspondingly, Options Execution Venue K, initially a Tier 1 Options Execution Venue in Period A, is reassigned to Tier 2 in Period B due to decreases in its market share.

Period A			Period B		
Options Execution Venue	Market share rank	Tier	Options Execution Venue	Market share rank	Tier
Options Execution Venue A	1	1	Options Execution Venue A	1	1
Options Execution Venue B	2	1	Options Execution Venue B	2	1
Options Execution Venue C	3	1	Options Execution Venue C	3	1
Options Execution Venue D	4	1	Options Execution Venue D	4	1
Options Execution Venue E	5	1	Options Execution Venue E	5	1
Options Execution Venue F	6	1	Options Execution Venue F	6	1
Options Execution Venue G	7	1	Options Execution Venue I	7	1
Options Execution Venue H	8	1	Options Execution Venue H	8	1
Options Execution Venue I	9	1	Options Execution Venue G	9	1
Options Execution Venue J	10	1	Options Execution Venue J	10	1
Options Execution Venue K	11	1	Options Execution Venue L	11	1
Options Execution Venue L	12	2	Options Execution Venue K	12	2
Options Execution Venue M	13	2	Options Execution Venue N	13	2
Options Execution Venue N	14	2	Options Execution Venue M	14	2

⁵⁸ The CAT Fees are designed to recover the costs associated with the CAT. Accordingly, CAT Fees would not be affected by increases or decreases in other non-CAT expenses incurred by the

Participants, such as any changes in costs related to the retirement of existing regulatory systems, such as OATS.

⁵⁹ Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85006.

Period A			Period B		
Options Execution Venue	Market share rank	Tier	Options Execution Venue	Market share rank	Tier
Options Execution Venue O	15	2	Options Execution Venue O	15	2

For each periodic tier reassignment, the Operating Committee will review the new tier assignments, particularly those assignments for CAT Reporters that shift from the lowest tier to a higher tier. This review is intended to evaluate whether potential changes to the market or CAT Reporters (e.g., dissolution of a large CAT Reporter) adversely affect the tier reassignments.

(J) Sunset Provision

The Operating Committee developed the proposed funding model by analyzing currently available historical data. Such historical data, however, is not as comprehensive as data that will be submitted to the CAT. Accordingly, the Operating Committee believes that it will be appropriate to revisit the funding model once CAT Reporters have actual experience with the funding model. Accordingly, the Operating Committee determined to include an automatic sunset provision for the proposed fees. Specifically, the Operating Committee determined that the CAT Fees should automatically expire two years after the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. The Operating Committee intends to monitor the operation of the funding model during this two year period and to evaluate its effectiveness during that period. Such a process will inform the Operating Committee’s approach to funding the CAT after the two year period.

(3) Proposed CAT Fee Schedule

SRO proposes the Consolidated Audit Trail Funding Fees to impose the CAT Fees determined by the Operating Committee on SRO’s members. The proposed fee schedule has four sections, covering definitions, the fee schedule for CAT Fees, the timing and manner of payments, and the automatic sunset of the CAT Fees. Each of these sections is discussed in detail below.

(A) Definitions

Paragraph (a) of the proposed fee schedule sets forth the definitions for the proposed fee schedule. Paragraph (a)(1) states that, for purposes of the Consolidated Audit Trail Funding Fees, the terms “CAT”, “CAT NMS Plan,” “Industry Member,” “NMS Stock,” “OTC Equity Security”, “Options

Market Maker”, and “Participant” are defined as set forth in Rule 4.5 (Consolidated Audit Trail—Definitions).

The proposed fee schedule imposes different fees on Equity ATSs and Industry Members that are not Equity ATSs. Accordingly, the proposed fee schedule defines the term “Equity ATS.” First, paragraph (a)(2) defines an “ATS” to mean an alternative trading system as defined in Rule 300(a) of Regulation ATS under the Securities Exchange Act of 1934, as amended, that operates pursuant to Rule 301 of Regulation ATS. This is the same definition of an ATS as set forth in Section 1.1 of the CAT NMS Plan in the definition of an “Execution Venue.” Then, paragraph (a)(4) defines an “Equity ATS” as an ATS that executes transactions in NMS Stocks and/or OTC Equity Securities.

Paragraph (a)(3) of the proposed fee schedule defines the term “CAT Fee” to mean the Consolidated Audit Trail Funding Fee(s) to be paid by Industry Members as set forth in paragraph (b) in the proposed fee schedule.

Finally, Paragraph (a)(6) defines an “Execution Venue” as a Participant or an ATS (excluding any such ATS that does not execute orders). This definition is the same substantive definition as set forth in Section 1.1 of the CAT NMS Plan. Paragraph (a)(5) defines an “Equity Execution Venue” as an Execution Venue that trades NMS Stocks and/or OTC Equity Securities.

(B) Fee Schedule

SRO proposes to impose the CAT Fees applicable to its Industry Members through paragraph (b) of the proposed fee schedule. Paragraph (b)(1) of the proposed fee schedule sets forth the CAT Fees applicable to Industry Members other than Equity ATSs. Specifically, paragraph (b)(1) states that the Company will assign each Industry Member (other than an Equity ATS) to a fee tier once every quarter, where such tier assignment is calculated by ranking each Industry Member based on its total message traffic (with discounts for equity market maker quotes and Options Market Maker quotes based on the trade to quote ratio for equities and options, respectively) for the three months prior to the quarterly tier calculation day and assigning each Industry Member to a tier based on that ranking and predefined

Industry Member percentages. The Industry Members with the highest total quarterly message traffic will be ranked in Tier 1, and the Industry Members with lowest quarterly message traffic will be ranked in Tier 7. Each quarter, each Industry Member (other than an Equity ATS) shall pay the following CAT Fee corresponding to the tier assigned by the Company for such Industry Member for that quarter:

Tier	Percentage of Industry Members	Quarterly CAT fee
1	0.900	\$81,483
2	2.150	59,055
3	2.800	40,899
4	7.750	25,566
5	8.300	7,428
6	18.800	1,968
7	59.300	105

Paragraph (b)(2) of the proposed fee schedule sets forth the CAT Fees applicable to Equity ATSs.⁶⁰ These are the same fees that Participants that trade NMS Stocks and/or OTC Equity Securities will pay. Specifically, paragraph (b)(2) states that the Company will assign each Equity ATS to a fee tier once every quarter, where such tier assignment is calculated by ranking each Equity Execution Venue based on its total market share of NMS Stocks and OTC Equity Securities (with a discount for Equity ATSs exclusively trading OTC Equity Securities based on the average shares per trade ratio between NMS Stocks and OTC Equity Securities) for the three months prior to the quarterly tier calculation day and assigning each Equity ATS to a tier based on that ranking and predefined Equity Execution Venue percentages. The Equity ATSs with the higher total quarterly market share will be ranked in Tier 1, and the Equity ATSs with the lowest quarterly market share will be ranked in Tier 4. Specifically, paragraph (b)(2) states that, each quarter, each Equity ATS shall pay the following CAT Fee corresponding to the tier assigned by the Company for such Equity ATS for that quarter:

⁶⁰ Note that no fee schedule is provided for Execution Venue ATSs that execute transactions in Listed Options, as no such Execution Venue ATSs currently exist due to trading restrictions related to Listed Options.

Tier	Percentage of Equity Execution Venues	Quarterly CAT fee
1	25.00	\$81,048
2	42.00	37,062
3	23.00	21,126
4	10.00	129

(C) Timing and Manner of Payment

Section 11.4 of the CAT NMS Plan states that the Operating Committee shall establish a system for the collection of fees authorized under the CAT NMS Plan. The Operating Committee may include such collection responsibility as a function of the Plan Processor or another administrator. To implement the payment process to be adopted by the Operating Committee, paragraph (c)(1) of the proposed fee schedule states that the Company will provide each Industry Member with one invoice each quarter for its CAT Fees as determined pursuant to paragraph (b) of the proposed fee schedule, regardless of whether the Industry Member is a member of multiple self-regulatory organizations. Paragraph (c)(1) further states that each Industry Member will pay its CAT Fees to the Company via the centralized system for the collection of CAT Fees established by the Company in the manner prescribed by the Company. SRO will provide Industry Members with details regarding the manner of payment of CAT Fees by Regulatory Circular.

All CAT fees will be billed and collected centrally through the Company via the Plan Processor. Although each Participant will adopt its own fee schedule regarding CAT Fees, no CAT Fees or portion thereof will be collected by the individual Participants. Each Industry Member will receive from the Company one invoice for its applicable CAT fees, not separate invoices from each Participant of which it is a member. The Industry Members will pay the CAT Fees to the Company via the centralized system for the collection of CAT fees established by the Company.⁶¹

Section 11.4 of the CAT NMS Plan also states that Participants shall require each Industry Member to pay all applicable authorized CAT Fees within thirty days after receipt of an invoice or other notice indicating payment is due (unless a longer payment period is otherwise indicated). Section 11.4 further states that, if an Industry Member fails to pay any such fee when due, such Industry Member shall pay interest on the outstanding balance from

such due date until such fee is paid at a per annum rate equal to the lesser of: (i) the Prime Rate plus 300 basis points; or (ii) the maximum rate permitted by applicable law. Therefore, in accordance with Section 11.4 of the CAT NMS Plan, SRO proposed to adopt paragraph (c)(2) of the proposed fee schedule. Paragraph (c)(2) of the proposed fee schedule states that each Industry Member shall pay CAT Fees within thirty days after receipt of an invoice or other notice indicating payment is due (unless a longer payment period is otherwise indicated). If an Industry Member fails to pay any such fee when due, such Industry Member shall pay interest on the outstanding balance from such due date until such fee is paid at a per annum rate equal to the lesser of: (i) the Prime Rate plus 300 basis points; or (ii) the maximum rate permitted by applicable law.

(D) Sunset Provision

The Operating Committee has determined to require that the CAT Fees automatically sunset two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. Accordingly, SRO proposes paragraph (d) of the fee schedule, which states that “[t]hese Consolidated Audit Trailing Funding Fees will automatically expire two years after the operative date of the amendment of the CAT NMS Plan that adopts CAT fees for the Participants.”

(4) Changes to Prior CAT Fee Plan Amendment

The proposed funding model set forth in this Amendment is a revised version of the Original Proposal. The Commission received a number of comment letters in response to the Original Proposal.⁶² The SEC suspended the Original Proposal and instituted proceedings to determine whether to approve or disapprove it.⁶³ Pursuant to those proceedings, additional comment letters were submitted regarding the proposed funding model.⁶⁴ In developing this Amendment, the Operating Committee carefully considered these comments and made a number of changes to the Original Proposal to address these comments where appropriate.

This Amendment makes the following changes to the Original Proposal: (1) Adds two additional CAT Fee tiers for

⁶² For a description of the comments submitted in response to the Original Proposal, see Suspension Order.

⁶³ Suspension Order.

⁶⁴ See MFA Letter; SIFMA Letter; FIA Principal Traders Group Letter; Belvedere Letter; Sidley Letter; Group One Letter; and Virtu Financial Letter.

Equity Execution Venues; (2) discounts the market share of Execution Venue ATSS exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF by the average shares per trade ratio between NMS Stocks and OTC Equity Securities (calculated as 0.17% based on available data from the second quarter of 2017) when calculating the market share of Execution Venue ATSS exclusively trading OTC Equity Securities and FINRA; (3) discounts the Options Market Maker quotes by the trade to quote ratio for options (calculated as 0.01% based on available data for June 2016 through June 2017) when calculating message traffic for Options Market Makers; (4) discounts equity market maker quotes by the trade to quote ratio for equities (calculated as 5.43% based on available data for June 2016 through June 2017) when calculating message traffic for equity market makers; (5) decreases the number of tiers for Industry Members (other than the Execution Venue ATSS) from nine to seven; (6) changes the allocation of CAT costs between Equity Execution Venues and Options Execution Venues from 75%/25% to 67%/33%; (7) adjusts tier percentages and recovery allocations for Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSS); (8) focuses the comparability of CAT Fees on the individual entity level, rather than primarily on the comparability of affiliated entities; (9) commences invoicing of CAT Reporters as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Participants and the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants; and (10) requires the proposed fees to automatically expire two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for the Participants.

(A) Equity Execution Venues

(i) Small Equity Execution Venues

In the Original Proposal, the Operating Committee proposed to establish two fee tiers for Equity Execution Venues. The Commission and commenters raised the concern that, by establishing only two tiers, smaller Equity Execution Venues (e.g., those Equity ATSS representing less than 1% of NMS market share) would be placed in the same fee tier as larger Equity Execution Venues, thereby imposing an undue or inappropriate burden on

⁶¹ Section 11.4 of the CAT NMS Plan.

competition.⁶⁵ To address this concern, the Operating Committee proposes to add two additional tiers for Equity Execution Venues, a third tier for smaller Equity Execution Venues and a fourth tier for the smallest Equity Execution Venues.

Specifically, the Original Proposal had two tiers of Equity Execution Venues. Tier 1 required the largest Equity Execution Venues to pay a quarterly fee of \$63,375. Based on available data, these largest Equity Execution Venues were those that had equity market share of share volume greater than or equal to 1%.⁶⁶ Tier 2 required the remaining smaller Equity Execution Venues to pay a quarterly fee of \$38,820.

To address concerns about the potential for the \$38,820 quarterly fee to impose an undue burden on smaller Equity Execution Venues, the Operating Committee determined to move to a four tier structure for Equity Execution Venues. Tier 1 would continue to include the largest Equity Execution Venues by share volume (that is, based on currently available data, those with market share of equity share volume greater than or equal to one percent), and these Equity Execution Venues would be required to pay a quarterly fee of \$81,048. The Operating Committee determined to divide the original Tier 2 into three tiers. The new Tier 2 Equity Execution Venues, which would include the next largest Equity Execution Venues by equity share volume, would be required to pay a quarterly fee of \$37,062. The new Tier 3 Equity Execution Venues would be required to pay a quarterly fee of \$21,126. The new Tier 4 Equity Execution Venues, which would include the smallest Equity Execution Venues by share volume, would be required to pay a quarterly fee of \$129.

In developing the proposed four tier structure, the Operating Committee considered keeping the existing two tiers, as well as shifting to three, four or five Equity Execution Venue tiers (the maximum number of tiers permitted under the Plan), to address the concerns regarding small Equity Execution

Venues. For each of the two, three, four and five tier alternatives, the Operating Committee considered the assignment of various percentages of Equity Execution Venues to each tier as well as various percentage of Equity Execution Venue recovery allocations for each alternative. As discussed below in more detail, each of these options was considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined that the four tier alternative addressed the spectrum of different Equity Execution Venues. The Operating Committee determined that neither a two tier structure nor a three tier structure sufficiently accounted for the range of market shares of smaller Equity Execution Venues. The Operating Committee also determined that, given the limited number of Equity Execution Venues, that a fifth tier was unnecessary to address the range of market shares of the Equity Execution Venues.

By increasing the number of tiers for Equity Execution Venues and reducing the proposed CAT Fees for the smaller Equity Execution Venues, the Operating Committee believes that the proposed fees for Equity Execution Venues would not impose an undue or inappropriate burden on competition under Section 6 or Section 15A of the Exchange Act. Moreover, the Operating Committee believes that the proposed fees appropriately take into account the distinctions in the securities trading operations of different Equity Execution Venues, as required under the funding principles of the CAT NMS Plan.⁶⁷ The larger number of tiers more closely tracks the variety of sizes of equity share volume of Equity Execution Venues. In addition, the reduction in the fees for the smaller Equity Execution Venues recognizes the potential burden of larger fees on smaller entities. In particular, the very small quarterly fee of \$129 for Tier 4 Equity Execution Venues reflects the fact that certain Equity Execution Venues have a very small share volume due to their typically more focused business models.

Accordingly, with this Amendment, SRO proposes to amend paragraph (b)(2) of the proposed fee schedule to add the two additional tiers for Equity Execution Venues, to establish the percentages and fees for Tiers 3 and 4 as described, and to revise the percentages and fees for Tiers 1 and 2 as described.

(ii) Execution Venues for OTC Equity Securities

In the Original Proposal, the Operating Committee proposed to group Execution Venues for OTC Equity Securities and Execution Venues for NMS Stocks in the same tier structure. The Commission and commenters raised concerns as to whether this determination to place Execution Venues for OTC Equity Securities in the same tier structure as Execution Venues for NMS Stocks would result in an undue or inappropriate burden on competition, recognizing that the application of share volume may lead to different outcomes as applied to OTC Equity Securities and NMS Stocks.⁶⁸ To address this concern, the Operating Committee proposes to discount the market share of Execution Venue ATSS exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF by the average shares per trade ratio between NMS Stocks and OTC Equity Securities (0.17% for the second quarter of 2017) in order to adjust for the greater number of shares being traded in the OTC Equity Securities market, which is generally a function of a lower per share price for OTC Equity Securities when compared to NMS Stocks.

As commenters noted, many OTC Equity Securities are priced at less than one dollar—and a significant number at less than one penny—and low-priced shares tend to trade in larger quantities. Accordingly, a disproportionately large number of shares are involved in transactions involving OTC Equity Securities versus NMS Stocks, which has the effect of overstating an Execution Venue's true market share when the Execution Venue is involved in the trading of OTC Equity Securities. Because the proposed fee tiers are based on market share calculated by share volume, Execution Venue ATSS trading OTC Equity Securities and FINRA may be subject to higher tiers than their operations may warrant.⁶⁹ The Operating Committee proposes to address this concern in two ways. First, the Operating Committee proposes to increase the number of Equity Execution Venue tiers, as discussed above. Second, the Operating Committee determined to discount the market share of Execution Venue ATSS exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF when calculating their tier placement. Because the disparity in share volume between Execution Venues trading in OTC

⁶⁵ See Suspension Order at 31664; SIFMA Letter at 3.

⁶⁶ Note that while these equity market share thresholds were referenced as data points to help differentiate between Equity Execution Venue tiers, the proposed funding model is directly driven not by market share thresholds, but rather by fixed percentages of Equity Execution Venues across tiers to account for fluctuating levels of market share across time. Actual market share in any tier will vary based on the actual market activity in a given measurement period, as well as the number of Equity Execution Venues included in the measurement period.

⁶⁷ Section 11.2(b) of the CAT NMS Plan.

⁶⁸ See Suspension Order at 31664–5.

⁶⁹ Suspension Order at 31664–5.

Equity Securities and NMS Stocks is based on the different number of shares per trade for OTC Equity Securities and NMS Stocks, the Operating Committee believes that discounting the share volume of such Execution Venue ATSs as well as the market share of the FINRA ORF would address the difference in shares per trade for OTC Equity Securities and NMS Stocks. Specifically, the Operating Committee proposes to impose a discount based on the objective measure of the average shares per trade ratio between NMS Stocks and OTC Equity Securities. Based on available data from the second quarter of 2017, the average shares per trade ratio between NMS Stocks and OTC Equity Securities is 0.17%.

The practical effect of applying such a discount for trading in OTC Equity Securities is to shift Execution Venue ATSs exclusively trading OTC Equity Securities to tiers for smaller Execution Venues and with lower fees. For example, under the Original Proposal, one Execution Venue ATS exclusively trading OTC Equity Securities was placed in the first CAT Fee tier, which had a quarterly fee of \$63,375. With the imposition of the proposed tier changes and the discount, this ATS would be ranked in Tier 3 and would owe a quarterly fee of \$21,126.

In developing the proposed discount for Equity Execution Venue ATSs exclusively trading OTC Equity Securities and FINRA, the Operating Committee evaluated different alternatives to address the concerns related to OTC Equity Securities, including creating a separate tier structure for Execution Venues trading OTC Equity Securities (like the separate tier for Options Execution Venues) as well as the proposed discounting method for Execution Venue ATSs exclusively trading OTC Equity Securities and FINRA. For these alternatives, the Operating Committee considered how each alternative would affect the recovery allocations. In addition, each of these options was considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee did not adopt a separate tier structure for Equity Execution Venues trading OTC Equity Securities as they determined that the proposed discount approach appropriately addresses the concern. The Operating Committee determined to adopt the proposed discount because it directly relates to the concern regarding the trading patterns and operations in

the OTC Equity Securities markets, and is an objective discounting method.

By increasing the number of tiers for Equity Execution Venues and imposing a discount on the market share of share volume calculation for trading in OTC Equity Securities, the Operating Committee believes that the proposed fees for Equity Execution Venues would not impose an undue or inappropriate burden on competition under Section 6 or Section 15A of the Exchange Act. Moreover, the Operating Committee believes that the proposed fees appropriately take into account the distinctions in the securities trading operations of different Equity Execution Venues, as required under the funding principles of the CAT NMS Plan.⁷⁰ As discussed above, the larger number of tiers more closely tracks the variety of sizes of equity share volume of Equity Execution Venues. In addition, the proposed discount recognizes the different types of trading operations at Equity Execution Venues trading OTC Equity Securities versus those trading NMS Stocks, thereby more closely matching the relative revenue generation by Equity Execution Venues trading OTC Equity Securities to their CAT Fees.

Accordingly, with this Amendment, SRO proposes to amend paragraph (b)(2) of the proposed fee schedule to indicate that the market share for Equity ATSs exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF would be discounted. In addition, as discussed above, to address concerns related to smaller ATSs, including those that exclusively trade OTC Equity Securities, SRO proposes to amend paragraph (b)(2) of the proposed fee schedule to add two additional tiers for Equity Execution Venues, to establish the percentages and fees for Tiers 3 and 4 as described, and to revise the percentages and fees for Tiers 1 and 2 as described.

(B) Market Makers

In the Original Proposal, the Operating Committee proposed to include both Options Market Maker quotes and equities market maker quotes in the calculation of total message traffic for such market makers for purposes of tiering for Industry Members (other than Execution Venue ATSs). The Commission and commenters raised questions as to whether the proposed treatment of Options Market Maker quotes may result in an undue or inappropriate burden on competition or may lead to

a reduction in market quality.⁷¹ To address this concern, the Operating Committee determined to discount the Options Market Maker quotes by the trade to quote ratio for options when calculating message traffic for Options Market Makers. Similarly, to avoid disincentives to quoting behavior on the equities side as well, the Operating Committee determined to discount equity market maker quotes by the trade to quote ratio for equities when calculating message traffic for equities market makers.

In the Original Proposal, market maker quotes were treated the same as other message traffic for purposes of tiering for Industry Members (other than Execution Venue ATSs). Commenters noted, however, that charging Industry Members on the basis of message traffic will impact market makers disproportionately because of their continuous quoting obligations. Moreover, in the context of options market makers, message traffic would include bids and offers for every listed options strikes and series, which are not an issue for equities.⁷² The Operating Committee proposes to address this concern in two ways. First, the Operating Committee proposes to discount Options Market Maker quotes when calculating the Options Market Makers' tier placement. Specifically, the Operating Committee proposes to impose a discount based on the objective measure of the trade to quote ratio for options. Based on available data from June 2016 through June 2017, the trade to quote ratio for options is 0.01%. Second, the Operating Committee proposes to discount equities market maker quotes when calculating the equities market makers' tier placement. Specifically, the Operating Committee proposes to impose a discount based on the objective measure of the trade to quote ratio for equities. Based on available data for June 2016 through June 2017, this trade to quote ratio for equities is 5.43%.

The practical effect of applying such discounts for quoting activity is to shift market makers' calculated message traffic lower, leading to the potential shift to tiers for lower message traffic and reduced fees. Such an approach would move sixteen Industry Member CAT Reporters that are market makers to a lower tier than in the Original Proposal. For example, under the

⁷¹ See Suspension Order at 31663-4; SIFMA Letter at 4-6; FIA Principal Traders Group Letter at 3; Sidley Letter at 2-6; Group One Letter at 2-6; and Belvedere Letter at 2.

⁷² Suspension Order at 31664.

⁷⁰ Section 11.2(b) of the CAT NMS Plan.

Original Proposal, Broker-Dealer Firm ABC was placed in the first CAT Fee tier, which had a quarterly fee of \$101,004. With the imposition of the proposed tier changes and the discount, Broker-Dealer Firm ABC, an options market maker, would be ranked in Tier 3 and would owe a quarterly fee of \$40,899.

In developing the proposed market maker discounts, the Operating Committee considered various discounts for Options Market Makers and equity market makers, including discounts of 50%, 25%, 0.00002%, as well as the 5.43% for option market makers and 0.01% for equity market makers. Each of these options were considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined to adopt the proposed discount because it directly relates to the concern regarding the quoting requirement, is an objective discounting method, and has the desired potential to shift market makers to lower fee tiers.

By imposing a discount on Options Market Makers and equities market makers' quoting traffic for the calculation of message traffic, the Operating Committee believes that the proposed fees for market makers would not impose an undue or inappropriate burden on competition under Section 6 or Section 15A of the Exchange Act. Moreover, the Operating Committee believes that the proposed fees appropriately take into account the distinctions in the securities trading operations of different Industry Members, and avoid disincentives, such as a reduction in market quality, as required under the funding principles of the CAT NMS Plan.⁷³ The proposed discounts recognize the different types of trading operations presented by Options Market Makers and equities market makers, as well as the value of the market makers' quoting activity to the market as a whole. Accordingly, the Operating Committee believes that the proposed discounts will not impact the ability of small Options Market Makers or equities market makers to provide liquidity.

Accordingly, with this Amendment, SRO proposes to amend paragraph (b)(1) of the proposed fee schedule to indicate that the message traffic related to equity market maker quotes and Options Market Maker quotes would be discounted. In addition, SRO proposes to define the term "Options Market

Maker" in paragraph (a)(1) of the proposed fee schedule.

(C) Comparability/Allocation of Costs

Under the Original Proposal, 75% of CAT costs were allocated to Industry Members (other than Execution Venue ATSSs) and 25% of CAT costs were allocated to Execution Venues. This cost allocation sought to maintain the greatest level of comparability across the funding model, where comparability considered affiliations among or between CAT Reporters. The Commission and commenters expressed concerns regarding whether the proposed 75%/25% allocation of CAT costs is consistent with the Plan's funding principles and the Exchange Act, including whether the allocation places a burden on competition or reduces market quality. The Commission and commenters also questioned whether the approach of accounting for affiliations among CAT Reporters in setting CAT Fees disadvantages non-affiliated CAT Reporters or otherwise burdens competition in the market for trading services.⁷⁴

In response to these concerns, the Operating Committee determined to revise the proposed funding model to focus the comparability of CAT Fees on the individual entity level, rather than primarily on the comparability of affiliated entities. In light of the interconnected nature of the various aspects of the funding model, the Operating Committee determined to revise various aspects of the model to enhance comparability at the individual entity level. Specifically, to achieve such comparability, the Operating Committee determined to (1) decrease the number of tiers for Industry Members (other than Execution Venue ATSSs) from nine to seven; (2) change the allocation of CAT costs between Equity Execution Venues and Options Execution Venues from 75%/25% to 67%/33%; and (3) adjust tier percentages and recovery allocations for Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSSs). With these changes, the proposed funding model provides fee comparability for the largest individual entities, with the largest Industry Members (other than Execution Venue ATSSs), Equity Execution Venues and Options Execution Venues each paying a CAT Fee of approximately \$81,000 each quarter.

(i) Number of Industry Member Tiers

In the Original Proposal, the proposed funding model had nine tiers for Industry Members (other than Execution Venue ATSSs). The Operating Committee determined that reducing the number of tiers from nine tiers to seven tiers (and adjusting the predefined Industry Member Percentages as well) continues to provide a fair allocation of fees among Industry Members and appropriately distinguishes between Industry Members with differing levels of message traffic. In reaching this conclusion, the Operating Committee considered historical message traffic generated by Industry Members across all exchanges and as submitted to FINRA's OATS, and considered the distribution of firms with similar levels of message traffic, grouping together firms with similar levels of message traffic. Based on this, the Operating Committee determined that seven tiers would group firms with similar levels of message traffic, while also achieving greater comparability in the model for the individual CAT Reporters with the greatest market share or message traffic.

In developing the proposed seven tier structure, the Operating Committee considered remaining at nine tiers, as well as reducing the number of tiers down to seven when considering how to address the concerns raised regarding comparability. For each of the alternatives, the Operating Committee considered the assignment of various percentages of Industry Members to each tier as well as various percentages of Industry Member recovery allocations for each alternative. Each of these options was considered in the context of its effects on the full funding model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined that the seven tier alternative provided the most fee comparability at the individual entity level for the largest CAT Reporters, while both providing logical breaks in tiering for Industry Members with different levels of message traffic and a sufficient number of tiers to provide for the full spectrum of different levels of message traffic for all Industry Members.

(ii) Allocation of CAT Costs Between Equity and Options Execution Venues

The Operating Committee also determined to adjust the allocation of CAT costs between Equity Execution Venues and Options Execution Venues to enhance comparability at the individual entity level. In the Original

⁷⁴ See Suspension Order at 31662-3; SIFMA Letter at 3; Sidley Letter at 6-7; Group One Letter at 2; and Belvedere Letter at 2.

⁷³ Section 11.2(b) of the CAT NMS Plan.

Proposal, 75% of Execution Venue CAT costs were allocated to Equity Execution Venues, and 25% of Execution Venue CAT costs were allocated to Options Execution Venues. To achieve the goal of increased comparability at the individual entity level, the Operating Committee analyzed a range of alternative splits for revenue recovery between Equity and Options Execution Venues, along with other changes in the proposed funding model. Based on this analysis, the Operating Committee determined to allocate 67 percent of Execution Venue costs recovered to Equity Execution Venues and 33 percent to Options Execution Venues. The Operating Committee determined that a 67/33 allocation between Equity and Options Execution Venues enhances the level of fee comparability for the largest CAT Reporters. Specifically, the largest Equity and Options Execution Venues would pay a quarterly CAT Fee of approximately \$81,000.

In developing the proposed allocation of CAT costs between Equity and Options Execution Venues, the Operating Committee considered various different options for such allocation, including keeping the original 75%/25% allocation, as well as shifting to a 70%/30%, 67%/33%, or 57.75%/42.25% allocation. For each of the alternatives, the Operating Committee considered the effect each allocation would have on the assignment of various percentages of Equity Execution Venues to each tier as well as various percentages of Equity Execution Venue recovery allocations for each alternative. Moreover, each of these options was considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined that the 67%/33% allocation between Equity and Options Execution Venues provided the greatest level of fee comparability at the individual entity level for the largest CAT Reporters, while still providing for appropriate fee levels across all tiers for all CAT Reporters.

(iii) Allocation of Costs Between Execution Venues and Industry Members

The Operating Committee determined to allocate 25% of CAT costs to Execution Venues and 75% to Industry Members (other than Execution Venue ATSSs), as it had in the Original Proposal. The Operating Committee determined that this 75%/25% allocation, along with the other changes proposed above, led to the most

comparable fees for the largest Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSSs). The largest Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSSs) would each pay a quarterly CAT Fee of approximately \$81,000.

As a preliminary matter, the Operating Committee determined that it is appropriate to allocate most of the costs to create, implement and maintain the CAT to Industry Members for several reasons. First, there are many more broker-dealers expected to report to the CAT than Participants (*i.e.*, 1,541 broker-dealer CAT Reporters versus 22 Participants). Second, since most of the costs to process CAT reportable data is generated by Industry Members, Industry Members could be expected to contribute toward such costs. Finally, as noted by the SEC, the CAT “substantially enhance[s] the ability of the SROs and the Commission to oversee today’s securities markets,”⁷⁵ thereby benefitting all market participants. After making this determination, the Operating Committee analyzed several different cost allocations, as discussed further below, and determined that an allocation where 75% of the CAT costs should be borne by the Industry Members (other than Execution Venue ATSSs) and 25% should be paid by Execution Venues was most appropriate and led to the greatest comparability of CAT Fees for the largest CAT Reporters.

In developing the proposed allocation of CAT costs between Execution Venues and Industry Members (other than Execution Venue ATSSs), the Operating Committee considered various different options for such allocation, including keeping the original 75%/25% allocation, as well as shifting to an 80%/20%, 70%/30%, or 65%/35% allocation. Each of these options was considered in the context of the full model, including the effect on each of the changes discussed above, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. In particular, for each of the alternatives, the Operating Committee considered the effect each allocation had on the assignment of various percentages of Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSSs) to each relevant tier as well as various percentages of recovery

allocations for each tier. The Operating Committee determined that the 75%/25% allocation between Execution Venues and Industry Members (other than Execution Venue ATSSs) provided the greatest level of fee comparability at the individual entity level for the largest CAT Reporters, while still providing for appropriate fee levels across all tiers for all CAT Reporters.

(iv) Affiliations

The funding principles set forth in Section 11.2 of the Plan require that the fees charged to CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether Execution Venue and/or Industry Members). The proposed funding model satisfies this requirement. As discussed above, under the proposed funding model, the largest Equity Execution Venues, Options Execution Venues, and Industry Members (other than Execution Venue ATSSs) pay approximately the same fee. Moreover, the Operating Committee believes that the proposed funding model takes into consideration affiliations between or among CAT Reporters as complexes with multiple CAT Reporters will pay the appropriate fee based on the proposed fee schedule for each of the CAT Reporters in the complex. For example, a complex with a Tier 1 Equity Execution Venue and Tier 2 Industry Member will pay the same as another complex with a Tier 1 Equity Execution Venue and Tier 2 Industry Member.

(v) Fee Schedule Changes

Accordingly, with this Amendment, SRO proposes to amend paragraphs (b)(1) and (2) of the proposed fee schedule to reflect the changes discussed in this section. Specifically, SRO proposes to amend paragraph (b)(1) and (2) of the proposed fee schedule to update the number of tiers, and the fees and percentages assigned to each tier to reflect the described changes.

(D) Market Share/Message Traffic

In the Original Proposal, the Operating Committee proposed to charge Execution Venues based on market share and Industry Members (other than Execution Venue ATSSs) based on message traffic. Commenters questioned the use of the two different metrics for calculating CAT Fees.⁷⁶ The

⁷⁵ Securities Exchange Act Rel. No. 67457 (Jul 18, 2012), 77 FR 45722, 45726 (Aug. 1, 2012) (“Rule 613 Adopting Release”).

⁷⁶ Suspension Order at 31663; FIA Principal Traders Group Letter at 2.

Operating Committee continues to believe that the proposed use of market share and message traffic satisfies the requirements of the Exchange Act and the funding principles set forth in the CAT NMS Plan. Accordingly, the proposed funding model continues to charge Execution Venues based on market share and Industry Members (other than Execution Venue ATSS) based on message traffic.

In drafting the Plan and the Original Proposal, the Operating Committee expressed the view that the correlation between message traffic and size does not apply to Execution Venues, which they described as producing similar amounts of message traffic regardless of size. The Operating Committee believed that charging Execution Venues based on message traffic would result in both large and small Execution Venues paying comparable fees, which would be inequitable, so the Operating Committee determined that it would be more appropriate to treat Execution Venues differently from Industry Members in the funding model. Upon a more detailed analysis of available data, however, the Operating Committee noted that Execution Venues have varying levels of message traffic. Nevertheless, the Operating Committee continues to believe that a bifurcated funding model—where Industry Members (other than Execution Venue ATSS) are charged fees based on message traffic and Execution Venues are charged based on market share—complies with the Plan and meets the standards of the Exchange Act for the reasons set forth below.

Charging Industry Members based on message traffic is the most equitable means for establishing fees for Industry Members (other than Execution Venue ATSS). This approach will assess fees to Industry Members that create larger volumes of message traffic that are relatively higher than those fees charged to Industry Members that create smaller volumes of message traffic. Since message traffic, along with fixed costs of the Plan Processor, is a key component of the costs of operating the CAT, message traffic is an appropriate criterion for placing Industry Members in a particular fee tier.

The Operating Committee also believes that it is appropriate to charge Execution Venues CAT Fees based on their market share. In contrast to Industry Members (other than Execution Venue ATSS), which determine the degree to which they produce the message traffic that constitutes CAT Reportable Events, the CAT Reportable Events of Execution Venues are largely derivative of quotations and orders

received from Industry Members that the Execution Venues are required to display. The business model for Execution Venues, however, is focused on executions in their markets. As a result, the Operating Committee believes that it is more equitable to charge Execution Venues based on their market share rather than their message traffic.

Similarly, focusing on message traffic would make it more difficult to draw distinctions between large and small exchanges, including options exchanges in particular. For instance, the Operating Committee analyzed the message traffic of Execution Venues and Industry Members for the period of April 2017 to June 2017 and placed all CAT Reporters into a nine-tier framework (*i.e.*, a single tier may include both Execution Venues and Industry Members). The Operating Committee's analysis found that the majority of exchanges (15 total) were grouped in Tiers 1 and 2. Moreover, virtually all of the options exchanges were in Tiers 1 and 2.⁷⁷ Given the concentration of options exchanges in Tiers 1 and 2, the Operating Committee believes that using a funding model based purely on message traffic would make it more difficult to distinguish between large and small options exchanges, as compared to the proposed bifurcated fee approach.

In addition, the Operating Committee also believes that it is appropriate to treat ATSS as Execution Venues under the proposed funding model since ATSS have business models that are similar to those of exchanges, and ATSS also compete with exchanges. For these reasons, the Operating Committee believes that charging Execution Venues based on market share is more appropriate and equitable than charging Execution Venues based on message traffic.

(E) Time Limit

In the Original Proposal, the Operating Committee did not impose any time limit on the application of the proposed CAT Fees. As discussed above, the Operating Committee developed the proposed funding model by analyzing currently available historical data. Such historical data, however, is not as comprehensive as data that will be submitted to the CAT. Accordingly, the Operating Committee believes that it will be appropriate to revisit the funding model once CAT Reporters have actual experience with

⁷⁷ The Participants note that this analysis did not place MIA X PEARL in Tier 1 or Tier 2 since the exchange commenced trading on February 6, 2017.

the funding model. Accordingly, the Operating Committee proposes to include a sunset provision in the proposed fee model. The proposed CAT Fees will sunset two years after the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. Specifically, SRO proposes to add paragraph (d) of the proposed fee schedule to include this sunset provision. Such a provision will provide the Operating Committee and other market participants with the opportunity to reevaluate the performance of the proposed funding model.

(F) Tier Structure/Decreasing Cost per Unit

In the Original Proposal, the Operating Committee determined to use a tiered fee structure. The Commission and commenters questioned whether the decreasing cost per additional unit (of message traffic in the case of Industry Members, or of share volume in the case of Execution Venues) in the proposed fee schedules burdens competition by disadvantaging small Industry Members and Execution Venues and/or by creating barriers to entry in the market for trading services and/or the market for broker-dealer services.⁷⁸

The Operating Committee does not believe that decreasing cost per additional unit in the proposed fee schedules places an unfair competitive burden on Small Industry Members and Execution Venues. While the cost per unit of message traffic or share volume necessarily will decrease as volume increases in any tiered fee model using fixed fee percentages and, as a result, Small Industry Members and small Execution Venues may pay a larger fee per message or share, this comment fails to take account of the substantial differences in the absolute fees paid by Small Industry Members and small Execution Venues as opposed to large Industry Members and large Execution Venues. For example, under the fee proposals, Tier 7 Industry Members would pay a quarterly fee of \$105, while Tier 1 Industry Members would pay a quarterly fee of \$81,483. Similarly, a Tier 4 Equity Execution Venue would pay a quarterly fee of \$129, while a Tier 1 Equity Execution Venue would pay a quarterly fee of \$81,048. Thus, Small Industry Members and small Execution Venues are not disadvantaged in terms of the total fees that they actually pay. In contrast to a tiered model using fixed fee percentages, the Operating Committee believes that strictly variable

⁷⁸ Suspension Order at 31667.

or metered funding models based on message traffic or share volume would be more likely to affect market behavior and may present administrative challenges (e.g., the costs to calculate and monitor fees may exceed the fees charged to the smallest CAT Reporters).

(G) Other Alternatives Considered

In addition to the various funding model alternatives discussed above regarding discounts, number of tiers and allocation percentages, the Operating Committee also discussed other possible funding models. For example, the Operating Committee considered allocating the total CAT costs equally among each of the Participants, and then permitting each Participant to charge its own members as it deems appropriate.⁷⁹ The Operating Committee determined that such an approach raised a variety of issues, including the likely inconsistency of the ensuing charges, potential for lack of transparency, and the impracticality of multiple SROs submitting invoices for CAT charges. The Operating Committee therefore determined that the proposed funding model was preferable to this alternative.

(H) Industry Member Input

Commenters expressed concern regarding the level of Industry Member input into the development of the proposed funding model, and certain commenters have recommended a greater role in the governance of the CAT.⁸⁰ The Participants previously addressed this concern in its letters responding to comments on the Plan and the CAT Fees.⁸¹ As discussed in those letters, the Participants discussed the funding model with the Development Advisory Group (“DAG”), the advisory group formed to assist in the development of the Plan, during its original development.⁸² Moreover, Industry Members currently have a voice in the affairs of the Operating Committee and operation of the CAT generally through the Advisory Committee established pursuant to Rule 613(b)(7) and Section 4.13 of the Plan. The Advisory Committee attends all meetings of the Operating Committee, as well as meetings of various subcommittees and working groups, and

⁷⁹ See FIA Principal Traders Group Letter at 2; Belvedere Letter at 4.

⁸⁰ See Suspension Order at 31662; MFA Letter at 1–2.

⁸¹ Letter from Participants to Brent J. Fields, Secretary, SEC (Sept. 23, 2016) (“Plan Response Letter”); Letter from CAT NMS Plan Participants to Brent J. Fields, Secretary, SEC (June 29, 2017) (“Fee Rule Response Letter”).

⁸² Fee Rule Response Letter at 2; Plan Response Letter at 18.

provides valuable and critical input for the Participants’ and Operating Committee’s consideration. The Operating Committee continues to believe that that Industry Members have an appropriate voice regarding the funding of the Company.

(I) Conflicts of Interest

Commenters also raised concerns regarding Participant conflicts of interest in setting the CAT Fees.⁸³ The Participants previously responded to this concern in both the Plan Response Letter and the Fee Rule Response Letter.⁸⁴ As discussed in those letters, the Plan, as approved by the SEC, adopts various measures to protect against the potential conflicts issues raised by the Participants’ fee-setting authority. Such measures include the operation of the Company as a not for profit business league and on a break-even basis, and the requirement that the Participants file all CAT Fees under Section 19(b) of the Exchange Act. The Operating Committee continues to believe that these measures adequately protect against concerns regarding conflicts of interest in setting fees, and that additional measures, such as an independent third party to evaluate an appropriate CAT Fee, are unnecessary.

(J) Fee Transparency

Commenters also argued that they could not adequately assess whether the CAT Fees were fair and equitable because the Operating Committee has not provided details as to what the Participants are receiving in return for the CAT Fees.⁸⁵ The Operating Committee provided a detailed discussion of the proposed funding model in the Plan, including the expenses to be covered by the CAT Fees. In addition, the agreement between the Company and the Plan Processor sets forth a comprehensive set of services to be provided to the Company with regard to the CAT. Such services include, without limitation: User support services (e.g., a help desk); tools to allow each CAT Reporter to monitor and correct their submissions; a comprehensive compliance program to monitor CAT Reporters’ adherence to Rule 613; publication of detailed Technical Specifications for Industry Members and Participants; performing data linkage functions; creating comprehensive data security and confidentiality safeguards; creating

⁸³ See Suspension Order at 31662; FIA Principal Traders Group at 3.

⁸⁴ See Plan Response Letter at 16, 17; Fee Rule Response Letter at 10–12.

⁸⁵ See FIA Principal Traders Group at 3; SIFMA Letter at 3.

query functionality for regulatory users (i.e., the Participants, and the SEC and SEC staff); and performing billing and collection functions. The Operating Committee further notes that the services provided by the Plan Processor and the costs related thereto were subject to a bidding process.

(K) Funding Authority

Commenters also questioned the authority of the Operating Committee to impose CAT Fees on Industry Members.⁸⁶ The Participants previously responded to this same comment in the Plan Response Letter and the Fee Rule Response Letter.⁸⁷ As the Participants previously noted, SEC Rule 613 specifically contemplates broker-dealers contributing to the funding of the CAT. In addition, as noted by the SEC, the CAT “substantially enhance[s] the ability of the SROs and the Commission to oversee today’s securities markets,”⁸⁸ thereby benefitting all market participants. Therefore, the Operating Committee continues to believe that it is equitable for both Participants and Industry Members to contribute to funding the cost of the CAT.

2. Statutory Basis

SRO believes that the proposed rule change is consistent with the provisions of Section 6(b)(5) of the Act,⁸⁹ which require, among other things, that the SRO rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest, and not designed to permit unfair discrimination between customers, issuers, brokers and dealer, and Section 6(b)(4) of the Act,⁹⁰ which requires that SRO rules provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using its facilities. As discussed above, the SEC approved the bifurcated, tiered, fixed fee funding model in the CAT NMS Plan, finding it was reasonable and that it equitably allocated fees among Participants and Industry Members. SRO believes that the proposed tiered fees adopted pursuant to the funding model approved by the SEC in the CAT NMS Plan are reasonable, equitably allocated and not unfairly discriminatory.

⁸⁶ See Suspension Order at 31661–2; SIFMA Letter at 2.

⁸⁷ See Plan Response Letter at 9–10; Fee Rule Response Letter at 3–4.

⁸⁸ Rule 613 Adopting Release at 45726.

⁸⁹ 15 U.S.C. 78f(b)(5).

⁹⁰ 15 U.S.C. 78f(b)(4).

SRO believes that this proposal is consistent with the Act because it implements, interprets or clarifies the provisions of the Plan, and is designed to assist SRO and its Industry Members in meeting regulatory obligations pursuant to the Plan. In approving the Plan, the SEC noted that the Plan “is necessary and appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanism of a national market system, or is otherwise in furtherance of the purposes of the Act.”⁹¹ To the extent that this proposal implements, interprets or clarifies the Plan and applies specific requirements to Industry Members, SRO believes that this proposal furthers the objectives of the Plan, as identified by the SEC, and is therefore consistent with the Act.

SRO believes that the proposed tiered fees are reasonable. First, the total CAT Fees to be collected would be directly associated with the costs of establishing and maintaining the CAT, where such costs include Plan Processor costs and costs related to insurance, third party services and the operational reserve. The CAT Fees would not cover Participant services unrelated to the CAT. In addition, any surplus CAT Fees cannot be distributed to the individual Participants; such surpluses must be used as a reserve to offset future fees. Given the direct relationship between the fees and the CAT costs, SRO believes that the total level of the CAT Fees is reasonable.

In addition, SRO believes that the proposed CAT Fees are reasonably designed to allocate the total costs of the CAT equitably between and among the Participants and Industry Members, and are therefore not unfairly discriminatory. As discussed in detail above, the proposed tiered fees impose comparable fees on similarly situated CAT Reporters. For example, those with a larger impact on the CAT (measured via message traffic or market share) pay higher fees, whereas CAT Reporters with a smaller impact pay lower fees. Correspondingly, the tiered structure lessens the impact on smaller CAT Reporters by imposing smaller fees on those CAT Reporters with less market share or message traffic. In addition, the fee structure takes into consideration distinctions in securities trading operations of CAT Reporters, including ATSS trading OTC Equity Securities, and equity and options market makers.

Moreover, SRO believes that the division of the total CAT costs between Industry Members and Execution

Venues, and the division of the Execution Venue portion of total costs between Equity and Options Execution Venues, is reasonably designed to allocate CAT costs among CAT Reporters. The 75%/25% division between Industry Members (other than Execution Venue ATSS) and Execution Venues maintains the greatest level of comparability across the funding model. For example, the cost allocation establishes fees for the largest Industry Members (*i.e.*, those Industry Members in Tiers 1) that are comparable to the largest Equity Execution Venues and Options Execution Venues (*i.e.*, those Execution Venues in Tier 1). Furthermore, the allocation of total CAT cost recovery recognizes the difference in the number of CAT Reporters that are Industry Members (other than Execution Venue ATSS) versus CAT Reporters that are Execution Venues. Similarly, the 67%/33% allocation between Equity and Options Execution Venues also helps to provide fee comparability for the largest CAT Reporters.

Finally, SRO believes that the proposed fees are reasonable because they would provide ease of calculation, ease of billing and other administrative functions, and predictability of a fixed fee. Such factors are crucial to estimating a reliable revenue stream for the Company and for permitting CAT Reporters to reasonably predict their payment obligations for budgeting purposes.

(B) Self-Regulatory Organization's Statement on Burden on Competition

Section 6(b)(8) of the Act⁹² require that SRO rules not impose any burden on competition that is not necessary or appropriate. SRO does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. SRO notes that the proposed rule change implements provisions of the CAT NMS Plan approved by the Commission, and is designed to assist SRO in meeting its regulatory obligations pursuant to the Plan. Similarly, all national securities exchanges and FINRA are proposing this proposed fee schedule to implement the requirements of the CAT NMS Plan. Therefore, this is not a competitive fee filing and, therefore, it does not raise competition issues between and among the exchanges and FINRA.

Moreover, as previously described, SRO believes that the proposed rule change fairly and equitably allocates costs among CAT Reporters. In

particular, the proposed fee schedule is structured to impose comparable fees on similarly situated CAT Reporters, and lessen the impact on smaller CAT Reporters. CAT Reporters with similar levels of CAT activity will pay similar fees. For example, Industry Members (other than Execution Venue ATSS) with higher levels of message traffic will pay higher fees, and those with lower levels of message traffic will pay lower fees. Similarly, Execution Venue ATSS and other Execution Venues with larger market share will pay higher fees, and those with lower levels of market share will pay lower fees. Therefore, given that there is generally a relationship between message traffic and/or market share to the CAT Reporter's size, smaller CAT Reporters generally pay less than larger CAT Reporters. Accordingly, SRO does not believe that the CAT Fees would have a disproportionate effect on smaller or larger CAT Reporters. In addition, ATSS and exchanges will pay the same fees based on market share. Therefore, SRO does not believe that the fees will impose any burden on the competition between ATSS and exchanges. Accordingly, SRO believes that the proposed fees will minimize the potential for adverse effects on competition between CAT Reporters in the market.

Furthermore, the tiered, fixed fee funding model limits the disincentives to providing liquidity to the market. Therefore, the proposed fees are structured to limit burdens on competitive quoting and other liquidity provision in the market.

In addition, the Operating Committee believes that the proposed changes to the Original Proposal, as discussed above in detail, address certain competitive concerns raised by commenters, including concerns related to, among other things, smaller ATSS, ATSS trading OTC Equity Securities, market making quoting and fee comparability. As discussed above, the Operating Committee believes that the proposals address the competitive concerns raised by commenters.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

SRO has set forth responses to comments received regarding the Original Proposal in Section 3(a)(4) above.

III. Solicitation of Comments on Amendment No. 1

Interested persons are invited to submit written data, views, and arguments concerning the foregoing,

⁹¹ Approval Order at 84697.

⁹² 15 U.S.C. 78f(b)(8)

including whether Amendment No. 1 is consistent with the Act. In particular, the Commission seeks comment on the following:

Allocation of Costs

(1) Commenters' views as to whether the allocation of CAT costs is consistent with the funding principle expressed in the CAT NMS Plan that requires the Operating Committee to "avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality."⁹³

(2) Commenters' views as to whether the allocation of 25% of CAT costs to the Execution Venues (including all the Participants) and 75% to Industry Members, will incentivize or disincentivize the Participants to effectively and efficiently manage the CAT costs incurred by the Participants since they will only bear 25% of such costs.

(3) Commenters' views on the determination to allocate 75% of all costs incurred by the Participants from November 21, 2016 to November 21, 2017 to Industry Members (other than Execution Venue ATSS), when such costs are development and build costs and when Industry Member reporting is scheduled to commence a year later, including views on whether such "fees, costs and expenses . . . [are] fairly and reasonably shared among the Participants and Industry Members" in accordance with the CAT NMS Plan.⁹⁴

(4) Commenters' views on whether an analysis of the ratio of the expected Industry Member-reported CAT messages to the expected SRO-reported CAT messages should be the basis for determining the allocation of costs between Industry Members and Execution Venues.⁹⁵

(5) Any additional data analysis on the allocation of CAT costs, including any existing supporting evidence.

Comparability

(6) Commenters' views on the shift in the standard used to assess the comparability of CAT Fees, with the emphasis now on comparability of individual entities instead of affiliated entities, including views as to whether this shift is consistent with the funding principle expressed in the CAT NMS Plan that requires the Operating

Committee to establish a fee structure in which the fees charged to "CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether Execution Venues and/or Industry Members)."⁹⁶

(7) Commenters' views as to whether the reduction in the number of tiers for Industry Members (other than Execution Venue ATSS) from nine to seven, the revised allocation of CAT costs between Equity Execution Venues and Options Execution Venues from a 75%/25% split to a 67%/33% split, and the adjustment of all tier percentages and recovery allocations achieves comparability across individual entities, and whether these changes should have resulted in a change to the allocation of 75% of total CAT costs to Industry Members (other than Execution Venue ATSS) and 25% of such costs to Execution Venues.

Discounts

(8) Commenters' views as to whether the discounts for options market-makers, equities market-makers, and Equity ATSS trading OTC Equity Securities are clear, reasonable, and consistent with the funding principle expressed in the CAT NMS Plan that requires the Operating Committee to "avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality,"⁹⁷ including views as to whether the discounts for market-makers limit any potential disincentives to act as a market-maker and/or to provide liquidity due to CAT fees.

Calculation of Costs and Imposition of CAT Fees

(9) Commenters' views as to whether the amendment provides sufficient information regarding the amount of costs incurred from November 21, 2016 to November 21, 2017, particularly, how those costs were calculated, how those costs relate to the proposed CAT Fees, and how costs incurred after November 21, 2017 will be assessed upon Industry Members and Execution Venues;

(10) Commenters' views as to whether the timing of the imposition and collection of CAT Fees on Execution Venues and Industry Members is reasonably related to the timing of when the Company expects to incur such

development and implementation costs.⁹⁸

(11) Commenters' views on dividing CAT costs equally among each of the Participants, and then each Participant charging its own members as it deems appropriate, taking into consideration the possibility of inconsistency in charges, the potential for lack of transparency, and the impracticality of multiple SROs submitting invoices for CAT charges.

Burden on Competition and Barriers to Entry

(12) Commenters' views as to whether the allocation of 75% of CAT costs to Industry Members (other than Execution Venue ATSS) imposes any burdens on competition to Industry Members, including views on what baseline competitive landscape the Commission should consider when analyzing the proposed allocation of CAT costs.

(13) Commenters' views on the burdens on competition, including the relevant markets and services and the impact of such burdens on the baseline competitive landscape in those relevant markets and services.

(14) Commenters' views on any potential burdens imposed by the fees on competition between and among CAT Reporters, including views on which baseline markets and services the fees could have competitive effects on and whether the fees are designed to minimize such effects.

(15) Commenters' general views on the impact of the proposed fees on economies of scale and barriers to entry.

(16) Commenters' views on the baseline economies of scale and barriers to entry for Industry Members and Execution Venues and the relevant markets and services over which these economies of scale and barriers to entry exist.

(17) Commenters' views as to whether a tiered fee structure necessarily results in less active tiers paying more per unit than those in more active tiers, thus creating economies of scale, with supporting information if possible.

(18) Commenters' views as to how the level of the fees for the least active tiers would or would not affect barriers to entry.

(19) Commenters' views on whether the difference between the cost per unit (messages or market share) in less active tiers compared to the cost per unit in more active tiers creates regulatory economies of scale that favor larger competitors and, if so:

⁹³ Section 11.2(e) of the CAT NMS Plan.

⁹⁴ Section 11.1(c) of the CAT NMS Plan.

⁹⁵ The Notice for the CAT NMS Plan did not provide a comprehensive count of audit trail message traffic from different regulatory data sources, but the Commission did estimate the ratio of all SRO audit trail messages to OATS audit trail messages to be 1.9431. See Securities Exchange Act Release No. 77724 (April 27, 2016), 81 FR 30613, 30721 n.919 and accompanying text (May 17, 2016).

⁹⁶ Section 11.2(c) of the CAT NMS Plan.

⁹⁷ Section 11.2(e) of the CAT NMS Plan.

⁹⁸ Section 11.1(c) of the CAT NMS Plan.

(a) How those economies of scale compare to operational economies of scale; and

(b) Whether those economies of scale reduce or increase the current advantages enjoyed by larger competitors or otherwise alter the competitive landscape.

(20) Commenters' views on whether the fees could affect competition between and among national securities exchanges and FINRA, in light of the fact that implementation of the fees does not require the unanimous consent of all such entities, and, specifically:

(a) Whether any of the national securities exchanges or FINRA are disadvantaged by the fees; and

(b) If so, whether any such disadvantages would be of a magnitude that would alter the competitive landscape.

(21) Commenters' views on any potential burden imposed by the fees on competitive quoting and other liquidity provision in the market, including, specifically:

(a) Commenters' views on the kinds of disincentives that discourage liquidity provision and/or disincentives that the Commission should consider in its analysis;

(b) Commenters' views as to whether the fees could disincentivize the provision of liquidity; and

(c) Commenters' views as to whether the fees limit any disincentives to provide liquidity.

(22) Commenters' views as to whether the amendment adequately responds to and/or addresses comments received on related filings.

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-BatsEDGA-2017-13 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-BatsEDGA-2017-13. 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 website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements

with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-BatsEDGA-2017-13 Amendment No. 1 and should be submitted on or before January 4, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁹⁹

Robert W. Errett,
Deputy Secretary.

[FR Doc. 2017-27011 Filed 12-13-17; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-82250; File No. SR-Phlx-2017-102]

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Exclude Options Overlying NDX From Several Pricing Programs

December 8, 2017.

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 December 1, 2017, Nasdaq PHLX LLC ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to

solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Exchange's Pricing Schedule at Section II, "Multiply Listed Options Fees,"³ and Section IV, entitled "Other Transaction Fees." Specifically, the Exchange proposes to exclude options overlying NDX⁴ from several pricing programs.

The text of the proposed rule change is available on the Exchange's website at <http://nasdaqphlx.cchwallstreet.com/>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Phlx proposes to exclude options overlying NDX from the Monthly Market Maker Cap, the Market Access and Routing Subsidy or "MARS," and Phlx's Price Improvement XL ("PIXL") pricing. Each of the proposals are discussed in more detail below. The Exchange seeks to differentiate pricing for this exclusively-listed product from other multiply listed product pricing.

³ This includes options overlying equities, ETFs, ETNs and indexes which are Multiply Listed.

⁴ NDX represents options on the Nasdaq 100 Index traded under the symbol NDX ("NDX").

⁹⁹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

Monthly Market Maker Cap

Today, Phlx Specialists⁵ and Market Makers⁶ are subject to a “Monthly Market Maker Cap” of \$500,000 for: (i) Electronic Option Transaction Charges, excluding surcharges; and (ii) Qualified Contingent Cross (“QCC”) Transaction Fees (as defined in Exchange Rule 1080(o) and Floor QCC Orders, as defined in 1064(e)).⁷ All dividend, merger, short stock interest, reversal and conversion, jelly roll and box spread strategy executions (as defined in Section II of the Pricing Schedule) will be excluded from the Monthly Market Maker Cap. Specialists or Market Makers that (i) are on the contra-side of an electronically-delivered and executed Customer order, excluding responses to a PIXL auction; and (ii) have reached the Monthly Market Maker Cap will be assessed fees as follows: \$0.05 per contract Fee for Adding Liquidity in Penny Pilot Options, \$0.18 per contract Fee for Removing Liquidity in Penny Pilot Options and \$0.18 per contract in Non-Penny Pilot Options.

The Exchange proposes to amend the Monthly Market Maker Cap to exclude options overlying NDX from electronic Options Transaction Charges as subject to the Monthly Market Maker Cap. Transactions in NDX will not be subject to the Monthly Market Maker Cap.

PIXL

Today, the Exchange assess a \$0.07 per contract PIXL Initiating Order Fee. However, if the member or member organization qualifies for the Tier 3, 4 or 5 Customer Rebate in Section B the member or member organization is assessed \$0.05 per contract. If the member or member organization executes equal to or greater than 3.00% of National Customer Volume in Multiply-Listed equity and ETF Options Classes (excluding SPY Options) in a

⁵ The term “Specialist” applies to transactions for the account of a Specialist (as defined in Exchange Rule 1020(a)). A Specialist is an Exchange member who is registered as an options specialist pursuant to Rule 1020(a). An options Specialist includes a Remote Specialist which is defined as an options specialist in one or more classes that does not have a physical presence on an Exchange floor and is approved by the Exchange pursuant to Rule 501. See Preface to Phlx’s Pricing Schedule.

⁶ The term “Registered Options Trader” or “ROT”, “Streaming Quote Trader” or “SQT” and “Remote Streaming Quote Trader” or “RSQT” applies to transactions for the accounts of ROTs, SQTs, and RSQTs. For purposes of the Pricing Schedule, the term “Market Maker” will be utilized to describe fees and rebates applicable to ROTs, SQTs and RSQTs. See Preface to Phlx’s Pricing Schedule.

⁷ The trading activity of separate Specialist and Market Maker member organizations is aggregated in calculating the Monthly Market Maker Cap if there is Common Ownership between the member organizations.

given month, the member or member organization is assessed no fee for Complex PIXL Orders. Any member or member organization under Common Ownership with another member or member organization that qualifies for a Customer Rebate Tier 4 or 5 in Section B, or executes equal to or greater than 3.00% of National Customer Volume in Multiply-Listed equity and ETF Options Classes (excluding SPY Options) in a given month receives one of the PIXL Initiating Order discounts as described above. Members or member organizations that qualify for Customer Rebate Tiers 2 through 6 or qualify for the Monthly Firm Fee Cap⁸ are eligible for a rebate of \$0.12 per contract for all Complex PIXL Orders (excluding SPY Options) greater than 499 contracts, provided the member executes an average of 2,500 contracts per day of SPY Complex PIXL Orders in a month.

Further, the Exchange has pricing noted for PIXL Order Executions in Section II Multiply Listed Options. When the PIXL Order is contra to the Initiating Order a Customer PIXL Order is assessed no fee and Non-Customer PIXL Orders will be assessed \$0.30 per contract. When a PIXL Order is contra to a PIXL Auction Responder, a Customer PIXL Order is assessed no fee, other Non-Customer PIXL Orders are assessed \$0.30 per contract in Penny Pilot Options or \$0.38 per contract in Non-Penny Pilot Options. A Responder that is a Specialist or a Market Maker is assessed \$0.25 per contract in Penny Pilot Options or \$0.40 per contract in Non-Penny Pilot Options. Other Non-Customer Responders are assessed \$0.48 per contract in Penny Pilot Options or \$0.70 per contract in Non-Penny Pilot Options when contra to a PIXL Order. A Responder that is a Customer is assessed \$0.00 per contract in Penny Pilot Options and Non-Penny Pilot Options. Finally, when a PIXL Order is contra to a resting order or quote a Customer PIXL Order is assessed no fee, other Non-Customers are assessed \$0.30 per contract and the resting order or quote is assessed the appropriate Options Transaction Charge in Section II. All other fees discussed in Section II, including Marketing Fees and surcharges, apply as appropriate.

The Exchange proposes to exclude options overlying NDX from the PIXL Pricing in Section IV, Part A. NDX would be subject to Section II pricing, specifically the Options Transactions Charges in NDX as noted.

⁸ Firms are subject to a maximum fee of \$75,000 (“Monthly Firm Fee Cap”). Additional details on the Monthly Firm Fee Cap are at Section II of the Pricing Schedule.

MARS

Today, MARS, pays a subsidy to Phlx members that provide certain order routing functionalities to other Phlx members and/or use such functionalities themselves. Generally, under MARS, Phlx pays participating Phlx members to subsidize their costs of providing routing services to route orders to Phlx. To qualify for MARS, a Phlx member’s order routing functionality would be required to meet certain criteria.⁹ With respect to Complex Orders, the Exchange would not require Complex Orders to enable the electronic routing of orders to all of the U.S. options exchanges or provide current consolidated market data from the U.S. options exchanges. Any Phlx member may apply for MARS, provided the requirements are met, including a robust and reliable System. The member is solely responsible for implementing and operating its System. The Exchange is not proposing to amend this eligibility standards.

Today, a MARS Payment would be made to Phlx members that have System Eligibility and have routed the requisite number of Eligible Contracts daily in a month, which were executed on Phlx. For the purpose of qualifying for the MARS Payment, Eligible Contracts include Firm,¹⁰ Broker-Dealer,¹¹ Joint Back Office or “JBO”¹² or

⁹ Specifically, a Phlx member’s routing system (hereinafter “System”) would be required to: (1) Enable the electronic routing of orders to all of the U.S. options exchanges, including Phlx; (2) provide current consolidated market data from the U.S. options exchanges; and (3) be capable of interfacing with Phlx’s API to access current Phlx match engine functionality. Further, the member’s System would also need to cause Phlx to be the one of the top five default destination exchanges for individually executed marketable orders if Phlx is at the national best bid or offer (“NBBO”), regardless of size or time, but allow any user to manually override Phlx as a default destination on an order-by-order basis. Notwithstanding the above, with respect to Complex Orders a Phlx member’s routing system would not be required to enable the electronic routing of orders to all of the U.S. options exchanges or provide current consolidated market data from the U.S. options exchanges. Any Phlx member would be permitted to avail itself of this arrangement, provided that its order routing functionality incorporates the features described above and satisfies Phlx that it appears to be robust and reliable. The member remains solely responsible for implementing and operating its system.

¹⁰ The term “Firm” or (“F”) applies to any transaction that is identified by a Participant for clearing in the Firm range at OCC.

¹¹ The term “Broker-Dealer” applies to any transaction which is not subject to any of the other transaction fees applicable within a particular category.

¹² The term “Joint Back Office” or “JBO” applies to any transaction that is identified by a member or member organization for clearing in the Firm range at OCC and is identified with an origin code as a JBO. A JBO will be priced the same as a Broker-Dealer. A JBO participant is a member, member

Professional¹³ equity option orders that are electronically delivered and executed. Eligible Contracts do not include floor-based orders, qualified contingent cross or “QCC” orders,¹⁴

price improvement or “PIXL” orders,¹⁵ Mini-Option orders¹⁶ or Singly-Listed Options¹⁷ orders. The Eligible Contracts requirements are not being amended.

Phlx members that have System Eligibility and have executed the requisite number of Eligible Contracts in a month are paid the following per contract rebates:¹⁸

Tiers	Average daily volume (“ADV”)	MARS payment	
		Non-SPY	SPY
1	1,000	\$0.01	\$0.01
2	30,000	0.10	0.10
3	40,000	0.12	0.12
4	52,500	0.14	0.12
5	65,000	0.18	0.12
6	75,000	0.20	0.12

The Exchange proposes to exclude options overlying NDX from Eligible Contracts for purposes of qualifying for a MARS Payment. Only Eligible Contracts are paid rebates, therefore no MARS Payment would be paid on options overlying NDX.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹⁹ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,²⁰ in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed pricing changes to exclude options overlying NDX from the Monthly Market Maker Cap, MARS and PIXL pricing for NDX are reasonable, equitable and not unfairly discriminatory. NDX transitioned in 2017 to an exclusively-listed product. Similar to other proprietary products, the Exchange seeks to recoup the operational costs for listing proprietary products.²¹ Also, pricing by symbol is a common practice on many U.S. options exchanges as a means to incentivize

order flow to be sent to an exchange for execution in particular products. Other options exchanges price by symbol.²² Further, the Exchange notes that with its products, market participants are offered an opportunity to either transact options overlying NDX or separately execute options overlying PowerShares QQQ Trust (“QQQ”).²³ Offering products such as QQQ provides market participants with a variety of choices in selecting the product they desire to utilize to transact NDX.²⁴ When exchanges are able to recoup costs associated with offering proprietary products, it incentivizes growth and competition for the innovation of additional products.

Monthly Market Maker Cap

The Exchange’s proposal to exclude electronic Options Transaction Charges for options overlying NDX from the Monthly Market Maker Cap is reasonable because Market Makers will continue to be able to utilize the cap to reduce electronic Option Transaction Charges, excluding surcharges, QCC transaction fees and Floor QCC Orders, despite the exclusion of NDX transactions. The Exchange’s proposal to exclude electronic Options Transaction Charges for options overlying NDX from the Monthly Market Maker Cap is equitable and not

unfairly discriminatory because the Exchange will uniformly exclude electronic options overlying NDX from the Monthly Market Maker Cap.

PIXL

The Exchange’s proposal to exclude options overlying NDX from the PIXL Pricing in Section IV, Part A is reasonable because the Exchange believes that the PIXL pricing continues to be competitive despite the exclusion of NDX. The Exchange’s proposal to exclude options overlying NDX from the PIXL Pricing in Section IV, Part A is equitable and not unfairly discriminatory because the Exchange will uniformly exclude options overlying NDX from PIXL pricing.

MARS

The Exchange’s proposal to exclude options overlying NDX from Eligible Contracts for purposes of qualifying for a MARS Payment is reasonable because the Exchange believes that despite the exclusion of NDX, MARS remains a competitive offering. The Exchange’s proposal to exclude options overlying NDX from Eligible Contracts for purposes of qualifying for a MARS Payment is equitable and not unfairly discriminatory because the Exchange will uniformly exclude options overlying NDX from MARS.

organization or non-member organization that maintains a JBO arrangement with a clearing broker-dealer (“JBO Broker”) subject to the requirements of Regulation T Section 220.7 of the Federal Reserve System as further discussed at Exchange Rule 703.

¹³ The term “professional” means any person or entity that (i) is not a broker or dealer in securities, and (ii) places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s). See Rule 1000(b)(14).

¹⁴ A QCC Order is comprised of an order to buy or sell at least 1000 contracts that is identified as being part of a qualified contingent trade, as that term is defined in Rule 1080(o)(3), coupled with a contra-side order to buy or sell an equal number of contracts. The QCC Order must be executed at a price at or between the NBBO and be rejected if a

Customer order is resting on the Exchange book at the same price. A QCC Order shall only be submitted electronically from off the floor to the Exchange’s match engine. See Rule 1080(o).

¹⁵ PIXL is the Exchange’s price improvement mechanism known as Price Improvement XL or (PIXLSM). See Rule 1080(n).

¹⁶ Mini Options are further specified in Phlx Rule 1012, Commentary .13.

¹⁷ Singly Listed Options are options overlying currencies, equities, ETFs, ETNs treasury securities and indexes not listed on another exchange.

¹⁸ The specified MARS Payment are paid on all executed Eligible Contracts which are routed to Phlx through a participating Phlx member’s System and meet the requisite Eligible Contracts ADV. No payment are made with respect to orders that are routed to Phlx, but not executed.

¹⁹ 15 U.S.C. 78f(b).

²⁰ 15 U.S.C. 78f(b)(4) and (5).

²¹ By way of example, in analyzing an obvious error, the Exchange would have additional data points available in establishing a theoretical price for a multiply listed option as compared to a proprietary product, which requires additional analysis and administrative time to comply with Exchange rules to resolve an obvious error.

²² See pricing for Russell 2000 Index (“RUT”) on Cboe Exchange, Inc.’s Fees Schedule.

²³ QQQ is an exchange-traded fund based on the Nasdaq-100 Index®.

²⁴ By comparison, a market participant may trade options overlying RUT or separately the market participant has the choice of trading iShares Russell 2000 Index Fund (“IWM”) Exchange-Traded Fund Shares options, which are also multiply listed.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable.

The Exchange's proposal to exclude electronic Options Transaction Charges for options overlying NDX from the Monthly Market Maker Cap does not impose an undue burden on intra-market competition because the Exchange will uniformly exclude electronic options overlying NDX from the Monthly Market Maker Cap. The Exchange's proposal to exclude options overlying NDX from the PIXL Pricing in Section IV, Part A does not impose an undue burden on intra-market competition because the Exchange will uniformly exclude options overlying NDX from PIXL pricing. The Exchange's proposal to exclude options overlying NDX from Eligible Contracts for purposes of qualifying for a MARS Payment does not impose an undue burden on intra-market competition because the Exchange will uniformly exclude options overlying NDX from MARS.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.²⁵

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: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-Phlx-2017-102 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-Phlx-2017-102. 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 website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-Phlx-2017-102 and should be submitted on or before January 4, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁶

Eduardo A. Aleman,
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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-82249; File No. SR-NYSEArca-2017-110]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Amendment No. 2 and Order Approving on an Accelerated Basis a Proposed Rule Change, as Modified by Amendment No. 2, To List and Trade Shares of the GraniteShares Platinum Trust Under NYSE Arca Rule 8.201-E

December 8, 2017.

I. Introduction

On September 12, 2017, NYSE Arca, Inc. ("NYSE Arca" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to list and trade shares of the GraniteShares Platinum Trust under NYSE Arca Rule 8.201-E. The proposed rule change was published for comment in the *Federal Register* on September 27, 2017.³ On October 24, 2017, the Exchange filed Amendment No. 1 to the proposed rule change, which superseded the proposed rule change as originally filed. On November 16, 2017, the Exchange filed Amendment No. 2 to the proposed rule change, which superseded the proposed rule change as modified by Amendment No. 1.⁴ The

²⁶ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 81675 (Sept. 21, 2017), 82 FR 45080.

⁴ In Amendment No. 2, the Exchange: (1) Clarified the permitted investments of the Trust (as defined herein); (2) supplemented its description of the duties of the Trust Custodian (as defined herein); (3) provided information about platinum futures; (4) supplemented its description of the process of Share (as defined herein) redemptions; (5) supplemented its description of how the Trust's net asset value ("NAV") will be calculated; (6) increased the minimum number of Shares that the Exchange will require to be outstanding at the commencement of trading; (7) expanded the circumstances in which the Exchange would or might halt trading in the Shares; (8) specified that the Shares would trade in all of the Exchange's trading sessions; (9) represented that platinum futures trade on significant exchanges, including NYMEX (as defined herein), which is regulated by the CFTC (as defined herein) and is a member of ISG (as defined herein); and (10) made certain

²⁵ 15 U.S.C. 78s(b)(3)(A)(ii).

Commission has not received any comments on the proposed rule change. The Commission is publishing this notice to solicit comments on Amendment No. 2 from interested persons, and is approving the proposed rule change, as modified by Amendment No. 2, on an accelerated basis.

II. Description of the Proposed Rule Change, as Modified by Amendment No. 2

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to list and trade shares ("Shares") of the GraniteShares Platinum Trust (the "Trust"), under NYSE Arca Rule 8.201-E.⁵ Under NYSE Arca Rule 8.201-E, the Exchange may propose to list and/or trade pursuant to unlisted trading privileges ("UTP") Commodity-Based Trust Shares.⁶

The Trust will not be registered as an investment company under the

Investment Company Act of 1940, as amended,⁷ and is not required to register under such act. The Trust is not a commodity pool for purposes of the Commodity Exchange Act, as amended.⁸

The Sponsor of the Trust is GraniteShares LLC, a Delaware limited liability company. The Bank of New York Mellon is the trustee of the Trust (the "Trustee")⁹ and ICBC Standard Bank PLC is the custodian of the Trust (the "Custodian").¹⁰

The Commission has previously approved listing on the Exchange under NYSE Arca Rule 8.201-E of other precious metals and platinum-based commodity trusts, including the ETFS Platinum Trust,¹¹ the ETFS Palladium Trust,¹² and the Sprott Physical Platinum and Palladium Trust.¹³

The Exchange represents that the Shares satisfy the requirements of NYSE Arca Rule 8.201-E and thereby qualify for listing on the Exchange.¹⁴

⁷ 15 U.S.C. 80a-1.

⁸ 17 U.S.C. 1.

⁹ The Trustee is responsible for the day-to-day administration of the Trust. The responsibilities of the Trustee include (1) processing orders for the creation and redemption of Baskets; (2) coordinating with the Custodian the receipt and delivery of platinum transferred to, or by, the Trust in connection with each issuance and redemption of Baskets; (3) calculating the net asset value of the Trust on each business day; and (4) selling the Trust's platinum as needed to cover the Trust's expenses. The Trust does not have a Board of Directors or persons acting in a similar capacity.

¹⁰ The Custodian is responsible for safekeeping the platinum owned by the Trust. The Custodian is appointed by the Trustee and is responsible to the Trustee under the Trust's platinum custody agreements. The Custodian will facilitate the transfer of platinum in and out of the Trust through the unallocated platinum accounts it may maintain for each Authorized Participant or unallocated platinum accounts that may be maintained for an Authorized Participant by another platinum-clearing bank approved by the London Platinum and Palladium Market ("LPPM"), and through the loco London account maintained for the Trust by the Custodian on an unallocated basis pursuant to the trust unallocated account agreement (the "Trust Unallocated Account"). The Custodian is responsible for allocating specific bars of platinum to the loco London account maintained for the Trust by the Custodian on an allocated basis pursuant to the Trust agreement (the "Trust Allocated Account"). The Custodian will provide the Trustee with regular reports detailing the platinum transfers in and out of the Trust Unallocated Account with the Custodian and identifying the platinum bars held in the Trust Allocated Account.

¹¹ Securities Exchange Act Release No. 61219 (December 22, 2009), 74 FR 68886 (December 29, 2009) (SR-NYSEArca-2009-95).

¹² Securities Exchange Act Release No. 61220 (December 22, 2009), 74 FR 68895 (December 29, 2009) (SR-NYSEArca-2009-94).

¹³ Securities Exchange Act Release No. 68430 (December 13, 2012), 77 FR 75239 (December 13, 2012) [sic] (SR-NYSEArca-2012-111).

¹⁴ With respect to the application of Rule 10A-3 (17 CFR 240.10A-3) under the Act, the Trust relies on the exemption contained in Rule 10A-3(c)(7).

Operation of the Trust¹⁵

The investment objective of the Trust will be for the Shares to reflect the performance of the price of platinum, less the expenses and liabilities of the Trust. The Trust will issue Shares which represent units of fractional undivided beneficial interest in and ownership of the Trust.

The Trust will not hold or trade in any instrument or asset on any futures exchange or over the counter ("OTC") other than physical platinum bullion. The Trust will take delivery of physical platinum bullion that complies with the LPPM platinum delivery rules.

The Shares are intended to constitute a simple and cost-effective means of making an investment similar to an investment in platinum. Although the Shares are not the exact equivalent of an investment in platinum, they provide investors with an alternative that allows a level of participation in the platinum market through the securities market.

Operation of the Platinum Market

The global trade in platinum consists of OTC transactions in spot, forwards, and options and other derivatives, together with exchange traded futures and options.

According to the Registration Statement, most trading in physical platinum is conducted on the OTC market, predominantly in Zurich and London. The LPPM coordinates various OTC market activities, including clearing and vaulting, acts as the principal intermediary between physical platinum market participants and the relevant regulators, promotes good trading practices and develops standard market documentation. In addition, the LPPM promotes refining standards for the platinum market by maintaining the "London/Zurich Good Delivery List," which are the lists of LPPM accredited melters and assayers of platinum.

The most significant platinum futures exchanges are the New York Mercantile Exchange, Inc. ("NYMEX"), a subsidiary of the Chicago Mercantile Exchange Group (the "CME Group"), and the Tokyo Commodity Exchange.¹⁶ U.S. futures exchanges are registered with the Commodities Futures Trading Commission ("CFTC") and seek to provide a neutral, regulated marketplace for the trading of derivatives contracts for commodities, such as futures,

¹⁵ The description of the operation of the Trust, the Shares and the platinum market contained herein are based, in part, on the Registration Statement. See note 5, *supra*.

¹⁶ NYMEX is a member of the Intermarket Surveillance Group ("ISG").

technical corrections. Amendment No. 2 is available at: <https://www.sec.gov/comments/sr-nysearca-2017-110/nysearca2017110-2693353-161502.pdf>.

⁵ On September 8, 2017, the Trust submitted to the Commission its draft registration statement on Form S-1 (the "Registration Statement") under the Securities Act of 1933 (15 U.S.C. 77a) ("Securities Act"). The Jumpstart Our Business Startups Act, enacted on April 5, 2012, added Section 6(e) to the Securities Act. Section 6(e) of the Securities Act provides that an "emerging growth company" may confidentially submit to the Commission a draft registration statement for confidential, non-public review by the Commission staff prior to public filing, provided that the initial confidential submission and all amendments thereto shall be publicly filed not later than 21 days before the date on which the issuer conducts a road show, as such term is defined in Securities Act Rule 433(h)(4). An emerging growth company is defined in Section 2(a)(19) of the Securities Act as an issuer with less than \$1,000,000,000 total annual gross revenues during its most recently completed fiscal year. The Trust meets the definition of an emerging growth company and consequently has submitted its Form S-1 Registration Statement on a confidential basis with the Commission.

⁶ Commodity-Based Trust Shares are securities issued by a trust that represents investors' discrete identifiable and undivided beneficial ownership interest in the commodities deposited into the Trust.

options and certain swaps. The platinum contract market is of significant size and liquidity.

The basis for settlement and delivery of a spot trade is payment (generally in US dollars) two business days after the trade date against delivery. Delivery of the platinum can either be by physical delivery or through the clearing systems to an unallocated account. The unit of trade in London and Zurich is the troy ounce, whose conversion between grams is: 1,000 grams is equivalent to 32.1507465 troy ounces, and one troy ounce is equivalent to 31.1034768 grams.

A good delivery platinum plate or ingot is acceptable for delivery in settlement of a transaction on the OTC market (a "Good Delivery Platinum Plate or Ingot"). A Good Delivery Platinum Plate or Ingot must contain between 32 and 192 troy ounces of platinum with a minimum fineness (or purity) of 999.5 parts per 1,000 (99.95%). A Good Delivery Platinum Plate or Ingot must also bear the stamp of one of the melters and assayers who are on the LPPM approved list. Unless otherwise specified, the platinum spot price always refers to the "Good Delivery Standards" set by the LPPM.

Creation and Redemption of Shares

The Trust will create and redeem Shares on a continuous basis in one or more blocks of 15,000 Shares (a block of 15,000 Shares is called a "Basket"). As described below, the Trust will issue Shares in Baskets to certain authorized participants ("Authorized Participants") on an ongoing basis. Baskets of Shares will only be issued or redeemed in exchange for an amount of platinum represented by the aggregate number of Shares issued or redeemed. No Shares will be issued unless the Custodian has allocated to the Trust's account the corresponding amount of platinum. Initially, a Basket will require delivery of 1,500 ounces of platinum. The amount of platinum necessary for the creation of a Basket, or to be received upon redemption of a Basket, will decrease over the life of the Trust, due to the payment or accrual of fees and other expenses or liabilities payable by the Trust.

Baskets may be created or redeemed only by Authorized Participants. Orders must be placed by 3:59 p.m. Eastern Time ("E.T."). The day on which a Trust receives a valid purchase or redemption order is the order date.

Each Authorized Participant must be a registered broker-dealer, a participant in Depository Trust Corporation ("DTC"), have entered into an agreement with the Trustee (the

"Authorized Participant Agreement") and have established a platinum unallocated account with the Custodian or another LPPM-approved platinum clearing bank. The Authorized Participant Agreement provides the procedures for the creation and redemption of Baskets and for the delivery of platinum in connection with such creations or redemptions.

According to the Registration Statement, Authorized Participants, acting on authority of the registered holder of Shares or on their own account, may surrender Baskets of Shares in exchange for the corresponding amount of platinum (measured in ounces) announced by the Trustee (the "Basket Amount"). Upon surrender of such Shares and payment of the Trustee's applicable fee and of any expenses, taxes or charges (such as stamp taxes or stock transfer taxes or fees), the Trustee will deliver to the order of the redeeming Authorized Participant the amount of platinum corresponding to the redeemed Baskets. Shares can only be surrendered for redemption in Baskets of 15,000 Shares each.

Before surrendering Baskets of Shares for redemption, an Authorized Participant must deliver to the Trustee a written request indicating the number of Baskets it intends to redeem. The date the Trustee receives that order determines the Basket Amount to be received in exchange. However, orders received by the Trustee after 3:59 p.m. E.T. on a business day or on a business day when the London Bullion Market Association ("LBMA") Platinum Price PM or other applicable benchmark price is not announced, will not be accepted.

The redemption distribution from the Trust will consist of a credit to the redeeming Authorized Participant's unallocated account representing the amount of the platinum held by the Trust evidenced by the Shares being redeemed as of the date of the redemption order.

Net Asset Value

The NAV of the Trust will be calculated by subtracting the Trust's expenses and liabilities on any day from the value of the platinum owned by the Trust on that day; the NAV per Share will be obtained by dividing the NAV of the Trust on a given day by the number of Shares outstanding on that day. On each day on which the Exchange is open for regular trading, the Trustee will determine the NAV as promptly as practicable after 4:00 p.m. E.T. The Trustee will value the Trust's platinum on the basis of LBMA Platinum Price PM. If there is no LBMA Platinum Price

PM on any day, the Trustee is authorized to use the LBMA Platinum Price AM announced on that day. If neither price is available for that day, the Trustee will value the Trust's platinum based on the most recently announced LBMA Platinum Price PM or LBMA Platinum Price AM. If the Sponsor determines that such price is inappropriate to use, the Sponsor will identify an alternate basis for evaluation to be employed by the Trustee by consulting other public sources of pricing information. For instance, the Sponsor could use the platinum spot price published by Bloomberg.

Authorized Participants will offer Shares in the secondary market at an offering price that will vary, depending on, among other factors, the price of platinum and the trading price of the Shares on the Exchange at the time of offer. Authorized Participants will not receive from the Trust, the Sponsor, the Trustee or any of their affiliates any fee or other compensation in connection with the offering of the Shares.

Secondary Market Trading

While the Trust seeks to reflect generally the performance of the price of platinum less the Trust's expenses and liabilities, Shares may trade at, above or below their NAV. The NAV of Shares will fluctuate with changes in the market value of the Trust's assets. The trading prices of Shares will fluctuate in accordance with changes in their NAV as well as market supply and demand. The amount of the discount or premium in the trading price relative to the NAV may be influenced by non-concurrent trading hours between the major platinum markets and the Exchange. While the Shares trade on the Exchange until 8:00 p.m. E.T., liquidity in the market for platinum may be reduced after the close of the major world platinum markets, including London, Zurich and NYMEX. As a result, during this time, trading spreads, and the resulting premium or discount, on Shares may widen.

Availability of Information Regarding Platinum

Currently, the Consolidated Tape Plan does not provide for dissemination of the spot price of a commodity such as platinum over the Consolidated Tape. However, there will be disseminated over the Consolidated Tape the last sale price for the Shares, as is the case for all equity securities traded on the Exchange (including exchange-traded funds). In addition, there is a considerable amount of platinum price and market information available on

public websites and through professional and subscription services.

Investors may obtain platinum pricing information on a 24-hour basis based on the spot price for an ounce of platinum from various financial information service providers, such as Reuters and Bloomberg. Reuters and Bloomberg provide at no charge on their websites delayed information regarding the spot price of platinum and last sale prices of platinum futures, as well as information about news and developments in the platinum market. Reuters and Bloomberg also offer a professional service to subscribers for a fee that provides information on platinum prices directly from market participants. ICAP plc provides an electronic trading platform called EBS for the trading of spot platinum, as well as a feed of real-time streaming prices, delivered as record-based digital data from the EBS platform to its customer's market data platform via Bloomberg or Reuters.

Complete real-time data for platinum futures and options prices traded on the NYMEX are available by subscription from Reuters and Bloomberg. The NYMEX also provides delayed futures and options information on current and past trading sessions and market news free of charge on its website. There are a variety of other public websites providing information on platinum, ranging from those specializing in precious metals to sites maintained by major newspapers, such as The Wall Street Journal.

Availability of Information

The intraday indicative value ("IIV") per Share for the Shares will be disseminated by one or more major market data vendors at least every 15 seconds during the Core Trading Session. The IIV will be calculated based on the amount of platinum held by the Trust and a price of platinum derived from updated bids and offers indicative of the spot price of platinum.¹⁷

The website for the Trust (www.graniteshares.com) will contain the following information, on a per Share basis, for the Trust: (a) The midpoint of the bid-ask price¹⁸ at the close of trading ("Bid/Ask Price"), and a calculation of the premium or discount of such price against such NAV; and (b) data in chart format displaying the

frequency distribution of discounts and premiums of the Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters. The website for the Trust will also provide the Trust's prospectus. Finally, the Trust's website will provide the prior day's closing price of the Shares as traded in the U.S. market. In addition, information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers.

Criteria for Initial and Continued Listing

The Trust will be subject to the criteria in NYSE Arca Rule 8.201-E(e) for initial and continued listing of the Shares.

A minimum of two Baskets or 30,000 Shares will be required to be outstanding at the start of trading, which is equivalent to 3,000 ounces of platinum. The Exchange believes that the anticipated minimum number of Shares outstanding at the start of trading is sufficient to provide adequate market liquidity.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. Trading in the Shares on the Exchange will occur during all three trading sessions in accordance with NYSE Arca Rule 7.34-E(a). The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in NYSE Arca Rule 7.6-E, the minimum price variation ("MPV") for quoting and entry of orders in equity securities traded on the NYSE Arca Marketplace is \$0.01, with the exception of securities that are priced less than \$1.00 for which the MPV for quoting and order entry is \$0.0001.

Further, NYSE Arca Rule 8.201-E sets forth certain restrictions on ETP Holders acting as registered Market Makers in the Shares to facilitate surveillance. Under NYSE Arca Rule 8.201-E(g), an ETP Holder¹⁹ acting as a registered Market Maker in the Shares is required to provide the Exchange with

information relating to its trading in the underlying platinum, related futures or options on futures, or any other related derivatives. Commentary .04 of NYSE Arca Rule 11.3 requires an ETP Holder acting as a registered Market Maker in the Shares and its affiliates to establish, maintain and enforce written policies and procedures reasonably designed to prevent the misuse of any material nonpublic information with respect to such products, any components of the related products, any physical asset or commodity underlying the product, applicable currencies, underlying indexes, related futures or options on futures, and any related derivative instruments (including the Shares).

As a general matter, the Exchange has regulatory jurisdiction over its ETP Holders and their associated persons, which include any person or entity controlling an ETP Holder. A subsidiary or affiliate of an ETP Holder that does business only in commodities or futures contracts would not be subject to Exchange jurisdiction, but the Exchange could obtain information regarding the activities of such subsidiary or affiliate through surveillance sharing agreements with regulatory organizations of which such subsidiary or affiliate is a member.

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares. Trading on the Exchange in the Shares may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) The extent to which conditions in the underlying platinum market have caused disruptions and/or lack of trading, or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. In addition, trading in Shares will be subject to trading halts caused by extraordinary market volatility pursuant to the Exchange's "circuit breaker" rule.²⁰ The Exchange will halt trading in the Shares if the NAV of the Trust is not calculated or disseminated daily or if not made available to all participants at the same time. The Exchange may halt trading during the day in which an interruption occurs to the dissemination of the IIV, as described above. If the interruption to the dissemination of the IIV persists past the trading day in which it occurs, the Exchange will halt trading no later than the beginning of the trading day following the interruption. The Exchange will also consider halting trading on a business

¹⁷ The IIV on a per Share basis disseminated during the Core Trading Session should not be viewed as a real-time update of the NAV, which is calculated once a day.

¹⁸ The bid-ask price of the Shares will be determined using the highest bid and lowest offer on the Consolidated Tape as of the time of calculation of the closing day NAV.

¹⁹ An "ETP Holder" means a sole proprietorship, partnership, corporation, limited liability company or other organization in good standing that is a registered broker-dealer and has been issued an Equity Trading Permit by the Exchange. See NYSE Arca Rule 1.1(n) and (o).

²⁰ See NYSE Arca Rule 7.12-E.

day when the LBMA Platinum Price PM or other applicable benchmark price is not announced.

Surveillance

The Exchange represents that trading in the Shares will be subject to the existing trading surveillances administered by the Exchange, as well as cross-market surveillances administered by the Financial Industry Regulatory Authority (“FINRA”) on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.²¹ The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and federal securities laws applicable to trading on the Exchange.

The surveillances referred to above generally focus on detecting securities trading outside their normal patterns, which could be indicative of manipulative or other violative activity. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.

The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares with other markets and other entities that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.²²

Also, pursuant to NYSE Arca Rule 8.201–E(g), the Exchange is able to obtain information regarding trading in the Shares and the underlying platinum, platinum futures contracts, options on platinum futures, or any other platinum derivative, through ETP Holders acting as registered Market Makers, in connection with such ETP Holders’ proprietary or customer trades through ETP Holders which they effect on any relevant market.

²¹ FINRA conducts cross-market surveillances on behalf of the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA’s performance under this regulatory services agreement.

²² For a list of the current members of ISG, see www.isgportal.org.

In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

All statements and representations made in this filing regarding (a) the description of the portfolio or reference assets, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of Exchange listing rules specified in this rule filing shall constitute continued listing requirements for listing the Shares of the Trust on the Exchange.

The issuer has represented to the Exchange that it will advise the Exchange of any failure by the Trust to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements. If the Trust is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under NYSE Arca Rule 5.5–E(m).

Information Bulletin

Prior to the commencement of trading, the Exchange will inform its ETP Holders in an Information Bulletin of the special characteristics and risks associated with trading the Shares. Specifically, the Information Bulletin will discuss the following: (1) The procedures for purchases and redemptions of Shares in Baskets (including noting that Shares are not individually redeemable); (2) NYSE Arca Rule 9.2–E(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (3) how information regarding the IIV is disseminated; (4) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; (5) the possibility that trading spreads and the resulting premium or discount on the Shares may widen as a result of reduced liquidity of platinum trading during the Core and Late Trading Sessions after the close of the major world platinum markets; and (6) trading information. For example, the Information Bulletin will advise ETP Holders, prior to the commencement of trading, of the prospectus delivery requirements applicable to the Trust. The Exchange notes that investors purchasing Shares directly from the Trust will receive a prospectus. ETP Holders purchasing Shares from the Trust for resale to investors will deliver a prospectus to such investors.

In addition, the Information Bulletin will reference that the Trust is subject to various fees and expenses as will be described in the Registration Statement. The Information Bulletin will also reference the fact that there is no regulated source of last sale information regarding physical platinum, that the Commission has no jurisdiction over the trading of platinum as a physical commodity, and that the CFTC has regulatory jurisdiction over the trading of platinum futures contracts and options on platinum futures contracts.

The Information Bulletin will also discuss any relief, if granted, by the Commission or the staff from any rules under the Act.

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(5)²³ that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed and traded on the Exchange pursuant to the initial and continued listing criteria in NYSE Arca Rule 8.201–E. The Exchange has in place surveillance procedures that are adequate to properly monitor trading in the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws. The Exchange may obtain information via ISG from other exchanges that are members of ISG or with which the Exchange has entered into a comprehensive surveillance sharing agreement. The most significant platinum futures exchange in the U.S. is the NYMEX, which is a member of ISG. U.S. futures exchanges are registered with the CFTC and seek to provide a neutral, regulated marketplace for the trading of derivatives contracts for commodities, such as futures, options and certain swaps. The platinum contract market is of significant size and liquidity.

The proposed rule change is designed to promote just and equitable principles of trade and to protect investors and the public interest in that there is a considerable amount of platinum price and platinum market information available on public websites and

²³ 15 U.S.C. 78f(b)(5).

through professional and subscription services. Investors may obtain platinum pricing information on a 24-hour basis based on the spot price for an ounce of platinum from various financial information service providers. ICAP's EBS platform also provides an electronic trading platform to institutions such as bullion banks and dealers for the trading of spot platinum, as well as a feed of live streaming prices to market data subscribers.

The NAV of the Trust will be published by the Sponsor on each day that the NYSE Arca is open for regular trading and will be posted on the Trust's website. The IIV relating to the Shares will be widely disseminated by one or more major market data vendors at least every 15 seconds during the Core Trading Session. The Trust's website will also provide the Trust's prospectus, as well as the two most recent reports to stockholders. In addition, information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers.

The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that it will facilitate the listing and trading of an additional type of exchange-traded product that will enhance competition among market participants, to the benefit of investors and the marketplace. As noted above, the Exchange has in place surveillance procedures relating to trading in the Shares and may obtain information via ISG from other exchanges that are members of ISG or with which the Exchange has entered into a comprehensive surveillance sharing agreement. In addition, as noted above, investors will have ready access to information regarding platinum pricing.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes the proposed rule change will enhance competition by accommodating Exchange trading of an additional exchange-traded product relating to physical platinum.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Discussion and Commission Findings

After careful review, the Commission finds that the Exchange's proposed rule change, as modified by Amendment No. 2, to list and trade the Shares is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.²⁴ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act,²⁵ which requires, among other things, that the Exchange's rules be designed to prevent fraudulent and manipulative acts and practices, 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. The Commission notes that the Exchange has represented that it will be able to share surveillance information with a significant, regulated market for trading futures on platinum.²⁶ The Commission also notes that it previously approved the listing and trading on the Exchange of other platinum-based commodity trusts.²⁷

The Commission also finds that the proposal is consistent with Section 11A(a)(1)(C)(iii) of the Act,²⁸ which sets forth Congress' finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities. The last-sale price of the Shares will be disseminated

²⁴ 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).

²⁵ 15 U.S.C. 78f(b)(5).

²⁶ Specifically, according to the Exchange, NYMEX, which is regulated by the CFTC, is a member of the ISG, which will allow the Exchange to obtain surveillance information. See Amendment No. 2, *supra* note 4, at 6, 14.

²⁷ See, e.g., Securities Exchange Act Release No. 61219 (Dec. 22, 2009), 74 FR 68886 (Dec. 29, 2009) (SR-NYSEArca-2009-95) (approving the listing and trading of the ETFs Platinum Trust). See also Securities Exchange Act Release No. 68430 (Dec. 13, 2012), 77 FR 75239 (Dec. 19, 2012) (SR-NYSEArca-2012-111) (approving the listing and trading of the Sprott Physical Platinum and Palladium Trust).

²⁸ 15 U.S.C. 78k-1(a)(1)(C)(iii).

over the Consolidated Tape. In addition, information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers.

The Commission believes that the proposed rule change is reasonably designed to promote fair disclosure of information that may be necessary to price the Shares appropriately. NYSE Arca Rule 8.201-E(e)(2)(v) requires that an IIV (which is referred to in the rule as the "Indicative Trust Value") be calculated and disseminated at least every 15 seconds. The IIV will be calculated based on the amount of platinum held by the Trust and a price of platinum derived from updated bids and offers indicative of the spot price of platinum.²⁹ The Exchange states that the IIV relating to the Shares will be widely disseminated by one or more major market data vendors at least every 15 seconds during the Core Trading Session.³⁰ According to the Exchange, there is a considerable amount of information about platinum markets available on public websites and through professional and subscription services, and investors may obtain platinum pricing information on a 24-hour basis based on the spot price for an ounce of platinum from various financial information service providers.³¹

Additionally, the NAV of the Trust will be published by the Sponsor on each day that the NYSE Arca is open for regular trading and will be posted on the Trust's website.³² The Trust also will publish the following information on its website: (1) The mid-point of the

²⁹ See Amendment No. 2, *supra* note 4, at 9.

³⁰ See *id.*

³¹ See *id.* The Exchange states that Reuters and Bloomberg, for example, provide at no charge on their websites delayed information regarding the spot price of platinum and last sale prices of platinum, as well as information about news and developments in the platinum market. Reuters and Bloomberg also offer a professional service to subscribers for a fee that provides information on platinum prices directly from market participants. ICAP plc provides an electronic trading platform called EBS for the trading of spot platinum, as well as a feed of real-time streaming prices, delivered as record-based digital data from the EBS platform to its customer's market data platform via Bloomberg or Reuters. Complete real-time data for platinum futures and options prices traded on NYMEX are available by subscription from Reuters and Bloomberg. There are a variety of other public websites providing information on platinum, ranging from those specializing in precious metals to sites maintained by major newspapers. See *id.*

³² See *id.* at 14.

Bid/Ask Price, and a calculation of the premium or discount of such price against such NAV; (2) data in chart format displaying the frequency distribution of discounts and premiums of the Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters; (3) the Trust's prospectus, as well as the two most recent reports to stockholders; and (4) the prior day's closing price of the Shares as traded in the U.S. market.³³

The Commission also believes that the proposal is reasonably designed to prevent trading when a reasonable degree of transparency cannot be assured. With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares. Trading on the Exchange in the Shares may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) The extent to which conditions in the underlying platinum market have caused disruptions or lack of trading, or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. In addition, trading in Shares will be subject to trading halts caused by extraordinary market volatility pursuant to the Exchange's "circuit breaker" rule.³⁴ The Exchange will halt trading in the Shares if the NAV of the Trust is not calculated or disseminated daily or if not made available to all participants at the same time.³⁵ The Exchange may halt trading during the day in which an interruption occurs to the dissemination of the IIV; if the interruption to the dissemination of the IIV persists past the trading day in which it occurs, the Exchange will halt trading no later than the beginning of the trading day following the interruption.³⁶

Additionally, the Commission notes that market makers in the Shares would be subject to the requirements of NYSE Arca Rule 8.201-E(g), which allow the Exchange to ensure that they do not use their positions to violate the requirements of Exchange rules or applicable federal securities laws.³⁷

In support of this proposal, the Exchange has made the following additional representations:

(1) The Shares will be listed and traded on the Exchange pursuant to the initial and continued listing criteria in NYSE Arca Rule 8.201-E.³⁸

(2) The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions.³⁹

(3) The Exchange deems the Shares to be equity securities.⁴⁰

(4) The Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.⁴¹

(5) Trading in the Shares will be subject to the existing trading surveillances administered by the Exchange, as well as cross-market surveillances administered by FINRA on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws, and that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and federal securities laws applicable to trading on the Exchange.⁴²

(6) The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares with other markets and other entities that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.⁴³

(7) Prior to the commencement of trading, the Exchange will inform its ETP Holders in an Information Bulletin of the special characteristics and risks associated with trading the Shares. Specifically, the Information Bulletin

components of the related products, any physical asset or commodity underlying the product, applicable currencies, underlying indexes, related futures or options on futures, and any related derivative instruments.

³⁸ See Amendment No. 2, *supra* note 4, at 14.

³⁹ See *id.* at 10.

⁴⁰ See *id.* The Commission notes that, as a result, trading of the Shares will be subject to the Exchange's existing rules governing the trading of equity securities.

⁴¹ See *id.* at 12.

⁴² FINRA conducts cross-market surveillances on behalf of the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA's performance under this regulatory services agreement. See *id.* at 12, n.19.

⁴³ See *id.* at 12.

will discuss the following: (1) The procedures for purchases and redemptions of Shares in Baskets (including noting that Shares are not individually redeemable); (2) NYSE Arca Rule 9.2-E(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (3) how information regarding the IIV is disseminated; (4) ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; (5) the possibility that trading spreads and the resulting premium or discount on the Shares may widen as a result of reduced liquidity of platinum trading during the Core and Late Trading Sessions after the close of the major world platinum markets; and (6) trading information.⁴⁴

(8) All statements and representations made in the Exchange's filing regarding (a) the description of the portfolio or reference assets, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of Exchange listing rules specified in this rule filing shall constitute continued listing requirements for listing the Shares of the Trust on the Exchange.⁴⁵

(9) The issuer has represented to the Exchange that it will advise the Exchange of any failure by the Trust to comply with the continued listing requirements and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements. If the Trust is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under the NYSE Arca Rule 5.5-E(m).⁴⁶

This approval order is based on all of the Exchange's representations—including those set forth above and in Amendment No. 2—and the Exchange's description of the Trust.

For the foregoing reasons, the Commission finds that the proposed rule change, as modified by Amendment No. 2, is consistent with Section 6(b)(5) of the Act⁴⁷ and the rules and regulations thereunder applicable to a national securities exchange.

IV. Solicitation of Comments on Amendment No. 2 to the Proposed Rule Change

Interested persons are invited to submit written data, views, and arguments concerning Amendment No.

⁴⁴ See *id.* at 13.

⁴⁵ See *id.* at 12–13.

⁴⁶ See *id.* at 13.

⁴⁷ 15 U.S.C. 78f(b)(5).

³³ See *id.* at 10, 14.

³⁴ See *id.* at 11, n.18 and accompanying text.

³⁵ See *id.* at 11.

³⁶ See *id.*

³⁷ Commentary .04 of NYSE Arca Equities Rule 11.3 requires that an ETP Holder acting as a registered market maker in the Shares, and its affiliates, establish, maintain and enforce written policies and procedures reasonably designed to prevent the misuse of any material nonpublic information with respect to such products, any

2 to the proposed rule change. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-NYSEArca-2017-110 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-NYSEArca-2017-110. 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 website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of this filing will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEArca-2017-110 and should be submitted on or before January 4, 2018.

V. Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 2

The Commission finds good cause to approve the proposed rule change, as modified by Amendment No. 2, prior to the 30th day after the date of publication of notice of Amendment No. 2 in the **Federal Register**. Amendment

No. 2 supplements the proposal by providing additional information regarding the Trust and the platinum futures market, and by expanding the circumstances in which the Exchange would or might halt trading in the Shares. These changes assisted the Commission in evaluating the Shares' susceptibility to manipulation, and in determining that the listing and trading of the Shares is consistent with the protection of investors and the public interest. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Exchange Act,⁴⁸ to approve the proposed rule change, as modified by Amendment No. 2, on an accelerated basis.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act,⁴⁹ that the proposed rule change (SR-NYSEArca-2017-110), as modified by Amendment No. 2, be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵⁰

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2017-26915 Filed 12-13-17; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-82284; File No. SR-BX-2017-023]

Self-Regulatory Organizations; Nasdaq BX, Inc.; Notice of Filing of Amendment No. 2 to a Proposed Rule Change To Adopt Rule 7004 and Chapter XV, Section 11

December 11, 2017.

On May 2, 2017, Nasdaq BX, Inc. ("Exchange" or "BX") 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 adopt a fee schedule to establish the fees for Industry Members related to the National Market System Plan Governing the Consolidated Audit Trail ("CAT NMS Plan"). The proposed rule change was published in the **Federal Register** for comment on May 22, 2017.³ The

⁴⁸ 15 U.S.C. 78s(b)(2).

⁴⁹ *Id.*

⁵⁰ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release Nos. 80697 (May 16, 2017), 82 FR 23398 (May 22, 2017) ("Original Proposal").

Commission received seven comment letters on the proposed rule change,⁴ and a response to comments from the Participants.⁵ On June 30, 2017, the Commission temporarily suspended and initiated proceedings to determine whether to approve or disapprove the proposed rule change.⁶ The Commission thereafter received seven comment letters,⁷ and a response to comments

⁴ Since the CAT NMS Plan Participants' proposed rule changes to adopt fees to be charged to Industry Members to fund the consolidated audit trail are substantively identical, the Commission is considering all comments received on the proposed rule changes regardless of the comment file to which they were submitted. See text accompanying notes 13-15 *infra*, for a list of the CAT NMS Plan Participants. See Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, to Brent J. Fields, Secretary, Commission (dated June 6, 2017), available at: <https://www.sec.gov/comments/sr-batsbx-2017-38/batsbx201738-1788188-153228.pdf>; Letter from Patricia L. Cerny and Steven O'Malley, Compliance Consultants, to Brent J. Fields, Secretary, Commission (dated June 12, 2017), available at: <https://www.sec.gov/comments/sr-cboe-2017-040/cboe2017040-1799253-153675.pdf>; Letter from Daniel Zinn, General Counsel, OTC Markets Group Inc., to Eduardo A. Aleman, Assistant Secretary, Commission (dated June 13, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-1801717-153703.pdf>; Letter from Joanna Mallers, Secretary, FIA Principal Traders Group, to Brent J. Fields, Secretary, Commission (dated June 22, 2017), available at: <https://www.sec.gov/comments/sr-cboe-2017-040/cboe2017040-1819670-154195.pdf>; Letter from Stuart J. Kaswell, Executive Vice President and Managing Director, General Counsel, Managed Funds Association, to Brent J. Fields, Secretary, Commission (dated June 23, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-1822454-154283.pdf>; and Letter from Suzanne H. Shatto, Investor, to Commission (dated June 27, 2017), available at: <https://www.sec.gov/comments/sr-batsedgx-2017-22/batsedgx201722-154443.pdf>. The Commission also received a comment letter which is not pertinent to these proposed rule changes. See Letter from Christina Crouch, Smart Ltd., to Brent J. Fields, Secretary, Commission (dated June 5, 2017), available at: <https://www.sec.gov/comments/sr-batsbx-2017-38/batsbx201738-1785545-153152.htm>.

⁵ See Letter from CAT NMS Plan Participants to Brent J. Fields, Secretary, Commission (dated June 29, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-1832632-154584.pdf>.

⁶ See Securities Exchange Act Release No. 81067 (June 30, 2017), 82 FR 31656 (July 7, 2017).

⁷ See Letter from W. Hardy Callcott, Partner, Sidley Austin LLP, to Brent J. Fields, Secretary, Commission (dated July 27, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2148338-157737.pdf>; Letter from Kevin Coleman, General Counsel and Chief Compliance Officer, Belvedere Trading LLC, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2148360-157740.pdf>; Letter from Joanna Mallers, Secretary, FIA Principal Traders Group, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2151228-157745.pdf>; Letter from Theodore R. Lazo, Managing Director and Associate General Counsel,

Continued

from the Participants.⁸ On November 6, 2017, the Exchange filed Amendment No. 1 to the proposed rule change.⁹ On November 9, 2017, the Commission extended the time period within which to approve the proposed rule change or disapprove the proposed rule change to January 14, 2018.¹⁰ On December 4, 2017, the Exchange filed Amendment No. 2 to the proposed rule change, as described in Items I and II below, which Items have been prepared by the Exchange.¹¹ The Commission is publishing this notice to solicit comments from interested persons on Amendment No. 2.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

On May 2, 2017, Nasdaq BX, Inc. filed with the Securities and Exchange Commission ("Commission" or "SEC") proposed rule change SR-BX-2017-023 (the "Original Proposal"), pursuant to which the Exchange proposed to adopt a fee schedule to establish the fees for Industry Members related to the National Market System Plan Governing the Consolidated Audit Trail (the "CAT NMS Plan" or "Plan").¹² On November 6, 2017, the Exchange filed an amendment to the Original Proposal ("Amendment No. 1"), which replaced

SIFMA, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2150977-157744.pdf>; Letter from Stuart J. Kaswell, Executive Vice President and Managing Director, General Counsel, Managed Funds Association, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2150818-157743.pdf>; Letter from John Kinahan, Chief Executive Officer, Group One Trading, L.P., to Brent J. Fields, Secretary, Commission (dated August 10, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-2214568-160619.pdf>; Letter from Joseph Molluso, Executive Vice President and CFO, Virtu Financial, to Brent J. Fields, Commission (dated August 18, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-2238648-160830.pdf>.

⁸ See Letter from Michael Simon, Chair, CAT NMS Plan Operating Committee, to Brent J. Fields, Commission, Secretary (dated November 2, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2674608-161412.pdf>.

⁹ Amendment No. 1 to the proposed rule change replaced and superseded the Original Proposal in its entirety and also described the changes made to the Original Proposal. Amendment No. 1 is available on the Commission's website for BX at: <https://www.sec.gov/comments/sr-bx-2017-023/bx2017023-2673141-161453.pdf>.

¹⁰ See Securities Exchange Act Release No. 82049 (November 9, 2017), 82 FR 53549 (November 16, 2017).

¹¹ Amendment No. 2 replaces and supersedes Amendment No. 1 in its entirety.

¹² Unless otherwise specified, capitalized terms used in this fee filing are defined as set forth herein, the CAT Compliance Rule Series, in the CAT NMS Plan, or the Original Proposal.

the Original Proposal in its entirety. The Exchange is now filing this Amendment No. 2 to replace Amendment No. 1 in its entirety. This Amendment No. 2 describes the changes from the Original Proposal.

With this Amendment, the Exchange is including *Exhibit 4*, which reflects the changes to the text of the proposed rule change as set forth in the Original Proposal, and *Exhibit 5*, which reflects all proposed changes to the Exchange's current rule text.

The text of the proposed rule change is available on the Exchange's website at <http://nasdaqbx.cchwallstreet.com/>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

BOX Options Exchange LLC, Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe C2 Exchange, Inc., Cboe Exchange, Inc.,¹³ Chicago Stock Exchange, Inc., Financial Industry Regulatory Authority, Inc. ("FINRA"), Investors' Exchange LLC, Miami International Securities Exchange, LLC, MIAX PEARL, LLC, Nasdaq BX, Inc., Nasdaq GEMX, LLC, Nasdaq ISE, LLC, Nasdaq MRX, LLC,¹⁴ Nasdaq PHLX LLC, The

¹³ Note that Bats BYX Exchange, Inc., Bats BZX Exchange, Inc., Bats EDGA Exchange, Inc., Bats EDGX Exchange, Inc., LLC, C2 Options Exchange, Incorporated, and Chicago Board Options Exchange, Incorporated, have been renamed Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe C2 Exchange, Inc., Cboe Exchange, Inc., respectively.

¹⁴ ISE Gemini, LLC, ISE Mercury, LLC and International Securities Exchange, LLC have been renamed Nasdaq GEMX, LLC, Nasdaq MRX, LLC, and Nasdaq ISE, LLC, respectively. See Securities Exchange Act Release No. 80248 (March 15, 2017), 82 FR 14547 (March 21, 2017); Securities Exchange

Nasdaq Stock Market LLC, New York Stock Exchange LLC, NYSE American LLC,¹⁵ NYSE Arca, Inc. and NYSE National, Inc.¹⁶ (collectively, the "Participants") filed with the Commission, pursuant to Section 11A of the Exchange Act¹⁷ and Rule 608 of Regulation NMS thereunder,¹⁸ the CAT NMS Plan.¹⁹ The Participants filed the Plan to comply with Rule 613 of Regulation NMS under the Exchange Act. The Plan was published for comment in the **Federal Register** on May 17, 2016,²⁰ and approved by the Commission, as modified, on November 15, 2016.²¹ The Plan is designed to create, implement and maintain a consolidated audit trail ("CAT") that would capture customer and order event information for orders in NMS Securities and OTC Equity Securities, across all markets, from the time of order inception through routing, cancellation, modification, or execution in a single consolidated data source. The Plan accomplishes this by creating CAT NMS, LLC (the "Company"), of which each Participant is a member, to operate the CAT.²² Under the CAT NMS Plan, the Operating Committee of the Company ("Operating Committee") has discretion to establish funding for the Company to operate the CAT, including establishing fees that the Participants will pay, and establishing fees for Industry Members that will be implemented by the Participants ("CAT Fees").²³ The Participants are required to file with the SEC under Section 19(b) of the Exchange Act any such CAT Fees applicable to Industry Members that the Operating Committee approves.²⁴

Act Release No. 80326 (March 29, 2017), 82 FR 16460 (April 4, 2017); and Securities Exchange Act Release No. 80325 (March 29, 2017), 82 FR 16445 (April 4, 2017).

¹⁵ NYSE MKT LLC has been renamed NYSE American LLC. See Securities Exchange Act Release No. 80283 (March 21, 2017), 82 FR 15244 (March 27, 2017).

¹⁶ National Stock Exchange, Inc. has been renamed NYSE National, Inc. See Securities Exchange Act Release No. 79902 (January 30, 2017), 82 FR 9258 (February 3, 2017).

¹⁷ 15 U.S.C. 78k-1.

¹⁸ 17 CFR 242.608.

¹⁹ See Letter from the Participants to Brent J. Fields, Secretary, Commission, dated September 30, 2014; and Letter from Participants to Brent J. Fields, Secretary, Commission, dated February 27, 2015. On December 24, 2015, the Participants submitted an amendment to the CAT NMS Plan. See Letter from Participants to Brent J. Fields, Secretary, Commission, dated December 23, 2015.

²⁰ Securities Exchange Act Release No. 77724 (April 27, 2016), 81 FR 30614 (May 17, 2016).

²¹ Securities Exchange Act Release No. 79318 (November 15, 2016), 81 FR 84696 (November 23, 2016) ("Approval Order").

²² The Plan also serves as the limited liability company agreement for the Company.

²³ Section 11.1(b) of the CAT NMS Plan.

²⁴ *Id.*

Accordingly, the Exchange submitted the Original Proposal to propose the Consolidated Audit Trail Funding Fees, which would require Industry Members that are SRO members to pay the CAT Fees determined by the Operating Committee.

The Commission published the Original Proposal for public comment in the **Federal Register** on May 22, 2017,²⁵ and received comments in response to the Original Proposal or similar fee filings by other Participants.²⁶ On June 30, 2017, the Commission suspended, and instituted proceedings to determine whether to approve or disapprove, the Original Proposal.²⁷ The Commission received seven comment letters in response to those proceedings.²⁸

In response to the comments on the Original Proposal, the Operating Committee determined to make the following changes to the funding model: (1) Adds two additional CAT Fee tiers for Equity Execution Venues; (2) discounts the OTC Equity Securities market share of Execution Venue ATSs trading OTC Equity Securities as well as the market share of the FINRA over-the-counter reporting facility (“ORF”) by the average shares per trade ratio between NMS Stocks and OTC Equity Securities (calculated as 0.17% based on available data from the second quarter of 2017) when calculating the market share of Execution Venue ATS trading OTC Equity Securities and FINRA; (3) discounts the Options Market Maker quotes by the trade to quote ratio for options (calculated as 0.01% based on available data for June 2016 through June 2017) when calculating message

traffic for Options Market Makers; (4) discounts equity market maker quotes by the trade to quote ratio for equities (calculated as 5.43% based on available data for June 2016 through June 2017) when calculating message traffic for equity market makers; (5) decreases the number of tiers for Industry Members (other than the Execution Venue ATSs) from nine to seven; (6) changes the allocation of CAT costs between Equity Execution Venues and Options Execution Venues from 75%/25% to 67%/33%; (7) adjusts tier percentages and recovery allocations for Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSs); (8) focuses the comparability of CAT Fees on the individual entity level, rather than primarily on the comparability of affiliated entities; (9) commences invoicing of CAT Reporters as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Participants and the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants; and (10) requires the proposed fees to automatically expire two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. As discussed in detail below, the Exchange proposes to amend the Original Proposal to reflect these changes.

(1) Executive Summary

The following provides an executive summary of the CAT funding model approved by the Operating Committee, as well as Industry Members’ rights and obligations related to the payment of CAT Fees calculated pursuant to the CAT funding model, as amended by this Amendment. A detailed description of the CAT funding model and the CAT Fees, as amended by this Amendment, as well as the changes made to the Original Proposal follows this executive summary.

(A) CAT Funding Model

- **CAT Costs.** The CAT funding model is designed to establish CAT-specific fees to collectively recover the costs of building and operating the CAT from all CAT Reporters, including Industry Members and Participants. The overall CAT costs used in calculating the CAT Fees in this fee filing are comprised of Plan Processor CAT costs and non-Plan Processor CAT costs incurred, and estimated to be incurred, from November 21, 2016 through November 21, 2017. Although the CAT costs from November 21, 2016 through November 21, 2017 were used in calculating the

CAT Fees, the CAT Fees set forth in this fee filing would be in effect until the automatic sunset date, as discussed below. (See Section 3(a)(2)(E) below)

- **Bifurcated Funding Model.** The CAT NMS Plan requires a bifurcated funding model, where costs associated with building and operating the CAT would be borne by (1) Participants and Industry Members that are Execution Venues for Eligible Securities through fixed tier fees based on market share, and (2) Industry Members (other than alternative trading systems (“ATSs”) that execute transactions in Eligible Securities (“Execution Venue ATSs”)) through fixed tier fees based on message traffic for Eligible Securities. (See Section 3(a)(2) below)

- **Industry Member Fees.** Each Industry Member (other than Execution Venue ATSs) will be placed into one of seven tiers of fixed fees, based on “message traffic” in Eligible Securities for a defined period (as discussed below). Prior to the start of CAT reporting, “message traffic” will be comprised of historical equity and equity options orders, cancels, quotes and executions provided by each exchange and FINRA over the previous three months. After an Industry Member begins reporting to the CAT, “message traffic” will be calculated based on the Industry Member’s Reportable Events reported to the CAT. Industry Members with lower levels of message traffic will pay a lower fee and Industry Members with higher levels of message traffic will pay a higher fee. To avoid disincentives to quoting behavior, Options Market Maker and equity market maker quotes will be discounted when calculating message traffic. (See Section 3(a)(2)(B) below)

- **Execution Venue Fees.** Each Equity Execution Venue will be placed in one of four tiers of fixed fees based on market share, and each Options Execution Venue will be placed in one of two tiers of fixed fees based on market share. Equity Execution Venue market share will be determined by calculating each Equity Execution Venue’s proportion of the total volume of NMS Stock and OTC Equity shares reported by all Equity Execution Venues during the relevant time period. For purposes of calculating market share, the OTC Equity Securities market share of Execution Venue ATSs trading OTC Equity Securities as well as the market share of the FINRA ORF will be discounted. Similarly, market share for Options Execution Venues will be determined by calculating each Options Execution Venue’s proportion of the total volume of Listed Options contracts reported by all Options Execution

²⁵ See Securities Exchange Act Release No. 80697 (May 16, 2017), 82 FR 23398 (May 22, 2017) (SR-BX-2017-023).

²⁶ For a summary of comments, see generally Securities Exchange Act Release No. 81067 (June 30, 2017), 82 FR 31656 (July 7, 2017) (“Suspension Order”).

²⁷ Suspension Order.

²⁸ See Letter from Stuart J. Kaswell, Executive Vice President, Managing Director and General Counsel, Managed Funds Association, to Brent J. Fields, Secretary, SEC (July 28, 2017) (“MFA Letter”); Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA, to Brent J. Fields, Secretary, SEC (July 28, 2017) (“SIFMA Letter”); Joanna Mallers, Secretary, FIA Principal Traders Group, to Brent J. Fields, Secretary, SEC (July 28, 2017) (“FIA Principal Traders Group Letter”); Letter from Kevin Coleman, General Counsel & Chief Compliance Officer, Belvedere Trading LLC, to Brent J. Fields, Secretary, SEC (July 28, 2017) (“Belvedere Letter”); Letter from W. Hardy Callcott, Sidley Austin LLP, to Brent J. Fields, Secretary, SEC (July 27, 2017) (“Sidley Letter”); Letter from John Kinahan, Chief Executive Officer, Group One Trading, L.P., to Brent J. Fields, Secretary, SEC (Aug. 10, 2017) (“Group One Letter”); and Letter from Joseph Molluso, Executive Vice President, Virtu Financial, to Brent J. Fields, Secretary, SEC (Aug. 18, 2017) (“Virtu Financial Letter”).

Venues during the relevant time period. Equity Execution Venues with a larger market share will pay a larger CAT Fee than Equity Execution Venues with a smaller market share. Similarly, Options Execution Venues with a larger market share will pay a larger CAT Fee than Options Execution Venues with a smaller market share. (See Section 3(a)(2)(C) below)

- *Cost Allocation.* For the reasons discussed below, in designing the model, the Operating Committee determined that 75 percent of total costs recovered would be allocated to Industry Members (other than Execution Venue ATs) and 25 percent would be allocated to Execution Venues. In addition, the Operating Committee determined to allocate 67 percent of Execution Venue costs recovered to Equity Execution Venues and 33 percent to Options Execution Venues. (See Section 3(a)(2)(D) below)

- *Comparability of Fees.* The CAT funding model charges CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) comparable CAT Fees. (See Section 3(a)(2)(F) below)

(B) CAT Fees for Industry Members

- *Fee Schedule.* The quarterly CAT Fees for each tier for Industry Members are set forth in the two fee schedules in the Consolidated Audit Trail Funding Fees, one for Equity ATs and one for Industry Members other than Equity ATs. (See Section 3(a)(3)(B) below)

- *Quarterly Invoices.* Industry Members will be billed quarterly for CAT Fees, with the invoices payable within 30 days. The quarterly invoices will identify within which tier the Industry Member falls. (See Section 3(a)(3)(C) below)

- *Centralized Payment.* Each Industry Member will receive from the Company one invoice for its applicable CAT Fees, not separate invoices from each Participant of which it is a member. Each Industry Member will pay its CAT Fees to the Company via the centralized system for the collection of CAT Fees established by the Operating Committee. (See Section 3(a)(3)(C) below)

- *Billing Commencement.* Industry Members will begin to receive invoices for CAT Fees as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Participants and the operative date of the Plan amendment adopting CAT Fees for Participants. (See Section 3(a)(2)(G) below)

- *Sunset Provision.* The Consolidated Audit Trail Funding Fees will sunset automatically two years from the

operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. (See Section 3(a)(2)(J) below)

(2) Description of the CAT Funding Model

Article XI of the CAT NMS Plan requires the Operating Committee to approve the operating budget, including projected costs of developing and operating the CAT for the upcoming year. In addition to a budget, Article XI of the CAT NMS Plan provides that the Operating Committee has discretion to establish funding for the Company, consistent with a bifurcated funding model, where costs associated with building and operating the Central Repository would be borne by (1) Participants and Industry Members that are Execution Venues through fixed tier fees based on market share, and (2) Industry Members (other than Execution Venue ATs) through fixed tier fees based on message traffic. In its order approving the CAT NMS Plan, the Commission determined that the proposed funding model was “reasonable”²⁹ and “reflects a reasonable exercise of the Participants’ funding authority to recover the Participants’ costs related to the CAT.”³⁰

More specifically, the Commission stated in approving the CAT NMS Plan that “[t]he Commission believes that the proposed funding model is reasonably designed to allocate the costs of the CAT between the Participants and Industry Members.”³¹ The Commission further noted the following:

The Commission believes that the proposed funding model reflects a reasonable exercise of the Participants’ funding authority to recover the Participants’ costs related to the CAT. The CAT is a regulatory facility jointly owned by the Participants and . . . the Exchange Act specifically permits the Participants to charge their members fees to fund their self-regulatory obligations. The Commission further believes that the proposed funding model is designed to impose fees reasonably related to the Participants’ self-regulatory obligations because the fees would be directly associated with the costs of establishing and maintaining the CAT, and not unrelated SRO services.³²

Accordingly, the funding model approved by the Operating Committee imposes fees on both Participants and Industry Members.

As discussed in Appendix C of the CAT NMS Plan, in developing and

approving the approved funding model, the Operating Committee considered the advantages and disadvantages of a variety of alternative funding and cost allocation models before selecting the proposed model.³³ After analyzing the various alternatives, the Operating Committee determined that the proposed tiered, fixed fee funding model provides a variety of advantages in comparison to the alternatives.

In particular, the fixed fee model, as opposed to a variable fee model, provides transparency, ease of calculation, ease of billing and other administrative functions, and predictability of a fixed fee. Such factors are crucial to estimating a reliable revenue stream for the Company and for permitting CAT Reporters to reasonably predict their payment obligations for budgeting purposes. Additionally, a strictly variable or metered funding model based on message volume would be far more likely to affect market behavior and place an inappropriate burden on competition.

In addition, reviews from varying time periods of current broker-dealer order and trading data submitted under existing reporting requirements showed a wide range in activity among broker-dealers, with a number of broker-dealers submitting fewer than 1,000 orders per month and other broker-dealers submitting millions and even billions of orders in the same period. Accordingly, the CAT NMS Plan includes a tiered approach to fees. The tiered approach helps ensure that fees are equitably allocated among similarly situated CAT Reporters and furthers the goal of lessening the impact on smaller firms.³⁴ In addition, in choosing a tiered fee structure, the Operating Committee concluded that the variety of benefits offered by a tiered fee structure, discussed above, outweighed the fact that CAT Reporters in any particular tier would pay different rates per message traffic order event or per market share (e.g., an Industry Member with the largest amount of message traffic in one tier would pay a smaller amount per order event than an Industry Member in the same tier with the least amount of message traffic). Such variation is the natural result of a tiered fee structure.³⁵ The Operating Committee considered several approaches to developing a

³³ Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85006.

³⁴ Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85006.

³⁵ Moreover, as the SEC noted in approving the CAT NMS Plan, “[t]he Participants also have offered a reasonable basis for establishing a funding model based on broad tiers, in that it may be easier to implement.” Approval Order at 84796.

²⁹ Approval Order at 84796.

³⁰ *Id.* at 84794.

³¹ *Id.* at 84795.

³² *Id.* at 84794.

tiered model, including defining fee tiers based on such factors as size of firm, message traffic or trading dollar volume. After analyzing the alternatives, it was concluded that the tiering should be based on message traffic which will reflect the relative impact of CAT Reporters on the CAT System.

Accordingly, the CAT NMS Plan contemplates that costs will be allocated across the CAT Reporters on a tiered basis in order to allocate higher costs to those CAT Reporters that contribute more to the costs of creating, implementing and maintaining the CAT and lower costs to those that contribute less.³⁶ The fees to be assessed at each tier are calculated so as to recoup a proportion of costs appropriate to the message traffic or market share (as applicable) from CAT Reporters in each tier. Therefore, Industry Members generating the most message traffic will be in the higher tiers, and will be charged a higher fee. Industry Members with lower levels of message traffic will be in lower tiers and will be assessed a smaller fee for the CAT.³⁷ Correspondingly, Execution Venues with the highest market shares will be in the top tier, and will be charged higher fees. Execution Venues with the lowest market shares will be in the lowest tier and will be assessed smaller fees for the CAT.³⁸

The CAT NMS Plan states that Industry Members (other than Execution Venue ATSS) will be charged based on message traffic, and that Execution Venues will be charged based on market share.³⁹ While there are multiple factors that contribute to the cost of building, maintaining and using the CAT, processing and storage of incoming message traffic is one of the most significant cost drivers for the CAT.⁴⁰ Thus, the CAT NMS Plan provides that the fees payable by Industry Members (other than Execution Venue ATSS) will be based on the message traffic generated by such Industry Member.⁴¹

In contrast to Industry Members, which determine the degree to which they produce message traffic that constitute CAT Reportable Events, the CAT Reportable Events of the Execution Venues are largely derivative of quotations and orders received from Industry Members that they are required to display. The business model for Execution Venues (other than FINRA),

however, is focused on executions in their markets. As a result, the Operating Committee believes that it is more equitable to charge Execution Venues based on their market share rather than their message traffic.

Focusing on message traffic would make it more difficult to draw distinctions between large and small Execution Venues and, in particular, between large and small options exchanges. For instance, the Operating Committee analyzed the message traffic of Execution Venues and Industry Members for the period of April 2017 to June 2017 and placed all CAT Reporters into a nine-tier framework (*i.e.*, a single tier may include both Execution Venues and Industry Members). The Operating Committee's analysis found that the majority of exchanges (15 total) were grouped in Tiers 1 and 2. Moreover, virtually all of the options exchanges were in Tiers 1 and 2.⁴² Given the resulting concentration of options exchanges in Tiers 1 and 2 under this approach, the analysis shows that a funding model for Execution Venues based on message traffic would make it more difficult to distinguish between large and small options exchanges, as compared to the proposed fee approach that bases fees for Execution Venues on market share.

The CAT NMS Plan's funding model also is structured to avoid a "reduction in market quality."⁴³ The tiered, fixed fee funding model is designed to limit the disincentives to providing liquidity to the market. For example, the Operating Committee expects that a firm that has a large volume of quotes would likely be categorized in one of the upper tiers, and would not be assessed a fee for this traffic directly as they would under a more directly metered model. In contrast, strictly variable or metered funding models based on message volume are far more likely to affect market behavior. In approving the CAT NMS Plan, the SEC stated that "[t]he Participants also offered a reasonable basis for establishing a funding model based on broad tiers, in that it may be . . . less likely to have an incremental deterrent effect on liquidity provision."⁴⁴

The funding model also is structured to avoid a reduction market quality because it discounts Options Market Maker and equity market maker quotes when calculating message traffic for Options Market Makers and equity

market makers, respectively. As discussed in more detail below, the Operating Committee determined to discount the Options Market Maker quotes by the trade to quote ratio for options when calculating message traffic for Options Market Makers. Similarly, to avoid disincentives to quoting behavior on the equities side as well, the Operating Committee determined to discount equity market maker quotes by the trade to quote ratio for equities when calculating message traffic for equity market makers. The proposed discounts recognize the value of the market makers' quoting activity to the market as a whole.

The CAT NMS Plan is further structured to avoid potential conflicts raised by the Operating Committee determining fees applicable to its own members—the Participants. First, the Company will operate on a "break-even" basis, with fees imposed to cover costs and an appropriate reserve. Any surpluses will be treated as an operational reserve to offset future fees and will not be distributed to the Participants as profits.⁴⁵ To ensure that the Participants' operation of the CAT will not contribute to the funding of their other operations, Section 11.1(c) of the CAT NMS Plan specifically states that "[a]ny surplus of the Company's revenues over its expenses shall be treated as an operational reserve to offset future fees." In addition, as set forth in Article VIII of the CAT NMS Plan, the Company "intends to operate in a manner such that it qualifies as a 'business league' within the meaning of Section 501(c)(6) of the [Internal Revenue] Code." To qualify as a business league, an organization must "not [be] organized for profit and no part of the net earnings of [the organization can] inure[] to the benefit of any private shareholder or individual."⁴⁶ As the SEC stated when approving the CAT NMS Plan, "the Commission believes that the Company's application for Section 501(c)(6) business league status addresses issues raised by commenters about the Plan's proposed allocation of profit and loss by mitigating concerns that the Company's earnings could be used to benefit individual Participants."⁴⁷ The Internal Revenue Service recently has determined that the Company is exempt from federal income tax under Section 501(c)(6) of the Internal Revenue Code.

The funding model also is structured to take into account distinctions in the

³⁶ Approval Order at 85005.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Section 11.3(a) and (b) of the CAT NMS Plan.

⁴⁰ Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85005.

⁴¹ Section 11.3(b) of the CAT NMS Plan.

⁴² The Operating Committee notes that this analysis did not place MIA X PEARL in Tier 1 or Tier 2 since the exchange commenced trading on February 6, 2017.

⁴³ Section 11.2(e) of the CAT NMS Plan.

⁴⁴ Approval Order at 84796.

⁴⁵ *Id.* at 84792.

⁴⁶ 26 U.S.C. 501(c)(6).

⁴⁷ Approval Order at 84793.

securities trading operations of Participants and Industry Members. For example, the Operating Committee designed the model to address the different trading characteristics in the OTC Equity Securities market. Specifically, the Operating Committee proposes to discount the OTC Equity Securities market share of Execution Venue ATSS trading OTC Equity Securities as well as the market share of the FINRA ORF by the average shares per trade ratio between NMS Stocks and OTC Equity Securities to adjust for the greater number of shares being traded in the OTC Equity Securities market, which is generally a function of a lower per share price for OTC Equity Securities when compared to NMS Stocks. In addition, the Operating Committee also proposes to discount Options Market Maker and equity market maker message traffic in recognition of their role in the securities markets. Furthermore, the funding model creates separate tiers for Equity and Options Execution Venues due to the different trading characteristics of those markets.

Finally, by adopting a CAT-specific fee, the Operating Committee will be fully transparent regarding the costs of the CAT. Charging a general regulatory fee, which would be used to cover CAT costs as well as other regulatory costs, would be less transparent than the selected approach of charging a fee designated to cover CAT costs only.

A full description of the funding model is set forth below. This description includes the framework for the funding model as set forth in the CAT NMS Plan, as well as the details as to how the funding model will be applied in practice, including the number of fee tiers and the applicable fees for each tier. The complete funding model is described below, including those fees that are to be paid by the Participants. The proposed Consolidated Audit Trail Funding Fees, however, do not apply to the Participants; the proposed Consolidated Audit Trail Funding Fees only apply to Industry Members. The CAT Fees for Participants will be imposed separately by the Operating Committee pursuant to the CAT NMS Plan.

(A) Funding Principles

Section 11.2 of the CAT NMS Plan sets forth the principles that the Operating Committee applied in establishing the funding for the Company. The Operating Committee has considered these funding principles as well as the other funding requirements set forth in the CAT NMS Plan and in Rule 613 in developing the proposed

funding model. The following are the funding principles in Section 11.2 of the CAT NMS Plan:

- To create transparent, predictable revenue streams for the Company that are aligned with the anticipated costs to build, operate and administer the CAT and other costs of the Company;
- To establish an allocation of the Company's related costs among Participants and Industry Members that is consistent with the Exchange Act, taking into account the timeline for implementation of the CAT and distinctions in the securities trading operations of Participants and Industry Members and their relative impact upon the Company's resources and operations;
- To establish a tiered fee structure in which the fees charged to: (i) CAT Reporters that are Execution Venues, including ATSS, are based upon the level of market share; (ii) Industry Members' non-ATS activities are based upon message traffic; (iii) the CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether Execution Venue and/or Industry Members);
 - To provide for ease of billing and other administrative functions;
 - To avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality; and
 - To build financial stability to support the Company as a going concern.

(B) Industry Member Tiering

Under Section 11.3(b) of the CAT NMS Plan, the Operating Committee is required to establish fixed fees to be payable by Industry Members, based on message traffic generated by such Industry Member, with the Operating Committee establishing at least five and no more than nine tiers.

The CAT NMS Plan clarifies that the fixed fees payable by Industry Members pursuant to Section 11.3(b) shall, in addition to any other applicable message traffic, include message traffic generated by: (i) An ATS that does not execute orders that is sponsored by such Industry Member; and (ii) routing orders to and from any ATS sponsored by such Industry Member. In addition, the Industry Member fees will apply to Industry Members that act as routing broker-dealers for exchanges. The Industry Member fees will not be applicable, however, to an ATS that

qualifies as an Execution Venue, as discussed in more detail in the section on Execution Venue tiering.

In accordance with Section 11.3(b), the Operating Committee approved a tiered fee structure for Industry Members (other than Execution Venue ATSS) as described in this section. In determining the tiers, the Operating Committee considered the funding principles set forth in Section 11.2 of the CAT NMS Plan, seeking to create funding tiers that take into account the relative impact on CAT System resources of different Industry Members, and that establish comparable fees among the CAT Reporters with the most Reportable Events. The Operating Committee has determined that establishing seven tiers results in an allocation of fees that distinguishes between Industry Members with differing levels of message traffic. Thus, each such Industry Member will be placed into one of seven tiers of fixed fees, based on "message traffic" for a defined period (as discussed below).

A seven tier structure was selected to provide a wide range of levels for tiering Industry Members such that Industry Members submitting significantly less message traffic to the CAT would be adequately differentiated from Industry Members submitting substantially more message traffic. The Operating Committee considered historical message traffic from multiple time periods, generated by Industry Members across all exchanges and as submitted to FINRA's Order Audit Trail System ("OATS"), and considered the distribution of firms with similar levels of message traffic, grouping together firms with similar levels of message traffic. Based on this, the Operating Committee determined that seven tiers would group firms with similar levels of message traffic, charging those firms with higher impact on the CAT more, while lowering the burden on Industry Members that have less CAT-related activity. Furthermore, the selection of seven tiers establishes comparable fees among the largest CAT Reporters.

Each Industry Member (other than Execution Venue ATSS) will be ranked by message traffic and tiered by predefined Industry Member percentages (the "Industry Member Percentages"). The Operating Committee determined to use predefined percentages rather than fixed volume thresholds to ensure that the total CAT Fees collected recover the expected CAT costs regardless of changes in the total level of message traffic. To determine the fixed percentage of Industry Members in each tier, the Operating Committee analyzed

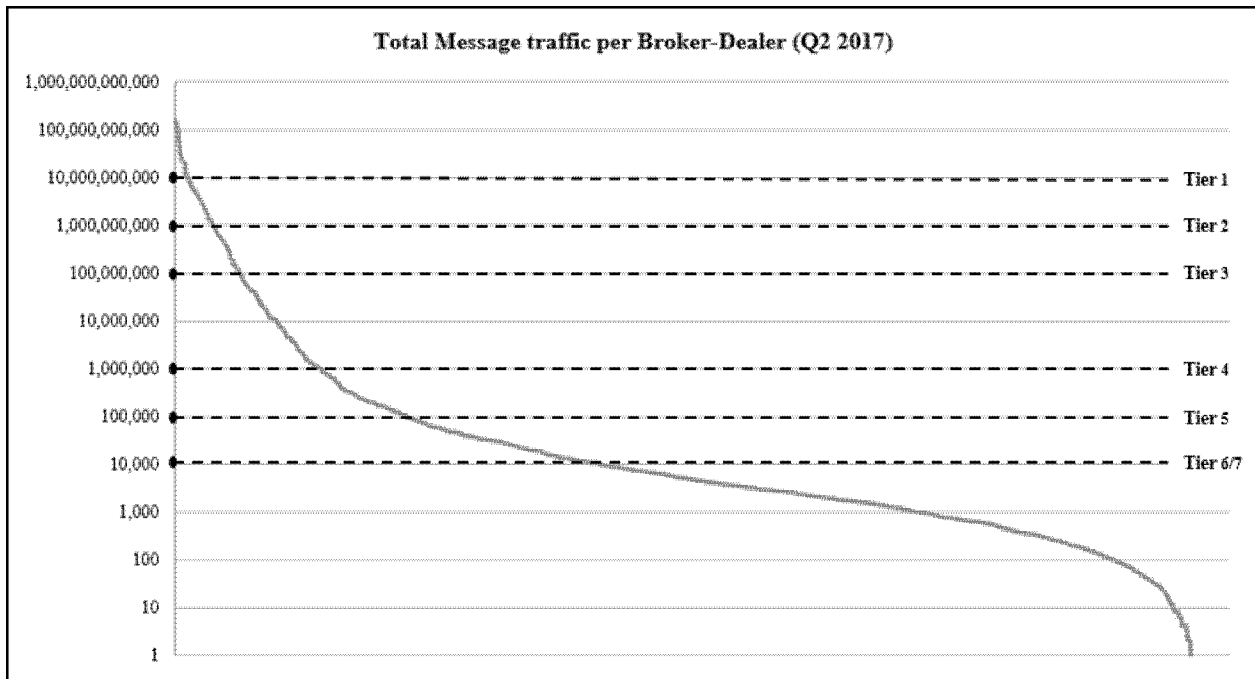
historical message traffic generated by Industry Members across all exchanges and as submitted to OATS, and considered the distribution of firms with similar levels of message traffic, grouping together firms with similar levels of message traffic. Based on this, the Operating Committee identified seven tiers that would group firms with similar levels of message traffic.

The percentage of costs recovered by each Industry Member tier will be determined by predefined percentage allocations (the "Industry Member Recovery Allocation"). In determining the fixed percentage allocation of costs recovered for each tier, the Operating Committee considered the impact of CAT Reporter message traffic on the CAT System as well as the distribution of total message volume across Industry Members while seeking to maintain comparable fees among the largest CAT Reporters. Accordingly, following the determination of the percentage of Industry Members in each tier, the Operating Committee identified the percentage of total market volume for each tier based on the historical message traffic upon which Industry Members

had been initially ranked. Taking this into account along with the resulting percentage of total recovery, the percentage allocation of costs recovered for each tier were assigned, allocating higher percentages of recovery to tiers with higher levels of message traffic while avoiding any inappropriate burden on competition. Furthermore, by using percentages of Industry Members and costs recovered per tier, the Operating Committee sought to include elasticity within the funding model, allowing the funding model to respond to changes in either the total number of Industry Members or the total level of message traffic.

The following chart illustrates the breakdown of seven Industry Member tiers across the monthly average of total equity and equity options orders, cancels, quotes and executions in the second quarter of 2017 as well as message traffic thresholds between the largest of Industry Member message traffic gaps. The Operating Committee referenced similar distribution illustrations to determine the appropriate division of Industry Member percentages in each tier by

considering the grouping of firms with similar levels of message traffic and seeking to identify relative breakpoints in the message traffic between such groupings. In reviewing the chart and its corresponding table, note that while these distribution illustrations were referenced to help differentiate between Industry Member tiers, the proposed funding model is driven by fixed percentages of Industry Members across tiers to account for fluctuating levels of message traffic over time. This approach also provides financial stability for the CAT by ensuring that the funding model will recover the required amounts regardless of changes in the number of Industry Members or the amount of message traffic. Actual messages in any tier will vary based on the actual traffic in a given measurement period, as well as the number of firms included in the measurement period. The Industry Member Percentages and Industry Member Recovery Allocation for each tier will remain fixed with each Industry Member's tier to be reassigned periodically, as described below in Section 3(a)(2)(I).



APPROXIMATE MESSAGE TRAFFIC PER INDUSTRY

Industry Member tier	Member (Q2 2017) (orders, quotes, cancels and executions)
Tier 1	>10,000,000,000
Tier 2	1,000,000,000–10,000,000,000
Tier 3	100,000,000–1,000,000,000
Tier 4	1,000,000–100,000,000

APPROXIMATE MESSAGE TRAFFIC PER INDUSTRY—Continued

Industry Member tier	Member (Q2 2017) (orders, quotes, cancels and executions)
Tier 5	100,000–1,000,000
Tier 6	10,000–100,000
Tier 7	<10,000

Based on the above analysis, the Operating Committee approved the following Industry Member Percentages and Industry Member Recovery Allocations:

Industry Member tier	Percentage of Industry Members	Percentage of Industry Member Recovery	Percentage of total recovery
Tier 1	0.900	12.00	9.00
Tier 2	2.150	20.50	15.38
Tier 3	2.800	18.50	13.88
Tier 4	7.750	32.00	24.00
Tier 5	8.300	10.00	7.50
Tier 6	18.800	6.00	4.50
Tier 7	59.300	1.00	0.75
Total	100	100	75

For the purposes of creating these tiers based on message traffic, the Operating Committee determined to define the term “message traffic” separately for the period before the commencement of CAT reporting and for the period after the start of CAT reporting. The different definition for message traffic is necessary as there will be no Reportable Events as defined in the Plan, prior to the commencement of CAT reporting. Accordingly, prior to the start of CAT reporting, “message traffic” will be comprised of historical equity and equity options orders, cancels, quotes and executions provided by each exchange and FINRA over the previous three months. Prior to the start of CAT reporting, orders would be comprised of the total number of equity and equity options orders received and originated by a member of an exchange or FINRA over the previous three-month period, including principal orders, cancel/replace orders, market maker orders originated by a member of an exchange, and reserve (iceberg) orders as well as executions originated by a member of FINRA, and excluding order rejects, system-modified orders, order routes and implied orders.⁴⁸ In addition, prior to the start of CAT reporting, cancels would be comprised of the total number

of equity and equity option cancels received and originated by a member of an exchange or FINRA over a three-month period, excluding order modifications (e.g., order updates, order splits, partial cancels) and multiple cancels of a complex order. Furthermore, prior to the start of CAT reporting, quotes would be comprised of information readily available to the exchanges and FINRA, such as the total number of historical equity and equity options quotes received and originated by a member of an exchange or FINRA over the prior three-month period. Additionally, prior to the start of CAT reporting, executions would be comprised of the total number of equity and equity option executions received or originated by a member of an exchange or FINRA over a three-month period.

After an Industry Member begins reporting to the CAT, “message traffic” will be calculated based on the Industry Member’s Reportable Events reported to the CAT as will be defined in the Technical Specifications.⁴⁹

Quotes of Options Market Makers and equity market makers will be included in the calculation of total message traffic for those market makers for purposes of tiering under the CAT funding model

both prior to CAT reporting and once CAT reporting commences.⁵⁰ To address potential concerns regarding burdens on competition or market quality of including quotes in the calculation of message traffic, however, the Operating Committee determined to discount the Options Market Maker quotes by the trade to quote ratio for options when calculating message traffic for Options Market Makers. Based on available data for June 2016 through June 2017, the trade to quote ratio for options is 0.01%. Similarly, to avoid disincentives to quoting behavior on the equities side, the Operating Committee determined to discount equity market maker quotes by the trade to quote ratio for equities. Based on available data for June 2016 through June 2017, the trade to quote ratio for equities is 5.43%.⁵¹

⁵⁰The SEC approved exemptive relief permitting Options Market Maker quotes to be reported to the Central Repository by the relevant Options Exchange in lieu of requiring that such reporting be done by both the Options Exchange and the Options Market Maker, as required by Rule 613 of Regulation NMS. See Securities Exchange Act Release No. 77265 (March 1, 2017), 81 FR 11856 (March 7, 2016). This exemption applies to Options Market Maker quotes for CAT reporting purposes only. Therefore, notwithstanding the reporting exemption provided for Options Market Maker quotes, Options Market Maker quotes will be included in the calculation of total message traffic for Options Market Makers for purposes of tiering under the CAT funding model both prior to CAT reporting and once CAT reporting commences.

⁵¹The trade to quote ratios were calculated based on the inverse of the average of the monthly equity SIP and OPRA quote to trade ratios from June 2016–June 2017 that were compiled by the Financial

⁴⁸Consequently, firms that do not have “message traffic” reported to an exchange or OATS before they are reporting to the CAT would not be subject to a fee until they begin to report information to CAT.

⁴⁹If an Industry Member (other than an Execution Venue ATS) has no orders, cancels, quotes and executions prior to the commencement of CAT Reporting, or no Reportable Events after CAT reporting commences, then the Industry Member would not have a CAT Fee obligation.

The trade to quote ratio for options and the trade to quote ratio for equities will be calculated every three months when tiers are recalculated (as discussed below).

The Operating Committee has determined to calculate fee tiers every three months, on a calendar quarter basis, based on message traffic from the prior three months. Based on its analysis of historical data, the Operating Committee believes that calculating tiers based on three months of data will provide the best balance between reflecting changes in activity by Industry Members while still providing predictability in the tiering for Industry Members. Because fee tiers will be calculated based on message traffic from the prior three months, the Operating Committee will begin calculating message traffic based on an Industry Member's Reportable Events reported to the CAT once the Industry Member has been reporting to the CAT for three months. Prior to that, fee tiers will be calculated as discussed above with regard to the period prior to CAT reporting.

(C) Execution Venue Tiering

Under Section 11.3(a) of the CAT NMS Plan, the Operating Committee is required to establish fixed fees payable by Execution Venues. Section 1.1 of the CAT NMS Plan defines an Execution Venue as "a Participant or an alternative trading system ("ATS") (as defined in Rule 300 of Regulation ATS) that operates pursuant to Rule 301 of Regulation ATS (excluding any such ATS that does not execute orders)."⁵²

The Operating Committee determined that ATSs should be included within the definition of Execution Venue. The Operating Committee believes that it is appropriate to treat ATSs as Execution Venues under the proposed funding model since ATSs have business models that are similar to those of exchanges, and ATSs also compete with exchanges.

Given the differences between Execution Venues that trade NMS Stocks and/or OTC Equity Securities and Execution Venues that trade Listed Options, Section 11.3(a) addresses Execution Venues that trade NMS Stocks and/or OTC Equity Securities separately from Execution Venues that trade Listed Options. Equity and Options Execution Venues are treated separately for two reasons. First, the differing quoting behavior of Equity and

Options Execution Venues makes comparison of activity between such Execution Venues difficult. Second, Execution Venue tiers are calculated based on market share of share volume, and it is therefore difficult to compare market share between asset classes (*i.e.*, equity shares versus options contracts). Discussed below is how the funding model treats the two types of Execution Venues.

(I) NMS Stocks and OTC Equity Securities

Section 11.3(a)(i) of the CAT NMS Plan states that each Execution Venue that (i) executes transactions or, (ii) in the case of a national securities association, has trades reported by its members to its trade reporting facility or facilities for reporting transactions effected otherwise than on an exchange, in NMS Stocks or OTC Equity Securities will pay a fixed fee depending on the market share of that Execution Venue in NMS Stocks and OTC Equity Securities, with the Operating Committee establishing at least two and not more than five tiers of fixed fees, based on an Execution Venue's NMS Stocks and OTC Equity Securities market share. For these purposes, market share for Execution Venues that execute transactions will be calculated by share volume, and market share for a national securities association that has trades reported by its members to its trade reporting facility or facilities for reporting transactions effected otherwise than on an exchange in NMS Stocks or OTC Equity Securities will be calculated based on share volume of trades reported, provided, however, that the share volume reported to such national securities association by an Execution Venue shall not be included in the calculation of such national security association's market share.

In accordance with Section 11.3(a)(i) of the CAT NMS Plan, the Operating Committee approved a tiered fee structure for Equity Execution Venues and Option Execution Venues. In determining the Equity Execution Venue Tiers, the Operating Committee considered the funding principles set forth in Section 11.2 of the CAT NMS Plan, seeking to create funding tiers that take into account the relative impact on system resources of different Equity Execution Venues, and that establish comparable fees among the CAT Reporters with the most Reportable Events. Each Equity Execution Venue will be placed into one of four tiers of fixed fees, based on the Execution Venue's NMS Stocks and OTC Equity Securities market share. In choosing four tiers, the Operating Committee

performed an analysis similar to that discussed above with regard to the non-Execution Venue Industry Members to determine the number of tiers for Equity Execution Venues. The Operating Committee determined to establish four tiers for Equity Execution Venues, rather than a larger number of tiers as established for non-Execution Venue Industry Members, because the four tiers were sufficient to distinguish between the smaller number of Equity Execution Venues based on market share. Furthermore, the selection of four tiers serves to help establish comparability among the largest CAT Reporters.

Each Equity Execution Venue will be ranked by market share and tiered by predefined Execution Venue percentages, (the "Equity Execution Venue Percentages"). In determining the fixed percentage of Equity Execution Venues in each tier, the Operating Committee reviewed historical market share of share volume for Execution Venues. Equity Execution Venue market shares of share volume were sourced from market statistics made publicly-available by Bats Global Markets, Inc. ("Bats"). ATS market shares of share volume was sourced from market statistics made publicly-available by FINRA. FINRA trade reporting facility ("TRF") and ORF market share of share volume was sourced from market statistics made publicly available by FINRA. Based on data from FINRA and otcmarkets.com, ATSs accounted for 39.12% of the share volume across the TRFs and ORFs during the recent tiering period. A 39.12/60.88 split was applied to the ATS and non-ATS breakdown of FINRA market share, with FINRA tiered based only on the non-ATS portion of its market share of share volume.

The Operating Committee determined to discount the OTC Equity Securities market share of Execution Venue ATSs trading OTC Equity Securities as well as the market share of the FINRA ORF in recognition of the different trading characteristics of the OTC Equity Securities market as compared to the market in NMS Stocks. Many OTC Equity Securities are priced at less than one dollar—and a significant number at less than one penny—per share and low-priced shares tend to trade in larger quantities. Accordingly, a disproportionately large number of shares are involved in transactions involving OTC Equity Securities versus NMS Stocks. Because the proposed fee tiers are based on market share calculated by share volume, Execution Venue ATSs trading OTC Equity Securities and FINRA would likely be subject to higher tiers than their

Information Forum using data from Nasdaq and SIAC.

⁵² Although FINRA does not operate an execution venue, because it is a Participant, it is considered an "Execution Venue" under the Plan for purposes of determining fees.

operations may warrant. To address this potential concern, the Operating Committee determined to discount the OTC Equity Securities market share of Execution Venue ATSS trading OTC Equity Securities and the market share of the FINRA ORF by multiplying such market share by the average shares per trade ratio between NMS Stocks and OTC Equity Securities in order to adjust for the greater number of shares being traded in the OTC Equity Securities market. Based on available data for the second quarter of 2017, the average shares per trade ratio between NMS Stocks and OTC Equity Securities is 0.17%.⁵³ The average shares per trade ratio between NMS Stocks and OTC Equity Securities will be recalculated every three months when tiers are recalculated.

Based on this, the Operating Committee considered the distribution

of Execution Venues, and grouped together Execution Venues with similar levels of market share. The percentage of costs recovered by each Equity Execution Venue tier will be determined by predefined percentage allocations (the “Equity Execution Venue Recovery Allocation”). In determining the fixed percentage allocation of costs to be recovered from each tier, the Operating Committee considered the impact of CAT Reporter market share activity on the CAT System as well as the distribution of total market volume across Equity Execution Venues while seeking to maintain comparable fees among the largest CAT Reporters. Accordingly, following the determination of the percentage of Execution Venues in each tier, the Operating Committee identified the percentage of total market volume for each tier based on the historical market

share upon which Execution Venues had been initially ranked. Taking this into account along with the resulting percentage of total recovery, the percentage allocation of cost recovery for each tier were assigned, allocating higher percentages of recovery to the tier with a higher level of market share while avoiding any inappropriate burden on competition. Furthermore, by using percentages of Equity Execution Venues and cost recovery per tier, the Operating Committee sought to include elasticity within the funding model, allowing the funding model to respond to changes in either the total number of Equity Execution Venues or changes in market share.

Based on this analysis, the Operating Committee approved the following Equity Execution Venue Percentages and Recovery Allocations:

• Equity Execution Venue tier	• Percentage of Equity Execution Venues	• Percentage of Execution Venue Recovery	• Percentage of total recovery
• Tier 1	• 25.00	• 33.25	• 8.31
• Tier 2	• 42.00	• 25.73	• 6.43
• Tier 3	• 23.00	• 8.00	• 2.00
• Tier 4	• 10.00	• 0.02	• 0.01
• Total	• 100	• 67	• 16.75

(II) Listed Options

Section 11.3(a)(ii) of the CAT NMS Plan states that each Execution Venue that executes transactions in Listed Options will pay a fixed fee depending on the Listed Options market share of that Execution Venue, with the Operating Committee establishing at least two and no more than five tiers of fixed fees, based on an Execution Venue’s Listed Options market share. For these purposes, market share will be calculated by contract volume.

In accordance with Section 11.3(a)(ii) of the CAT NMS Plan, the Operating Committee approved a tiered fee structure for Options Execution Venues. In determining the tiers, the Operating Committee considered the funding principles set forth in Section 11.2 of the CAT NMS Plan, seeking to create funding tiers that take into account the relative impact on system resources of different Options Execution Venues, and that establish comparable fees among the CAT Reporters with the most Reportable Events. Each Options Execution Venue will be placed into one of two tiers of fixed fees, based on the

Execution Venue’s Listed Options market share. In choosing two tiers, the Operating Committee performed an analysis similar to that discussed above with regard to Industry Members (other than Execution Venue ATSS) to determine the number of tiers for Options Execution Venues. The Operating Committee determined to establish two tiers for Options Execution Venues, rather than a larger number, because the two tiers were sufficient to distinguish between the smaller number of Options Execution Venues based on market share. Furthermore, due to the smaller number of Options Execution Venues, the incorporation of additional Options Execution Venue tiers would result in significantly higher fees for Tier 1 Options Execution Venues and reduce comparability between Execution Venues and Industry Members. Furthermore, the selection of two tiers served to establish comparable fees among the largest CAT Reporters.

Each Options Execution Venue will be ranked by market share and tiered by predefined Execution Venue

percentages, (the “Options Execution Venue Percentages”). To determine the fixed percentage of Options Execution Venues in each tier, the Operating Committee analyzed the historical and publicly available market share of Options Execution Venues to group Options Execution Venues with similar market shares across the tiers. Options Execution Venue market share of share volume were sourced from market statistics made publicly-available by Bats. The process for developing the Options Execution Venue Percentages was the same as discussed above with regard to Equity Execution Venues.

The percentage of costs to be recovered from each Options Execution Venue tier will be determined by predefined percentage allocations (the “Options Execution Venue Recovery Allocation”). In determining the fixed percentage allocation of cost recovery for each tier, the Operating Committee considered the impact of CAT Reporter market share activity on the CAT System as well as the distribution of total market volume across Options Execution Venues while seeking to

⁵³ The average shares per trade ratio for both NMS Stocks and OTC Equity Securities from the second quarter of 2017 was calculated using publicly

available market volume data from Bats and OTC Markets Group, and the totals were divided to

determine the average number of shares per trade between NMS Stocks and OTC Equity Securities.

maintain comparable fees among the largest CAT Reporters. Furthermore, by using percentages of Options Execution Venues and cost recovery per tier, the Operating Committee sought to include elasticity within the funding model,

allowing the funding model to respond to changes in either the total number of Options Execution Venues or changes in market share. The process for developing the Options Execution Venue Recovery Allocation was the

same as discussed above with regard to Equity Execution Venues.

Based on this analysis, the Operating Committee approved the following Options Execution Venue Percentages and Recovery Allocations:

Options Execution Venue tier	Percentage of Options Execution Venues	Percentage of Execution Venue recovery	Percentage of total recovery
Tier 1	75.00	28.25	7.06
Tier 2	25.00	4.75	1.19
Total	100	33	8.25

(III) Market Share/Tier Assignments

The Operating Committee determined that, prior to the start of CAT reporting, market share for Execution Venues would be sourced from publicly-available market data. Options and equity volumes for Participants will be sourced from market data made publicly available by Bats while Execution Venue ATS volumes will be sourced from market data made publicly available by FINRA and OTC Markets. Set forth in the Appendix are two charts, one listing the current Equity Execution Venues, each with its rank and tier, and one listing the current Options Execution Venues, each with its rank and tier.

After the commencement of CAT reporting, market share for Execution Venues will be sourced from data reported to the CAT. Equity Execution Venue market share will be determined by calculating each Equity Execution Venue's proportion of the total volume of NMS Stock and OTC Equity shares reported by all Equity Execution Venues during the relevant time period (with the discounting of OTC Equity Securities market share of Execution Venue ATSS trading OTC Equity Securities as well as the market share of the FINRA ORF, as described above). Similarly, market share for Options Execution Venues will be determined by calculating each Options Execution Venue's proportion of the total volume of Listed Options contracts reported by all Options Execution Venues during the relevant time period.

The Operating Committee has determined to calculate fee tiers for Execution Venues every three months based on market share from the prior three months. Based on its analysis of historical data, the Operating Committee believes calculating tiers based on three months of data will provide the best balance between reflecting changes in activity by Execution Venues while still

providing predictability in the tiering for Execution Venues.

(D) Allocation of Costs

In addition to the funding principles discussed above, including comparability of fees, Section 11.1(c) of the CAT NMS Plan also requires expenses to be fairly and reasonably shared among the Participants and Industry Members. Accordingly, in developing the proposed fee schedules pursuant to the funding model, the Operating Committee calculated how the CAT costs would be allocated between Industry Members and Execution Venues, and how the portion of CAT costs allocated to Execution Venues would be allocated between Equity Execution Venues and Options Execution Venues. These determinations are described below.

(I) Allocation Between Industry Members and Execution Venues

In determining the cost allocation between Industry Members (other than Execution Venue ATSS) and Execution Venues, the Operating Committee analyzed a range of possible splits for revenue recovery from such Industry Members and Execution Venues, including 80%/20%, 75%/25%, 70%/30% and 65%/35% allocations. Based on this analysis, the Operating Committee determined that 75 percent of total costs recovered would be allocated to Industry Members (other than Execution Venue ATSS) and 25 percent would be allocated to Execution Venues. The Operating Committee determined that this 75%/25% division maintained the greatest level of comparability across the funding model. For example, the cost allocation establishes fees for the largest Industry Members (i.e., those Industry Members in Tiers 1) that are comparable to the largest Equity Execution Venues and Options Execution Venues (i.e., those Execution Venues in Tier 1).

Furthermore, the allocation of total CAT cost recovery recognizes the difference in the number of CAT Reporters that are Industry Members versus CAT Reporters that are Execution Venues. Specifically, the cost allocation takes into consideration that there are approximately 23 times more Industry Members expected to report to the CAT than Execution Venues (e.g., an estimated 1541 Industry Members versus 67 Execution Venues as of June 2017).

(II) Allocation Between Equity Execution Venues and Options Execution Venues

The Operating Committee also analyzed how the portion of CAT costs allocated to Execution Venues would be allocated between Equity Execution Venues and Options Execution Venues. In considering this allocation of costs, the Operating Committee analyzed a range of alternative splits for revenue recovered between Equity and Options Execution Venues, including a 70%/30%, 67%/33%, 65%/35%, 50%/50% and 25%/75% split. Based on this analysis, the Operating Committee determined to allocate 67 percent of Execution Venue costs recovered to Equity Execution Venues and 33 percent to Options Execution Venues. The Operating Committee determined that a 67%/33% allocation between Equity and Options Execution Venues maintained the greatest level of fee equitability and comparability based on the current number of Equity and Options Execution Venues. For example, the allocation establishes fees for the larger Equity Execution Venues that are comparable to the larger Options Execution Venues. Specifically, Tier 1 Equity Execution Venues would pay a quarterly fee of \$81,047 and Tier 1 Options Execution Venues would pay a quarterly fee of \$81,379. In addition to fee comparability between Equity Execution Venues and Options

Execution Venues, the allocation also establishes equitability between larger (Tier 1) and smaller (Tier 2) Execution Venues based upon the level of market share. Furthermore, the allocation is intended to reflect the relative levels of current equity and options order events.

(E) Fee Levels

The Operating Committee determined to establish a CAT-specific fee to collectively recover the costs of building and operating the CAT. Accordingly, under the funding model, the sum of the CAT Fees is designed to recover the total cost of the CAT. The Operating Committee has determined overall CAT costs to be comprised of Plan Processor costs and non-Plan Processor costs, which are estimated to be \$50,700,000 in total for the year beginning November 21, 2016.⁵⁴

The Plan Processor costs relate to costs incurred and to be incurred through November 21, 2017 by the Plan Processor and consist of the Plan

Processor's current estimates of average yearly ongoing costs, including development costs, which total \$37,500,000. This amount is based upon the fees due to the Plan Processor pursuant to the Company's agreement with the Plan Processor.

The non-Plan Processor estimated costs incurred and to be incurred by the Company through November 21, 2017 consist of three categories of costs. The first category of such costs are third party support costs, which include legal fees, consulting fees and audit fees from November 21, 2016 until the date of filing as well as estimated third party support costs for the rest of the year. These amount to an estimated \$5,200,000. The second category of non-Plan Processor costs are estimated cyber-insurance costs for the year. Based on discussions with potential cyber-insurance providers, assuming \$2–5 million cyber-insurance premium on \$100 million coverage, the Company has

estimated \$3,000,000 for the annual cost. The final cost figures will be determined following receipt of final underwriter quotes. The third category of non-Plan Processor costs is the CAT operational reserve, which is comprised of three months of ongoing Plan Processor costs (\$9,375,000), third party support costs (\$1,300,000) and cyber-insurance costs (\$750,000). The Operating Committee aims to accumulate the necessary funds to establish the three-month operating reserve for the Company through the CAT Fees charged to CAT Reporters for the year. On an ongoing basis, the Operating Committee will account for any potential need to replenish the operating reserve or other changes to total cost during its annual budgeting process. The following table summarizes the Plan Processor and non-Plan Processor cost components which comprise the total estimated CAT costs of \$50,700,000 for the covered period.

Cost category	Cost component	Amount
Plan Processor	Operational Costs	\$37,500,000
Non-Plan Processor	Third Party Support Costs	5,200,000
	Operational Reserve	⁵⁵ 5,000,000
	Cyber-insurance Costs	3,000,000
Estimated Total		50,700,000

Based on these estimated costs and the calculations for the funding model described above, the Operating Committee determined to impose the following fees:⁵⁶

For Industry Members (other than Execution Venue ATSS):

Tier	Percentage of Industry Members	Quarterly CAT fee
1	0.900	\$81,483
2	2.150	59,055
3	2.800	40,899
4	7.750	25,566
5	8.300	7,428
6	18.800	1,968
7	59.300	105

For Execution Venues for NMS Stocks and OTC Equity Securities:

Tier	Percentage of Equity Execution Venues	Quarterly CAT fee
1	25.00	\$81,048
2	42.00	37,062
3	23.00	21,126
4	10.00	129

For Execution Venues for Listed Options:

Tier	Percentage of Options Execution Venues	Quarterly CAT fee
1	75.00	\$81,381
2	25.00	37,629

The Operating Committee has calculated the schedule of effective fees for Industry Members (other than Execution Venue ATSS) and Execution Venues in the following manner. Note that the calculation of CAT Fees assumes 52 Equity Execution Venues, 15 Options Execution Venues and 1,541 Industry Members (other than Execution Venue ATSS) as of June 2017.

Industry Member tier	Percentage of Industry Members	Percentage of Industry Member recovery	Percentage of total recovery
Tier 1	0.900	12.00	9.00
Tier 2	2.150	20.50	15.38
Tier 3	2.800	18.50	13.88
Tier 4	7.750	32.00	24.00
Tier 5	8.300	10.00	7.50
Tier 6	18.800	6.00	4.50

⁵⁴ It is anticipated that CAT-related costs incurred prior to November 21, 2016 will be addressed via a separate filing.

⁵⁵ This \$5,000,000 represents the gradual accumulation of the funds for a target operating reserve of \$11,425,000.

⁵⁶ Note that all monthly, quarterly and annual CAT Fees have been rounded to the nearest dollar.

Industry Member tier	Percentage of Industry Members	Percentage of Industry Member recovery	Percentage of total recovery
Tier 7	59.300	1.00	0.75
Total	100	100	75

Industry Member tier	Estimated number of industry members	Industry Member tier	Estimated number of industry members	Industry Member tier	Estimated number of industry members
Tier 1	14	Tier 4	119	Tier 7	914
Tier 2	33	Tier 5	128	Total	1,541
Tier 3	43	Tier 6	290		

Calculation 1.1 (Calculation of a Tier 1 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 0.9\% \text{ [% of Tier 1 IMs]} = 14 \text{ [Estimated Tier 1 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 12\% \text{ [% of Tier 1 IM Recovery]}}{14 \text{ [Estimated Tier 1 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$27,161}$$

Calculation 1.2 (Calculation of a Tier 2 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 2.15\% \text{ [% of Tier 2 IMs]} = 33 \text{ [Estimated Tier 2 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 20.5\% \text{ [% of Tier 2 IM Recovery]}}{33 \text{ [Estimated Tier 2 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$19,685}$$

Calculation 1.3 (Calculation of a Tier 3 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 2.125\% \text{ [% of Tier 3 IMs]} = 43 \text{ [Estimated Tier 3 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 18.5\% \text{ [% of Tier 3 IM Recovery]}}{43 \text{ [Estimated Tier 3 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$13,633}$$

Calculation 1.4 (Calculation of a Tier 4 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 7.75\% \text{ [% of Tier 4 IMs]} = 119 \text{ [Estimated Tier 4 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 32\% \text{ [% of Tier 4 IM Recovery]}}{119 \text{ [Estimated Tier 4 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$8522}$$

Calculation 1.5 (Calculation of a Tier 5 Industry Member Annual Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 8.3\% \text{ [% of Tier 5 IMs]} = 128 \text{ [Estimated Tier 5 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 7.75\% \text{ [% of Tier 5 IM Recovery]}}{128 \text{ [Estimated Tier 5 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$2476}$$

Calculation 1.6 (Calculation of a Tier 6 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 18.8\% \text{ [% of Tier 6 IMs]} = 290 \text{ [Estimated Tier 6 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 6\% \text{ [% of Tier 6 IM Recovery]}}{290 \text{ [Estimated Tier 6 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$656}$$

Calculation 1.7 (Calculation of a Tier 7 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 59.3\% \text{ [% of Tier 7 IMs]} = 914 \text{ [Estimated Tier 7 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 1\% \text{ [% of Tier 7 IM Recovery]}}{914 \text{ [Estimated Tier 7 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$35}$$

CALCULATION OF ANNUAL TIER FEES FOR EQUITY EXECUTION VENUES (“EV”)

• Equity Execution Venue tier	• Percentage of Equity Execution Venues	• Percentage of Execution Venue recovery	• Percentage of total recovery
• Tier 1	• 25.00	• 33.25	• 8.31
• Tier 2	• 42.00	• 25.73	• 6.43
• Tier 3	• 23.00	• 8.00	• 2.00
• Tier 4	• 10.00	• 49.00	• 0.01
• Total	• 100	• 67	• 16.75

Equity Execution Venue tier	Estimated number of Equity Execution venues
Tier 1	13
Tier 2	22
Tier 3	12
Tier 4	5
Total	52

Calculation 2.1 (Calculation of a Tier 1 Equity Execution Venue Monthly Fee)

$$52 \text{ [Estimated Tot. Equity EVs]} \times 25\% \text{ [% of Tier 1 Equity EVs]} = 13 \text{ [Estimated Tier 1 Equity EVs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann.CAT Costs]} \times 33.25\% \text{ [EV \% of Tot. Ann.CAT Costs]} \times 26\% \text{ [% of Tier 1 Equity EV Recovery]}}{13 \text{ [Estimated Tier 1 Equity EVs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$27,016}$$

Calculation 2.2 (Calculation of a Tier 2 Equity Execution Venue Monthly Fee)

$$52 \text{ [Estimated Tot. Equity EVs]} \times 42\% \text{ [% of Tier 2 Equity EVs]} = 22 \text{ [Estimated Tier 2 Equity EVs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann.CAT Costs]} \times 25\% \text{ [EV \% of Tot. Ann.CAT Costs]} \times 25.73\% \text{ [% of Tier 2 Equity EV Recovery]}}{22 \text{ [Estimated Tier 2 Equity EVs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$12,353}$$

Calculation 2.3 (Calculation of a Tier 3 Equity Execution Venue Monthly Fee)

$$52 \text{ [Estimated Tot. Equity EVs]} \times 23\% \text{ [% of Tier 2 Equity EVs]} = 12 \text{ [Estimated Tier 2 Equity EVs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann.CAT Costs]} \times 25\% \text{ [EV \% of Tot. Ann.CAT Costs]} \times 8\% \text{ [% of Tier 2 Equity EV Recovery]}}{12 \text{ [Estimated Tier 2 Equity EVs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$7,042}$$

Calculation 2.4 (Calculation of a Tier 4 Equity Execution Venue Monthly Fee)

$$52 \text{ [Estimated Tot. Equity EVs]} \times 10\% \text{ [% of Tier 2 Equity EVs]} = 5 \text{ [Estimated Tier 2 Equity EVs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann.CAT Costs]} \times 25\% \text{ [EV \% of Tot. Ann.CAT Costs]} \times 0.02\% \text{ [% of Tier 2 Equity EV Recovery]}}{5 \text{ [Estimated Tier 2 Equity EVs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$42}$$

CALCULATION OF ANNUAL TIER FEES FOR OPTIONS EXECUTION VENUES (“EV”)

Options Execution Venue tier	Percentage of Options Execution venues	Percentage of Execution Venue Recovery	Percentage of Total Recovery
Tier 1	75.00	28.25	7.06
Tier 2	25.00	4.75	1.19
Total	100	33	8.25

Options Execution Venue tier	Estimated number of Options Execution venues
Tier 1	11

Options Execution Venue tier	Estimated number of Options Execution venues
Tier 2	4
Total	15

Calculation 3.1 (Calculation of a Tier 1 Options Execution Venue Monthly Fee)

15 [Estimated Tot. Options EVs] × 75% [% of Tier 1 Options EVs] = 11 [Estimated Tier 1 Options EVs]

$$\left(\frac{\$50,700,000 [\text{Tot. Ann. CAT Costs}] \times 25\% [\text{EV \% of Tot. Ann. CAT Costs}] \times 28.25\% [\text{\% of Tier 1 Options EV Recovery}]}{11 [\text{Estimated Tier 1 Options EVs}]} \right) \div 12 [\text{Months per year}] = \$27,127$$

Calculation 3.2 (Calculation of a Tier 2 Options Execution Venue Annual Fee)

15 [Estimated Tot. Options EVs] × 25% [% of Tier 2 Options EVs] = 4 [Estimated Tier 2 Options EVs]

$$\left(\frac{\$50,700,000 [\text{Tot. Ann. CAT Costs}] \times 25\% [\text{EV \% of Tot. Ann. CAT Costs}] \times 4.75\% [\text{\% of Tier 2 Options EV Recovery}]}{4 [\text{Estimated Tier 2 Options EVs}]} \right) \div 12 [\text{Months per year}] = \$12,543$$

TRACEABILITY OF TOTAL CAT FEES

Type	Industry member tier	Estimated number of members	CAT fees paid annually	Total recovery
Industry Members	Tier 1	14	\$325,932	\$4,563,048
	Tier 2	33	236,220	7,795,260
	Tier 3	43	163,596	7,034,628
	Tier 4	119	102,264	12,169,416
	Tier 5	128	29,712	3,803,136
	Tier 6	290	7,872	2,282,880
	Tier 7	914	420	383,880
Total .....	.....	1,541	.....	38,032,248
Equity Execution Venues	Tier 1	13	324,192	4,214,496
	Tier 2	22	148,248	3,261,456
	Tier 3	12	84,504	1,014,048
	Tier 4	5	516	2,580
Total .....	.....	52	.....	8,492,580
Options Execution Venues	Tier 1	11	325,524	3,580,764
	Tier 2	4	150,516	602,064
Total .....	.....	15	.....	4,182,828
Total .....	.....	.....	.....	50,700,000
Excess ⁵⁷ .....	.....	.....	.....	7,656

(F) Comparability of Fees

The funding principles require a funding model in which the fees charged to the CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes

⁵⁷ The amount in excess of the total CAT costs will contribute to the gradual accumulation of the target operating reserve of \$11.425 million.

into consideration affiliations between or among CAT Reporters, whether Execution Venue and/or Industry Members). Accordingly, in creating the model, the Operating Committee sought to establish comparable fees for the top tier of Industry Members (other than Execution Venue ATs), Equity Execution Venues and Options Execution Venues. Specifically, each Tier 1 CAT Reporter would be required to pay a quarterly fee of approximately \$81,000.

(G) Billing Onset

Under Section 11.1(c) of the CAT NMS Plan, to fund the development and implementation of the CAT, the Company shall time the imposition and collection of all fees on Participants and Industry Members in a manner reasonably related to the timing when the Company expects to incur such development and implementation costs. The Company is currently incurring such development and implementation costs and will continue to do so prior to the commencement of CAT reporting

and thereafter. In accordance with the CAT NMS Plan, all CAT Reporters, including both Industry Members and Execution Venues (including Participants), will be invoiced as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Participants and the operative date of the Plan amendment adopting CAT Fees for Participants.

(H) Changes to Fee Levels and Tiers

Section 11.3(d) of the CAT NMS Plan states that “[t]he Operating Committee shall review such fee schedule on at least an annual basis and shall make any changes to such fee schedule that it deems appropriate. The Operating Committee is authorized to review such fee schedule on a more regular basis, but shall not make any changes on more than a semi-annual basis unless, pursuant to a Supermajority Vote, the Operating Committee concludes that such change is necessary for the adequate funding of the Company.” With such reviews, the Operating Committee will review the distribution of Industry Members and Execution Venues across tiers, and make any updates to the percentage of CAT Reporters allocated to each tier as may be necessary. In addition, the reviews will evaluate the estimated ongoing CAT costs and the level of the operating reserve. To the extent that the total CAT costs decrease, the fees would be adjusted downward, and to the extent that the total CAT costs increase, the fees would be adjusted upward.⁵⁸ Furthermore, any surplus of the Company’s revenues over its expenses is

to be included within the operational reserve to offset future fees. The limitations on more frequent changes to the fee, however, are intended to provide budgeting certainty for the CAT Reporters and the Company.⁵⁹ To the extent that the Operating Committee approves changes to the number of tiers in the funding model or the fees assigned to each tier, then the Operating Committee will file such changes with the SEC pursuant to Rule 608 of the Exchange Act, and the Participants will file such changes with the SEC pursuant to Section 19(b) of the Exchange Act and Rule 19b-4 thereunder, and any such changes will become effective in accordance with the requirements of those provisions.

(I) Initial and Periodic Tier Reassignments

The Operating Committee has determined to calculate fee tiers every three months based on market share or message traffic, as applicable, from the prior three months. For the initial tier assignments, the Company will calculate the relevant tier for each CAT Reporter using the three months of data prior to the commencement date. As with the initial tier assignment, for the tri-monthly reassignments, the Company will calculate the relevant tier using the three months of data prior to the relevant tri-monthly date. Any movement of CAT Reporters between tiers will not change the criteria for each tier or the fee amount corresponding to each tier.

In performing the tri-monthly reassignments, the assignment of CAT Reporters in each assigned tier is

relative. Therefore, a CAT Reporter’s assigned tier will depend, not only on its own message traffic or market share, but also on the message traffic/market share across all CAT Reporters. For example, the percentage of Industry Members (other than Execution Venue ATs) in each tier is relative such that such Industry Member’s assigned tier will depend on message traffic generated across all CAT Reporters as well as the total number of CAT Reporters. The Operating Committee will inform CAT Reporters of their assigned tier every three months following the periodic tiering process, as the funding model will compare an individual CAT Reporter’s activity to that of other CAT Reporters in the marketplace.

The following demonstrates a tier reassignment. In accordance with the funding model, the top 75% of Options Execution Venues in market share are categorized as Tier 1 while the bottom 25% of Options Execution Venues in market share are categorized as Tier 2. In the sample scenario below, Options Execution Venue L is initially categorized as a Tier 2 Options Execution Venue in Period A due to its market share. When market share is recalculated for Period B, the market share of Execution Venue L increases, and it is therefore subsequently reranked and reassigned to Tier 1 in Period B. Correspondingly, Options Execution Venue K, initially a Tier 1 Options Execution Venue in Period A, is reassigned to Tier 2 in Period B due to decreases in its market share.

Period A			Period B		
Options Execution Venue	Market share rank	Tier	Options Execution Venue	Market share rank	Tier
Options Execution Venue A	1	1	Options Execution Venue A	1	1
Options Execution Venue B	2	1	Options Execution Venue B	2	1
Options Execution Venue C	3	1	Options Execution Venue C	3	1
Options Execution Venue D	4	1	Options Execution Venue D	4	1
Options Execution Venue E	5	1	Options Execution Venue E	5	1
Options Execution Venue F	6	1	Options Execution Venue F	6	1
Options Execution Venue G	7	1	Options Execution Venue I	7	1
Options Execution Venue H	8	1	Options Execution Venue H	8	1
Options Execution Venue I	9	1	Options Execution Venue G	9	1
Options Execution Venue J	10	1	Options Execution Venue J	10	1
Options Execution Venue K	11	1	Options Execution Venue L	11	1
Options Execution Venue L	12	2	Options Execution Venue K	12	2
Options Execution Venue M	13	2	Options Execution Venue N	13	2
Options Execution Venue N	14	2	Options Execution Venue M	14	2
Options Execution Venue O	15	2	Options Execution Venue O	15	2

⁵⁸The CAT Fees are designed to recover the costs associated with the CAT. Accordingly, CAT Fees would not be affected by increases or decreases in other non-CAT expenses incurred by the

Participants, such as any changes in costs related to the retirement of existing regulatory systems, such as OATS.

⁵⁹Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85006.

For each periodic tier reassignment, the Operating Committee will review the new tier assignments, particularly those assignments for CAT Reporters that shift from the lowest tier to a higher tier. This review is intended to evaluate whether potential changes to the market or CAT Reporters (e.g., dissolution of a large CAT Reporter) adversely affect the tier reassignments.

(J) Sunset Provision

The Operating Committee developed the proposed funding model by analyzing currently available historical data. Such historical data, however, is not as comprehensive as data that will be submitted to the CAT. Accordingly, the Operating Committee believes that it will be appropriate to revisit the funding model once CAT Reporters have actual experience with the funding model. Accordingly, the Operating Committee determined to include an automatic sunset provision for the proposed fees. Specifically, the Operating Committee determined that the CAT Fees should automatically expire two years after the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. The Operating Committee intends to monitor the operation of the funding model during this two year period and to evaluate its effectiveness during that period. Such a process will inform the Operating Committee's approach to funding the CAT after the two year period.

(3) Proposed CAT Fee Schedule

The Exchange proposes the Consolidated Audit Trail Funding Fees to impose the CAT Fees determined by the Operating Committee on the Exchange's members. The proposed fee schedule has four sections, covering definitions, the fee schedule for CAT Fees, the timing and manner of payments, and the automatic sunset of the CAT Fees. Each of these sections is discussed in detail below.

(A) Definitions

Paragraph (a) of the proposed fee schedule sets forth the definitions for the proposed fee schedule. Paragraph (a)(1) states that, for purposes of the Consolidated Audit Trail Funding Fees, the terms "CAT", "CAT NMS Plan," "Industry Member," "NMS Stock," "OTC Equity Security", "Options Market Maker", and "Participant" are defined as set forth in Rule 6810 and Chapter IX, Section 8(a) (Consolidated Audit Trail—Definitions).

The proposed fee schedule imposes different fees on Equity ATSs and Industry Members that are not Equity

ATSs. Accordingly, the proposed fee schedule defines the term "Equity ATS." First, paragraph (a)(2) defines an "ATS" to mean an alternative trading system as defined in Rule 300(a) of Regulation ATS under the Securities Exchange Act of 1934, as amended, that operates pursuant to Rule 301 of Regulation ATS. This is the same definition of an ATS as set forth in Section 1.1 of the CAT NMS Plan in the definition of an "Execution Venue." Then, paragraph (a)(4) defines an "Equity ATS" as an ATS that executes transactions in NMS Stocks and/or OTC Equity Securities.

Paragraph (a)(3) of the proposed fee schedule defines the term "CAT Fee" to mean the Consolidated Audit Trail Funding Fee(s) to be paid by Industry Members as set forth in paragraph (b) in the proposed fee schedule.

Finally, Paragraph (a)(6) defines an "Execution Venue" as a Participant or an ATS (excluding any such ATS that does not execute orders). This definition is the same substantive definition as set forth in Section 1.1 of the CAT NMS Plan. Paragraph (a)(5) defines an "Equity Execution Venue" as an Execution Venue that trades NMS Stocks and/or OTC Equity Securities.

(B) Fee Schedule

The Exchange proposes to impose the CAT Fees applicable to its Industry Members through paragraph (b) of the proposed fee schedule. Paragraph (b)(1) of the proposed fee schedule sets forth the CAT Fees applicable to Industry Members other than Equity ATSs. Specifically, paragraph (b)(1) states that the Company will assign each Industry Member (other than an Equity ATS) to a fee tier once every quarter, where such tier assignment is calculated by ranking each Industry Member based on its total message traffic (with discounts for equity market maker quotes and Options Market Maker quotes based on the trade to quote ratio for equities and options, respectively) for the three months prior to the quarterly tier calculation day and assigning each Industry Member to a tier based on that ranking and predefined Industry Member percentages. The Industry Members with the highest total quarterly message traffic will be ranked in Tier 1, and the Industry Members with lowest quarterly message traffic will be ranked in Tier 7. Each quarter, each Industry Member (other than an Equity ATS) shall pay the following CAT Fee corresponding to the tier assigned by the Company for such Industry Member for that quarter:

Tier	Percentage of Industry Members	Quarterly CAT fee
1	0.900	\$81,483
2	2.150	59,055
3	2.800	40,899
4	7.750	25,566
5	8.300	7,428
6	18.800	1,968
7	59.300	105

Paragraph (b)(2) of the proposed fee schedule sets forth the CAT Fees applicable to Equity ATSs.⁶⁰ These are the same fees that Participants that trade NMS Stocks and/or OTC Equity Securities will pay. Specifically, paragraph (b)(2) states that the Company will assign each Equity ATS to a fee tier once every quarter, where such tier assignment is calculated by ranking each Equity Execution Venue based on its total market share of NMS Stocks and OTC Equity Securities (with a discount for the OTC Equity Securities market share of Equity ATSs trading OTC Equity Securities based on the average shares per trade ratio between NMS Stocks and OTC Equity Securities) for the three months prior to the quarterly tier calculation day and assigning each Equity ATS to a tier based on that ranking and predefined Equity Execution Venue percentages. The Equity ATSs with the higher total quarterly market share will be ranked in Tier 1, and the Equity ATSs with the lowest quarterly market share will be ranked in Tier 4. Specifically, paragraph (b)(2) states that, each quarter, each Equity ATS shall pay the following CAT Fee corresponding to the tier assigned by the Company for such Equity ATS for that quarter:

Tier	Percentage of Equity Execution Venues	Quarterly CAT fee
1	25.00	\$81,048
2	42.00	37,062
3	23.00	21,126
4	10.00	129

(C) Timing and Manner of Payment

Section 11.4 of the CAT NMS Plan states that the Operating Committee shall establish a system for the collection of fees authorized under the CAT NMS Plan. The Operating Committee may include such collection responsibility as a function of the Plan Processor or another administrator. To

⁶⁰ Note that no fee schedule is provided for Execution Venue ATSs that execute transactions in Listed Options, as no such Execution Venue ATSs currently exist due to trading restrictions related to Listed Options.

implement the payment process to be adopted by the Operating Committee, paragraph (c)(1) of the proposed fee schedule states that the Company will provide each Industry Member with one invoice each quarter for its CAT Fees as determined pursuant to paragraph (b) of the proposed fee schedule, regardless of whether the Industry Member is a member of multiple self-regulatory organizations. Paragraph (c)(1) further states that each Industry Member will pay its CAT Fees to the Company via the centralized system for the collection of CAT Fees established by the Company in the manner prescribed by the Company. The Exchange will provide Industry Members with details regarding the manner of payment of CAT Fees by *Regulatory Notice*.

All CAT fees will be billed and collected centrally through the Company via the Plan Processor. Although each Participant will adopt its own fee schedule regarding CAT Fees, no CAT Fees or portion thereof will be collected by the individual Participants. Each Industry Member will receive from the Company one invoice for its applicable CAT fees, not separate invoices from each Participant of which it is a member. The Industry Members will pay the CAT Fees to the Company via the centralized system for the collection of CAT fees established by the Company.⁶¹

Section 11.4 of the CAT NMS Plan also states that Participants shall require each Industry Member to pay all applicable authorized CAT Fees within thirty days after receipt of an invoice or other notice indicating payment is due (unless a longer payment period is otherwise indicated). Section 11.4 further states that, if an Industry Member fails to pay any such fee when due, such Industry Member shall pay interest on the outstanding balance from such due date until such fee is paid at a per annum rate equal to the lesser of: (i) The Prime Rate plus 300 basis points; or (ii) the maximum rate permitted by applicable law. Therefore, in accordance with Section 11.4 of the CAT NMS Plan, the Exchange proposed to adopt paragraph (c)(2) of the proposed fee schedule. Paragraph (c)(2) of the proposed fee schedule states that each Industry Member shall pay CAT Fees within thirty days after receipt of an invoice or other notice indicating payment is due (unless a longer payment period is otherwise indicated). If an Industry Member fails to pay any such fee when due, such Industry Member shall pay interest on the outstanding balance from such due date

until such fee is paid at a per annum rate equal to the lesser of: (i) The Prime Rate plus 300 basis points; or (ii) the maximum rate permitted by applicable law.

(D) Sunset Provision

The Operating Committee has determined to require that the CAT Fees automatically sunset two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. Accordingly, the Exchange proposes paragraph (d) of the fee schedule, which states that “[t]hese Consolidated Audit Trailing Funding Fees will automatically expire two years after the operative date of the amendment of the CAT NMS Plan that adopts CAT fees for the Participants.”

(4) Changes to Prior CAT Fee Plan Amendment

The proposed funding model set forth in this Amendment is a revised version of the Original Proposal. The Commission received a number of comment letters in response to the Original Proposal.⁶² The SEC suspended the Original Proposal and instituted proceedings to determine whether to approve or disapprove it.⁶³ Pursuant to those proceedings, additional comment letters were submitted regarding the proposed funding model.⁶⁴ In developing this Amendment, the Operating Committee carefully considered these comments and made a number of changes to the Original Proposal to address these comments where appropriate.

This Amendment makes the following changes to the Original Proposal: (1) Adds two additional CAT Fee tiers for Equity Execution Venues; (2) discounts the OTC Equity Securities market share of Execution Venue ATSs trading OTC Equity Securities as well as the market share of the FINRA ORF by the average shares per trade ratio between NMS Stocks and OTC Equity Securities (calculated as 0.17% based on available data from the second quarter of 2017) when calculating the market share of Execution Venue ATSs trading OTC Equity Securities and FINRA; (3) discounts the Options Market Maker quotes by the trade to quote ratio for options (calculated as 0.01% based on available data for June 2016 through June 2017) when calculating message traffic for Options Market Makers; (4)

discounts equity market maker quotes by the trade to quote ratio for equities (calculated as 5.43% based on available data for June 2016 through June 2017) when calculating message traffic for equity market makers; (5) decreases the number of tiers for Industry Members (other than the Execution Venue ATSs) from nine to seven; (6) changes the allocation of CAT costs between Equity Execution Venues and Options Execution Venues from 75%/25% to 67%/33%; (7) adjusts tier percentages and recovery allocations for Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSs); (8) focuses the comparability of CAT Fees on the individual entity level, rather than primarily on the comparability of affiliated entities; (9) commences invoicing of CAT Reporters as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Participants and the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants; and (10) requires the proposed fees to automatically expire two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for the Participants.

(A) Equity Execution Venues

(i) Small Equity Execution Venues

In the Original Proposal, the Operating Committee proposed to establish two fee tiers for Equity Execution Venues. The Commission and commenters raised the concern that, by establishing only two tiers, smaller Equity Execution Venues (*e.g.*, those Equity ATSs representing less than 1% of NMS market share) would be placed in the same fee tier as larger Equity Execution Venues, thereby imposing an undue or inappropriate burden on competition.⁶⁵ To address this concern, the Operating Committee proposes to add two additional tiers for Equity Execution Venues, a third tier for smaller Equity Execution Venues and a fourth tier for the smallest Equity Execution Venues.

Specifically, the Original Proposal had two tiers of Equity Execution Venues. Tier 1 required the largest Equity Execution Venues to pay a quarterly fee of \$63,375. Based on available data, these largest Equity Execution Venues were those that had equity market share of share volume greater than or equal to 1%.⁶⁶ Tier 2

⁶² For a description of the comments submitted in response to the Original Proposal, see Suspension Order.

⁶³ Suspension Order.

⁶⁴ See MFA Letter; SIFMA Letter; FIA Principal Traders Group Letter; Belvedere Letter; Sidley Letter; Group One Letter; and Virtu Financial Letter.

⁶⁵ See Suspension Order at 31664; SIFMA Letter at 3.

⁶⁶ Note that while these equity market share thresholds were referenced as data points to help

⁶¹ Section 11.4 of the CAT NMS Plan.

required the remaining smaller Equity Execution Venues to pay a quarterly fee of \$38,820.

To address concerns about the potential for the \$38,820 quarterly fee to impose an undue burden on smaller Equity Execution Venues, the Operating Committee determined to move to a four tier structure for Equity Execution Venues. Tier 1 would continue to include the largest Equity Execution Venues by share volume (that is, based on currently available data, those with market share of equity share volume greater than or equal to one percent), and these Equity Execution Venues would be required to pay a quarterly fee of \$81,048. The Operating Committee determined to divide the original Tier 2 into three tiers. The new Tier 2 Equity Execution Venues, which would include the next largest Equity Execution Venues by equity share volume, would be required to pay a quarterly fee of \$37,062. The new Tier 3 Equity Execution Venues would be required to pay a quarterly fee of \$21,126. The new Tier 4 Equity Execution Venues, which would include the smallest Equity Execution Venues by share volume, would be required to pay a quarterly fee of \$129.

In developing the proposed four tier structure, the Operating Committee considered keeping the existing two tiers, as well as shifting to three, four or five Equity Execution Venue tiers (the maximum number of tiers permitted under the Plan), to address the concerns regarding small Equity Execution Venues. For each of the two, three, four and five tier alternatives, the Operating Committee considered the assignment of various percentages of Equity Execution Venues to each tier as well as various percentage of Equity Execution Venue recovery allocations for each alternative. As discussed below in more detail, each of these options was considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined that the four tier alternative addressed the spectrum of different Equity Execution Venues. The Operating Committee determined that neither a two tier structure nor a three tier structure sufficiently accounted for

differentiate between Equity Execution Venue tiers, the proposed funding model is directly driven not by market share thresholds, but rather by fixed percentages of Equity Execution Venues across tiers to account for fluctuating levels of market share across time. Actual market share in any tier will vary based on the actual market activity in a given measurement period, as well as the number of Equity Execution Venues included in the measurement period.

the range of market shares of smaller Equity Execution Venues. The Operating Committee also determined that, given the limited number of Equity Execution Venues, that a fifth tier was unnecessary to address the range of market shares of the Equity Execution Venues.

By increasing the number of tiers for Equity Execution Venues and reducing the proposed CAT Fees for the smaller Equity Execution Venues, the Operating Committee believes that the proposed fees for Equity Execution Venues would not impose an undue or inappropriate burden on competition under Section 6 or Section 15A of the Exchange Act. Moreover, the Operating Committee believes that the proposed fees appropriately take into account the distinctions in the securities trading operations of different Equity Execution Venues, as required under the funding principles of the CAT NMS Plan.⁶⁷ The larger number of tiers more closely tracks the variety of sizes of equity share volume of Equity Execution Venues. In addition, the reduction in the fees for the smaller Equity Execution Venues recognizes the potential burden of larger fees on smaller entities. In particular, the very small quarterly fee of \$129 for Tier 4 Equity Execution Venues reflects the fact that certain Equity Execution Venues have a very small share volume due to their typically more focused business models.

Accordingly, with this Amendment, the Exchange proposes to amend paragraph (b)(2) of the proposed fee schedule to add the two additional tiers for Equity Execution Venues, to establish the percentages and fees for Tiers 3 and 4 as described, and to revise the percentages and fees for Tiers 1 and 2 as described.

(ii) Execution Venues for OTC Equity Securities

In the Original Proposal, the Operating Committee proposed to group Execution Venues for OTC Equity Securities and Execution Venues for NMS Stocks in the same tier structure. The Commission and commenters raised concerns as to whether this determination to place Execution Venues for OTC Equity Securities in the same tier structure as Execution Venues for NMS Stocks would result in an undue or inappropriate burden on competition, recognizing that the application of share volume may lead to different outcomes as applied to OTC Equity Securities and NMS Stocks.⁶⁸ To address this concern, the Operating

Committee proposes to discount the OTC Equity Securities market share of Execution Venue ATSs trading OTC Equity Securities as well as the market share of the FINRA ORF by the average shares per trade ratio between NMS Stocks and OTC Equity Securities (0.17% for the second quarter of 2017) in order to adjust for the greater number of shares being traded in the OTC Equity Securities market, which is generally a function of a lower per share price for OTC Equity Securities when compared to NMS Stocks.

As commenters noted, many OTC Equity Securities are priced at less than one dollar—and a significant number at less than one penny—and low-priced shares tend to trade in larger quantities. Accordingly, a disproportionately large number of shares are involved in transactions involving OTC Equity Securities versus NMS Stocks, which has the effect of overstating an Execution Venue's true market share when the Execution Venue is involved in the trading of OTC Equity Securities. Because the proposed fee tiers are based on market share calculated by share volume, Execution Venue ATSs trading OTC Equity Securities and FINRA may be subject to higher tiers than their operations may warrant.⁶⁹ The Operating Committee proposes to address this concern in two ways. First, the Operating Committee proposes to increase the number of Equity Execution Venue tiers, as discussed above. Second, the Operating Committee determined to discount the OTC Equity Securities market share of Execution Venue ATSs trading OTC Equity Securities as well as the market share of the FINRA ORF when calculating their tier placement. Because the disparity in share volume between Execution Venues trading in OTC Equity Securities and NMS Stocks is based on the different number of shares per trade for OTC Equity Securities and NMS Stocks, the Operating Committee believes that discounting the OTC Equity Securities share volume of such Execution Venue ATSs as well as the market share of the FINRA ORF would address the difference in shares per trade for OTC Equity Securities and NMS Stocks. Specifically, the Operating Committee proposes to impose a discount based on the objective measure of the average shares per trade ratio between NMS Stocks and OTC Equity Securities. Based on available data from the second quarter of 2017, the average shares per trade ratio between NMS Stocks and OTC Equity Securities is 0.17%.

⁶⁷ Section 11.2(b) of the CAT NMS Plan.

⁶⁸ See Suspension Order at 31664–5.

⁶⁹ Suspension Order at 31664–5.

The practical effect of applying such a discount for trading in OTC Equity Securities is to shift Execution Venue ATSs trading OTC Equity Securities to tiers for smaller Execution Venues and with lower fees. For example, under the Original Proposal, one Execution Venue ATS trading OTC Equity Securities was placed in the first CAT Fee tier, which had a quarterly fee of \$63,375. With the imposition of the proposed tier changes and the discount, this ATS would be ranked in Tier 3 and would owe a quarterly fee of \$21,126.

In developing the proposed discount for Equity Execution Venue ATSs trading OTC Equity Securities and FINRA, the Operating Committee evaluated different alternatives to address the concerns related to OTC Equity Securities, including creating a separate tier structure for Execution Venues trading OTC Equity Securities (like the separate tier for Options Execution Venues) as well as the proposed discounting method for Execution Venue ATSs trading OTC Equity Securities and FINRA. For these alternatives, the Operating Committee considered how each alternative would affect the recovery allocations. In addition, each of these options was considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee did not adopt a separate tier structure for Equity Execution Venues trading OTC Equity Securities as they determined that the proposed discount approach appropriately addresses the concern. The Operating Committee determined to adopt the proposed discount because it directly relates to the concern regarding the trading patterns and operations in the OTC Equity Securities markets, and is an objective discounting method.

By increasing the number of tiers for Equity Execution Venues and imposing a discount on the market share of share volume calculation for trading in OTC Equity Securities, the Operating Committee believes that the proposed fees for Equity Execution Venues would not impose an undue or inappropriate burden on competition under Section 6 or Section 15A of the Exchange Act. Moreover, the Operating Committee believes that the proposed fees appropriately take into account the distinctions in the securities trading operations of different Equity Execution Venues, as required under the funding principles of the CAT NMS Plan.⁷⁰ As discussed above, the larger number of

tiers more closely tracks the variety of sizes of equity share volume of Equity Execution Venues. In addition, the proposed discount recognizes the different types of trading operations at Equity Execution Venues trading OTC Equity Securities versus those trading NMS Stocks, thereby more closely matching the relative revenue generation by Equity Execution Venues trading OTC Equity Securities to their CAT Fees.

Accordingly, with this Amendment, the Exchange proposes to amend paragraph (b)(2) of the proposed fee schedule to indicate that the OTC Equity Securities market share for Equity ATSs trading OTC Equity Securities as well as the market share of the FINRA ORF would be discounted. In addition, as discussed above, to address concerns related to smaller ATSs, including those that trade OTC Equity Securities, the Exchange proposes to amend paragraph (b)(2) of the proposed fee schedule to add two additional tiers for Equity Execution Venues, to establish the percentages and fees for Tiers 3 and 4 as described, and to revise the percentages and fees for Tiers 1 and 2 as described.

(B) Market Makers

In the Original Proposal, the Operating Committee proposed to include both Options Market Maker quotes and equities market maker quotes in the calculation of total message traffic for such market makers for purposes of tiering for Industry Members (other than Execution Venue ATSs). The Commission and commenters raised questions as to whether the proposed treatment of Options Market Maker quotes may result in an undue or inappropriate burden on competition or may lead to a reduction in market quality.⁷¹ To address this concern, the Operating Committee determined to discount the Options Market Maker quotes by the trade to quote ratio for options when calculating message traffic for Options Market Makers. Similarly, to avoid disincentives to quoting behavior on the equities side as well, the Operating Committee determined to discount equity market maker quotes by the trade to quote ratio for equities when calculating message traffic for equities market makers.

In the Original Proposal, market maker quotes were treated the same as other message traffic for purposes of

tiering for Industry Members (other than Execution Venue ATSs). Commenters noted, however, that charging Industry Members on the basis of message traffic will impact market makers disproportionately because of their continuous quoting obligations. Moreover, in the context of options market makers, message traffic would include bids and offers for every listed options strikes and series, which are not an issue for equities.⁷² The Operating Committee proposes to address this concern in two ways. First, the Operating Committee proposes to discount Options Market Maker quotes when calculating the Options Market Makers' tier placement. Specifically, the Operating Committee proposes to impose a discount based on the objective measure of the trade to quote ratio for options. Based on available data from June 2016 through June 2017, the trade to quote ratio for options is 0.01%. Second, the Operating Committee proposes to discount equities market maker quotes when calculating the equities market makers' tier placement. Specifically, the Operating Committee proposes to impose a discount based on the objective measure of the trade to quote ratio for equities. Based on available data for June 2016 through June 2017, this trade to quote ratio for equities is 5.43%.

The practical effect of applying such discounts for quoting activity is to shift market makers' calculated message traffic lower, leading to the potential shift to tiers for lower message traffic and reduced fees. Such an approach would move sixteen Industry Member CAT Reporters that are market makers to a lower tier than in the Original Proposal. For example, under the Original Proposal, Broker-Dealer Firm ABC was placed in the first CAT Fee tier, which had a quarterly fee of \$101,004. With the imposition of the proposed tier changes and the discount, Broker-Dealer Firm ABC, an options market maker, would be ranked in Tier 3 and would owe a quarterly fee of \$40,899.

In developing the proposed market maker discounts, the Operating Committee considered various discounts for Options Market Makers and equity market makers, including discounts of 50%, 25%, 0.00002%, as well as the 5.43% for option market makers and 0.01% for equity market makers. Each of these options were considered in the context of the full model, as changes in each variable in the model affect other variables in the

⁷¹ See Suspension Order at 31663-4; SIFMA Letter at 4-6; FIA Principal Traders Group Letter at 3; Sidley Letter at 2-6; Group One Letter at 2-6; and Belvedere Letter at 2.

⁷² Suspension Order at 31664.

⁷⁰ Section 11.2(b) of the CAT NMS Plan.

model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined to adopt the proposed discount because it directly relates to the concern regarding the quoting requirement, is an objective discounting method, and has the desired potential to shift market makers to lower fee tiers.

By imposing a discount on Options Market Makers and equities market makers' quoting traffic for the calculation of message traffic, the Operating Committee believes that the proposed fees for market makers would not impose an undue or inappropriate burden on competition under Section 6 or Section 15A of the Exchange Act. Moreover, the Operating Committee believes that the proposed fees appropriately take into account the distinctions in the securities trading operations of different Industry Members, and avoid disincentives, such as a reduction in market quality, as required under the funding principles of the CAT NMS Plan.⁷³ The proposed discounts recognize the different types of trading operations presented by Options Market Makers and equities market makers, as well as the value of the market makers' quoting activity to the market as a whole. Accordingly, the Operating Committee believes that the proposed discounts will not impact the ability of small Options Market Makers or equities market makers to provide liquidity.

Accordingly, with this Amendment, the Exchange proposes to amend paragraph (b)(1) of the proposed fee schedule to indicate that the message traffic related to equity market maker quotes and Options Market Maker quotes would be discounted. In addition, the Exchange proposes to define the term "Options Market Maker" in paragraph (a)(1) of the proposed fee schedule.

(C) Comparability/Allocation of Costs

Under the Original Proposal, 75% of CAT costs were allocated to Industry Members (other than Execution Venue ATs) and 25% of CAT costs were allocated to Execution Venues. This cost allocation sought to maintain the greatest level of comparability across the funding model, where comparability considered affiliations among or between CAT Reporters. The Commission and commenters expressed concerns regarding whether the proposed 75%/25% allocation of CAT costs is consistent with the Plan's funding principles and the Exchange Act, including whether the allocation

places a burden on competition or reduces market quality. The Commission and commenters also questioned whether the approach of accounting for affiliations among CAT Reporters in setting CAT Fees disadvantages non-affiliated CAT Reporters or otherwise burdens competition in the market for trading services.⁷⁴

In response to these concerns, the Operating Committee determined to revise the proposed funding model to focus the comparability of CAT Fees on the individual entity level, rather than primarily on the comparability of affiliated entities. In light of the interconnected nature of the various aspects of the funding model, the Operating Committee determined to revise various aspects of the model to enhance comparability at the individual entity level. Specifically, to achieve such comparability, the Operating Committee determined to (1) decrease the number of tiers for Industry Members (other than Execution Venue ATs) from nine to seven; (2) change the allocation of CAT costs between Equity Execution Venues and Options Execution Venues from 75%/25% to 67%/33%; and (3) adjust tier percentages and recovery allocations for Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATs). With these changes, the proposed funding model provides fee comparability for the largest individual entities, with the largest Industry Members (other than Execution Venue ATs), Equity Execution Venues and Options Execution Venues each paying a CAT Fee of approximately \$81,000 each quarter.

(i) Number of Industry Member Tiers

In the Original Proposal, the proposed funding model had nine tiers for Industry Members (other than Execution Venue ATs). The Operating Committee determined that reducing the number of tiers from nine tiers to seven tiers (and adjusting the predefined Industry Member Percentages as well) continues to provide a fair allocation of fees among Industry Members and appropriately distinguishes between Industry Members with differing levels of message traffic. In reaching this conclusion, the Operating Committee considered historical message traffic generated by Industry Members across all exchanges and as submitted to FINRA's OATS, and considered the

distribution of firms with similar levels of message traffic, grouping together firms with similar levels of message traffic. Based on this, the Operating Committee determined that seven tiers would group firms with similar levels of message traffic, while also achieving greater comparability in the model for the individual CAT Reporters with the greatest market share or message traffic.

In developing the proposed seven tier structure, the Operating Committee considered remaining at nine tiers, as well as reducing the number of tiers down to seven when considering how to address the concerns raised regarding comparability. For each of the alternatives, the Operating Committee considered the assignment of various percentages of Industry Members to each tier as well as various percentages of Industry Member recovery allocations for each alternative. Each of these options was considered in the context of its effects on the full funding model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined that the seven tier alternative provided the most fee comparability at the individual entity level for the largest CAT Reporters, while both providing logical breaks in tiering for Industry Members with different levels of message traffic and a sufficient number of tiers to provide for the full spectrum of different levels of message traffic for all Industry Members.

(ii) Allocation of CAT Costs Between Equity and Options Execution Venues

The Operating Committee also determined to adjust the allocation of CAT costs between Equity Execution Venues and Options Execution Venues to enhance comparability at the individual entity level. In the Original Proposal, 75% of Execution Venue CAT costs were allocated to Equity Execution Venues, and 25% of Execution Venue CAT costs were allocated to Options Execution Venues. To achieve the goal of increased comparability at the individual entity level, the Operating Committee analyzed a range of alternative splits for revenue recovery between Equity and Options Execution Venues, along with other changes in the proposed funding model. Based on this analysis, the Operating Committee determined to allocate 67 percent of Execution Venue costs recovered to Equity Execution Venues and 33 percent to Options Execution Venues. The Operating Committee determined that a 67/33 allocation between Equity and Options Execution Venues enhances the

⁷⁴ See Suspension Order at 31662-3; SIFMA Letter at 3; Sidley Letter at 6-7; Group One Letter at 2; and Belvedere Letter at 2.

⁷³ Section 11.2(b) of the CAT NMS Plan.

level of fee comparability for the largest CAT Reporters. Specifically, the largest Equity and Options Execution Venues would pay a quarterly CAT Fee of approximately \$81,000.

In developing the proposed allocation of CAT costs between Equity and Options Execution Venues, the Operating Committee considered various different options for such allocation, including keeping the original 75%/25% allocation, as well as shifting to a 70%/30%, 67%/33%, or 57.75%/42.25% allocation. For each of the alternatives, the Operating Committee considered the effect each allocation would have on the assignment of various percentages of Equity Execution Venues to each tier as well as various percentages of Equity Execution Venue recovery allocations for each alternative. Moreover, each of these options was considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined that the 67%/33% allocation between Equity and Options Execution Venues provided the greatest level of fee comparability at the individual entity level for the largest CAT Reporters, while still providing for appropriate fee levels across all tiers for all CAT Reporters.

(iii) Allocation of Costs Between Execution Venues and Industry Members

The Operating Committee determined to allocate 25% of CAT costs to Execution Venues and 75% to Industry Members (other than Execution Venue ATSSs), as it had in the Original Proposal. The Operating Committee determined that this 75%/25% allocation, along with the other changes proposed above, led to the most comparable fees for the largest Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSSs). The largest Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSSs) would each pay a quarterly CAT Fee of approximately \$81,000.

As a preliminary matter, the Operating Committee determined that it is appropriate to allocate most of the costs to create, implement and maintain the CAT to Industry Members for several reasons. First, there are many more broker-dealers expected to report to the CAT than Participants (*i.e.*, 1,541 broker-dealer CAT Reporters versus 22 Participants). Second, since most of the costs to process CAT reportable data is

generated by Industry Members, Industry Members could be expected to contribute toward such costs. Finally, as noted by the SEC, the CAT “substantially enhance[s] the ability of the SROs and the Commission to oversee today’s securities markets,”⁷⁵ thereby benefitting all market participants. After making this determination, the Operating Committee analyzed several different cost allocations, as discussed further below, and determined that an allocation where 75% of the CAT costs should be borne by the Industry Members (other than Execution Venue ATSSs) and 25% should be paid by Execution Venues was most appropriate and led to the greatest comparability of CAT Fees for the largest CAT Reporters.

In developing the proposed allocation of CAT costs between Execution Venues and Industry Members (other than Execution Venue ATSSs), the Operating Committee considered various different options for such allocation, including keeping the original 75%/25% allocation, as well as shifting to an 80%/20%, 70%/30%, or 65%/35% allocation. Each of these options was considered in the context of the full model, including the effect on each of the changes discussed above, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. In particular, for each of the alternatives, the Operating Committee considered the effect each allocation had on the assignment of various percentages of Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSSs) to each relevant tier as well as various percentages of recovery allocations for each tier. The Operating Committee determined that the 75%/25% allocation between Execution Venues and Industry Members (other than Execution Venue ATSSs) provided the greatest level of fee comparability at the individual entity level for the largest CAT Reporters, while still providing for appropriate fee levels across all tiers for all CAT Reporters.

(iv) Affiliations

The funding principles set forth in Section 11.2 of the Plan require that the fees charged to CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes

into consideration affiliations between or among CAT Reporters, whether Execution Venue and/or Industry Members). The proposed funding model satisfies this requirement. As discussed above, under the proposed funding model, the largest Equity Execution Venues, Options Execution Venues, and Industry Members (other than Execution Venue ATSSs) pay approximately the same fee. Moreover, the Operating Committee believes that the proposed funding model takes into consideration affiliations between or among CAT Reporters as complexes with multiple CAT Reporters will pay the appropriate fee based on the proposed fee schedule for each of the CAT Reporters in the complex. For example, a complex with a Tier 1 Equity Execution Venue and Tier 2 Industry Member will pay the same as another complex with a Tier 1 Equity Execution Venue and Tier 2 Industry Member.

(v) Fee Schedule Changes

Accordingly, with this Amendment, the Exchange proposes to amend paragraphs (b)(1) and (2) of the proposed fee schedule to reflect the changes discussed in this section. Specifically, the Exchange proposes to amend paragraph (b)(1) and (2) of the proposed fee schedule to update the number of tiers, and the fees and percentages assigned to each tier to reflect the described changes.

(D) Market Share/Message Traffic

In the Original Proposal, the Operating Committee proposed to charge Execution Venues based on market share and Industry Members (other than Execution Venue ATSSs) based on message traffic. Commenters questioned the use of the two different metrics for calculating CAT Fees.⁷⁶ The Operating Committee continues to believe that the proposed use of market share and message traffic satisfies the requirements of the Exchange Act and the funding principles set forth in the CAT NMS Plan. Accordingly, the proposed funding model continues to charge Execution Venues based on market share and Industry Members (other than Execution Venue ATSSs) based on message traffic.

In drafting the Plan and the Original Proposal, the Operating Committee expressed the view that the correlation between message traffic and size does not apply to Execution Venues, which they described as producing similar amounts of message traffic regardless of size. The Operating Committee believed

⁷⁵ Securities Exchange Act Release No. 67457 (July 18, 2012), 77 FR 45722, 45726 (August 1, 2012) (“Rule 613 Adopting Release”).

⁷⁶ Suspension Order at 31663; FIA Principal Traders Group Letter at 2.

that charging Execution Venues based on message traffic would result in both large and small Execution Venues paying comparable fees, which would be inequitable, so the Operating Committee determined that it would be more appropriate to treat Execution Venues differently from Industry Members in the funding model. Upon a more detailed analysis of available data, however, the Operating Committee noted that Execution Venues have varying levels of message traffic. Nevertheless, the Operating Committee continues to believe that a bifurcated funding model—where Industry Members (other than Execution Venue ATs) are charged fees based on message traffic and Execution Venues are charged based on market share—complies with the Plan and meets the standards of the Exchange Act for the reasons set forth below.

Charging Industry Members based on message traffic is the most equitable means for establishing fees for Industry Members (other than Execution Venue ATs). This approach will assess fees to Industry Members that create larger volumes of message traffic that are relatively higher than those fees charged to Industry Members that create smaller volumes of message traffic. Since message traffic, along with fixed costs of the Plan Processor, is a key component of the costs of operating the CAT, message traffic is an appropriate criterion for placing Industry Members in a particular fee tier.

The Operating Committee also believes that it is appropriate to charge Execution Venues CAT Fees based on their market share. In contrast to Industry Members (other than Execution Venue ATs), which determine the degree to which they produce the message traffic that constitutes CAT Reportable Events, the CAT Reportable Events of Execution Venues are largely derivative of quotations and orders received from Industry Members that the Execution Venues are required to display. The business model for Execution Venues, however, is focused on executions in their markets. As a result, the Operating Committee believes that it is more equitable to charge Execution Venues based on their market share rather than their message traffic.

Similarly, focusing on message traffic would make it more difficult to draw distinctions between large and small exchanges, including options exchanges in particular. For instance, the Operating Committee analyzed the message traffic of Execution Venues and Industry Members for the period of April 2017 to June 2017 and placed all

CAT Reporters into a nine-tier framework (*i.e.*, a single tier may include both Execution Venues and Industry Members). The Operating Committee's analysis found that the majority of exchanges (15 total) were grouped in Tiers 1 and 2. Moreover, virtually all of the options exchanges were in Tiers 1 and 2.⁷⁷ Given the concentration of options exchanges in Tiers 1 and 2, the Operating Committee believes that using a funding model based purely on message traffic would make it more difficult to distinguish between large and small options exchanges, as compared to the proposed bifurcated fee approach.

In addition, the Operating Committee also believes that it is appropriate to treat ATs as Execution Venues under the proposed funding model since ATs have business models that are similar to those of exchanges, and ATs also compete with exchanges. For these reasons, the Operating Committee believes that charging Execution Venues based on market share is more appropriate and equitable than charging Execution Venues based on message traffic.

(E) Time Limit

In the Original Proposal, the Operating Committee did not impose any time limit on the application of the proposed CAT Fees. As discussed above, the Operating Committee developed the proposed funding model by analyzing currently available historical data. Such historical data, however, is not as comprehensive as data that will be submitted to the CAT. Accordingly, the Operating Committee believes that it will be appropriate to revisit the funding model once CAT Reporters have actual experience with the funding model. Accordingly, the Operating Committee proposes to include a sunset provision in the proposed fee model. The proposed CAT Fees will sunset two years after the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. Specifically, the Exchange proposes to add paragraph (d) of the proposed fee schedule to include this sunset provision. Such a provision will provide the Operating Committee and other market participants with the opportunity to reevaluate the performance of the proposed funding model.

⁷⁷ The Participants note that this analysis did not place MIAx PEARL in Tier 1 or Tier 2 since the exchange commenced trading on February 6, 2017.

(F) Tier Structure/Decreasing Cost per Unit

In the Original Proposal, the Operating Committee determined to use a tiered fee structure. The Commission and commenters questioned whether the decreasing cost per additional unit (of message traffic in the case of Industry Members, or of share volume in the case of Execution Venues) in the proposed fee schedules burdens competition by disadvantaging small Industry Members and Execution Venues and/or by creating barriers to entry in the market for trading services and/or the market for broker-dealer services.⁷⁸

The Operating Committee does not believe that decreasing cost per additional unit in the proposed fee schedules places an unfair competitive burden on Small Industry Members and Execution Venues. While the cost per unit of message traffic or share volume necessarily will decrease as volume increases in any tiered fee model using fixed fee percentages and, as a result, Small Industry Members and small Execution Venues may pay a larger fee per message or share, this comment fails to take account of the substantial differences in the absolute fees paid by Small Industry Members and small Execution Venues as opposed to large Industry Members and large Execution Venues. For example, under the fee proposals, Tier 7 Industry Members would pay a quarterly fee of \$105, while Tier 1 Industry Members would pay a quarterly fee of \$81,483. Similarly, a Tier 4 Equity Execution Venue would pay a quarterly fee of \$129, while a Tier 1 Equity Execution Venue would pay a quarterly fee of \$81,048. Thus, Small Industry Members and small Execution Venues are not disadvantaged in terms of the total fees that they actually pay. In contrast to a tiered model using fixed fee percentages, the Operating Committee believes that strictly variable or metered funding models based on message traffic or share volume would be more likely to affect market behavior and may present administrative challenges (*e.g.*, the costs to calculate and monitor fees may exceed the fees charged to the smallest CAT Reporters).

(G) Other Alternatives Considered

In addition to the various funding model alternatives discussed above regarding discounts, number of tiers and allocation percentages, the Operating Committee also discussed other possible funding models. For example, the Operating Committee considered

⁷⁸ Suspension Order at 31667.

allocating the total CAT costs equally among each of the Participants, and then permitting each Participant to charge its own members as it deems appropriate.⁷⁹ The Operating Committee determined that such an approach raised a variety of issues, including the likely inconsistency of the ensuing charges, potential for lack of transparency, and the impracticality of multiple SROs submitting invoices for CAT charges. The Operating Committee therefore determined that the proposed funding model was preferable to this alternative.

(H) Industry Member Input

Commenters expressed concern regarding the level of Industry Member input into the development of the proposed funding model, and certain commenters have recommended a greater role in the governance of the CAT.⁸⁰ The Participants previously addressed this concern in its letters responding to comments on the Plan and the CAT Fees.⁸¹ As discussed in those letters, the Participants discussed the funding model with the Development Advisory Group (“DAG”), the advisory group formed to assist in the development of the Plan, during its original development.⁸² Moreover, Industry Members currently have a voice in the affairs of the Operating Committee and operation of the CAT generally through the Advisory Committee established pursuant to Rule 613(b)(7) and Section 4.13 of the Plan. The Advisory Committee attends all meetings of the Operating Committee, as well as meetings of various subcommittees and working groups, and provides valuable and critical input for the Participants’ and Operating Committee’s consideration. The Operating Committee continues to believe that that Industry Members have an appropriate voice regarding the funding of the Company.

(I) Conflicts of Interest

Commenters also raised concerns regarding Participant conflicts of interest in setting the CAT Fees.⁸³ The Participants previously responded to this concern in both the Plan Response

Letter and the Fee Rule Response Letter.⁸⁴ As discussed in those letters, the Plan, as approved by the SEC, adopts various measures to protect against the potential conflicts issues raised by the Participants’ fee-setting authority. Such measures include the operation of the Company as a not for profit business league and on a break-even basis, and the requirement that the Participants file all CAT Fees under Section 19(b) of the Exchange Act. The Operating Committee continues to believe that these measures adequately protect against concerns regarding conflicts of interest in setting fees, and that additional measures, such as an independent third party to evaluate an appropriate CAT Fee, are unnecessary.

(J) Fee Transparency

Commenters also argued that they could not adequately assess whether the CAT Fees were fair and equitable because the Operating Committee has not provided details as to what the Participants are receiving in return for the CAT Fees.⁸⁵ The Operating Committee provided a detailed discussion of the proposed funding model in the Plan, including the expenses to be covered by the CAT Fees. In addition, the agreement between the Company and the Plan Processor sets forth a comprehensive set of services to be provided to the Company with regard to the CAT. Such services include, without limitation: User support services (e.g., a help desk); tools to allow each CAT Reporter to monitor and correct their submissions; a comprehensive compliance program to monitor CAT Reporters’ adherence to Rule 613; publication of detailed Technical Specifications for Industry Members and Participants; performing data linkage functions; creating comprehensive data security and confidentiality safeguards; creating query functionality for regulatory users (i.e., the Participants, and the SEC and SEC staff); and performing billing and collection functions. The Operating Committee further notes that the services provided by the Plan Processor and the costs related thereto were subject to a bidding process.

(K) Funding Authority

Commenters also questioned the authority of the Operating Committee to impose CAT Fees on Industry Members.⁸⁶ The Participants previously

responded to this same comment in the Plan Response Letter and the Fee Rule Response Letter.⁸⁷ As the Participants previously noted, SEC Rule 613 specifically contemplates broker-dealers contributing to the funding of the CAT. In addition, as noted by the SEC, the CAT “substantially enhance[s] the ability of the SROs and the Commission to oversee today’s securities markets,”⁸⁸ thereby benefitting all market participants. Therefore, the Operating Committee continues to believe that it is equitable for both Participants and Industry Members to contribute to funding the cost of the CAT.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁸⁹ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,⁹⁰ in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility, is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, and is 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 discussed above, the SEC approved the bifurcated, tiered, fixed fee funding model in the CAT NMS Plan, finding it was reasonable and that it equitably allocated fees among Participants and Industry Members. The Exchange believes that the proposed tiered fees adopted pursuant to the funding model approved by the SEC in the CAT NMS Plan are reasonable, equitably allocated and not unfairly discriminatory.

The Exchange believes that this proposal is consistent with the Act because it implements, interprets or clarifies the provisions of the Plan, and is designed to assist the Exchange and its Industry Members in meeting regulatory obligations pursuant to the Plan. In approving the Plan, the SEC noted that the Plan “is necessary and appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanism of a national market system, or is otherwise in furtherance of the purposes of the Act.”⁹¹ To the

⁷⁹ See FIA Principal Traders Group Letter at 2; Belvedere Letter at 4.

⁸⁰ See Suspension Order at 31662; MFA Letter at 1–2.

⁸¹ Letter from Participants to Brent J. Fields, Secretary, SEC (Sept. 23, 2016) (“Plan Response Letter”); Letter from CAT NMS Plan Participants to Brent J. Fields, Secretary, SEC (June 29, 2017) (“Fee Rule Response Letter”).

⁸² Fee Rule Response Letter at 2; Plan Response Letter at 18.

⁸³ See Suspension Order at 31662; FIA Principal Traders Group at 3.

⁸⁴ See Plan Response Letter at 16, 17; Fee Rule Response Letter at 10–12.

⁸⁵ See FIA Principal Traders Group at 3; SIFMA Letter at 3.

⁸⁶ See Suspension Order at 31661–2; SIFMA Letter at 2.

⁸⁷ See Plan Response Letter at 9–10; Fee Rule Response Letter at 3–4.

⁸⁸ Rule 613 Adopting Release at 45726.

⁸⁹ 15 U.S.C. 78f(b).

⁹⁰ 15 U.S.C. 78f(b)(4) and (5).

⁹¹ Approval Order at 84697.

extent that this proposal implements, interprets or clarifies the Plan and applies specific requirements to Industry Members, the Exchange believes that this proposal furthers the objectives of the Plan, as identified by the SEC, and is therefore consistent with the Act.

The Exchange believes that the proposed tiered fees are reasonable. First, the total CAT Fees to be collected would be directly associated with the costs of establishing and maintaining the CAT, where such costs include Plan Processor costs and costs related to insurance, third party services and the operational reserve. The CAT Fees would not cover Participant services unrelated to the CAT. In addition, any surplus CAT Fees cannot be distributed to the individual Participants; such surpluses must be used as a reserve to offset future fees. Given the direct relationship between the fees and the CAT costs, the Exchange believes that the total level of the CAT Fees is reasonable.

In addition, the Exchange believes that the proposed CAT Fees are reasonably designed to allocate the total costs of the CAT equitably between and among the Participants and Industry Members, and are therefore not unfairly discriminatory. As discussed in detail above, the proposed tiered fees impose comparable fees on similarly situated CAT Reporters. For example, those with a larger impact on the CAT (measured via message traffic or market share) pay higher fees, whereas CAT Reporters with a smaller impact pay lower fees. Correspondingly, the tiered structure lessens the impact on smaller CAT Reporters by imposing smaller fees on those CAT Reporters with less market share or message traffic. In addition, the fee structure takes into consideration distinctions in securities trading operations of CAT Reporters, including ATSS trading OTC Equity Securities, and equity and options market makers.

Moreover, the Exchange believes that the division of the total CAT costs between Industry Members and Execution Venues, and the division of the Execution Venue portion of total costs between Equity and Options Execution Venues, is reasonably designed to allocate CAT costs among CAT Reporters. The 75%/25% division between Industry Members (other than Execution Venue ATSS) and Execution Venues maintains the greatest level of comparability across the funding model. For example, the cost allocation establishes fees for the largest Industry Members (*i.e.*, those Industry Members in Tiers 1) that are comparable to the largest Equity Execution Venues and

Options Execution Venues (*i.e.*, those Execution Venues in Tier 1). Furthermore, the allocation of total CAT cost recovery recognizes the difference in the number of CAT Reporters that are Industry Members (other than Execution Venue ATSS) versus CAT Reporters that are Execution Venues. Similarly, the 67%/33% allocation between Equity and Options Execution Venues also helps to provide fee comparability for the largest CAT Reporters.

Finally, the Exchange believes that the proposed fees are reasonable because they would provide ease of calculation, ease of billing and other administrative functions, and predictability of a fixed fee. Such factors are crucial to estimating a reliable revenue stream for the Company and for permitting CAT Reporters to reasonably predict their payment obligations for budgeting purposes.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Exchange notes that the proposed rule change implements provisions of the CAT NMS Plan approved by the Commission, and is designed to assist the Exchange in meeting its regulatory obligations pursuant to the Plan. Similarly, all national securities exchanges and FINRA are proposing this proposed fee schedule to implement the requirements of the CAT NMS Plan. Therefore, this is not a competitive fee filing and, therefore, it does not raise competition issues between and among the exchanges and FINRA.

Moreover, as previously described, the Exchange believes that the proposed rule change fairly and equitably allocates costs among CAT Reporters. In particular, the proposed fee schedule is structured to impose comparable fees on similarly situated CAT Reporters, and lessen the impact on smaller CAT Reporters. CAT Reporters with similar levels of CAT activity will pay similar fees. For example, Industry Members (other than Execution Venue ATSS) with higher levels of message traffic will pay higher fees, and those with lower levels of message traffic will pay lower fees. Similarly, Execution Venue ATSS and other Execution Venues with larger market share will pay higher fees, and those with lower levels of market share will pay lower fees. Therefore, given that there is generally a relationship between message traffic and/or market share to the CAT Reporter's size, smaller

CAT Reporters generally pay less than larger CAT Reporters. Accordingly, the Exchange does not believe that the CAT Fees would have a disproportionate effect on smaller or larger CAT Reporters. In addition, ATSS and exchanges will pay the same fees based on market share. Therefore, the Exchange does not believe that the fees will impose any burden on the competition between ATSS and exchanges. Accordingly, the Exchange believes that the proposed fees will minimize the potential for adverse effects on competition between CAT Reporters in the market.

Furthermore, the tiered, fixed fee funding model limits the disincentives to providing liquidity to the market. Therefore, the proposed fees are structured to limit burdens on competitive quoting and other liquidity provision in the market.

In addition, the Operating Committee believes that the proposed changes to the Original Proposal, as discussed above in detail, address certain competitive concerns raised by commenters, including concerns related to, among other things, smaller ATSS, ATSS trading OTC Equity Securities, market making quoting and fee comparability. As discussed above, the Operating Committee believes that the proposals address the competitive concerns raised by commenters.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has set forth responses to comments received regarding the Original Proposal in Section 3(a)(4) above.

III. Solicitation of Comments on Amendment No. 2

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment No. 2 is consistent with the Act. In particular, the Commission seeks comment on the following:

Allocation of Costs

(1) Commenters' views as to whether the allocation of CAT costs is consistent with the funding principle expressed in the CAT NMS Plan that requires the Operating Committee to "avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality."⁹²

(2) Commenters' views as to whether the allocation of 25% of CAT costs to

⁹² Section 11.2(e) of the CAT NMS Plan.

the Execution Venues (including all the Participants) and 75% to Industry Members, will incentivize or disincentivize the Participants to effectively and efficiently manage the CAT costs incurred by the Participants since they will only bear 25% of such costs.

(3) Commenters' views on the determination to allocate 75% of all costs incurred by the Participants from November 21, 2016 to November 21, 2017 to Industry Members (other than Execution Venue ATSSs), when such costs are development and build costs and when Industry Member reporting is scheduled to commence a year later, including views on whether such "fees, costs and expenses . . . [are] fairly and reasonably shared among the Participants and Industry Members" in accordance with the CAT NMS Plan.⁹³

(4) Commenters' views on whether an analysis of the ratio of the expected Industry Member-reported CAT messages to the expected SRO-reported CAT messages should be the basis for determining the allocation of costs between Industry Members and Execution Venues.⁹⁴

(5) Any additional data analysis on the allocation of CAT costs, including any existing supporting evidence.

Comparability

(6) Commenters' views on the shift in the standard used to assess the comparability of CAT Fees, with the emphasis now on comparability of individual entities instead of affiliated entities, including views as to whether this shift is consistent with the funding principle expressed in the CAT NMS Plan that requires the Operating Committee to establish a fee structure in which the fees charged to "CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether Execution Venues and/or Industry Members)." ⁹⁵

(7) Commenters' views as to whether the reduction in the number of tiers for Industry Members (other than Execution

Venue ATSSs) from nine to seven, the revised allocation of CAT costs between Equity Execution Venues and Options Execution Venues from a 75%/25% split to a 67%/33% split, and the adjustment of all tier percentages and recovery allocations achieves comparability across individual entities, and whether these changes should have resulted in a change to the allocation of 75% of total CAT costs to Industry Members (other than Execution Venue ATSSs) and 25% of such costs to Execution Venues.

Discounts

(8) Commenters' views as to whether the discounts for options market-makers, equities market-makers, and Equity ATSSs trading OTC Equity Securities are clear, reasonable, and consistent with the funding principle expressed in the CAT NMS Plan that requires the Operating Committee to "avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality," ⁹⁶ including views as to whether the discounts for market-makers limit any potential disincentives to act as a market-maker and/or to provide liquidity due to CAT fees.

Calculation of Costs and Imposition of CAT Fees

(9) Commenters' views as to whether the amendment provides sufficient information regarding the amount of costs incurred from November 21, 2016 to November 21, 2017, particularly, how those costs were calculated, how those costs relate to the proposed CAT Fees, and how costs incurred after November 21, 2017 will be assessed upon Industry Members and Execution Venues.

(10) Commenters' views as to whether the timing of the imposition and collection of CAT Fees on Execution Venues and Industry Members is reasonably related to the timing of when the Company expects to incur such development and implementation costs.⁹⁷

(11) Commenters' views on dividing CAT costs equally among each of the Participants, and then each Participant charging its own members as it deems appropriate, taking into consideration the possibility of inconsistency in charges, the potential for lack of transparency, and the impracticality of multiple SROs submitting invoices for CAT charges.

Burden on Competition and Barriers to Entry

(12) Commenters' views as to whether the allocation of 75% of CAT costs to Industry Members (other than Execution Venue ATSSs) imposes any burdens on competition to Industry Members, including views on what baseline competitive landscape the Commission should consider when analyzing the proposed allocation of CAT costs.

(13) Commenters' views on the burdens on competition, including the relevant markets and services and the impact of such burdens on the baseline competitive landscape in those relevant markets and services.

(14) Commenters' views on any potential burdens imposed by the fees on competition between and among CAT Reporters, including views on which baseline markets and services the fees could have competitive effects on and whether the fees are designed to minimize such effects.

(15) Commenters' general views on the impact of the proposed fees on economies of scale and barriers to entry.

(16) Commenters' views on the baseline economies of scale and barriers to entry for Industry Members and Execution Venues and the relevant markets and services over which these economies of scale and barriers to entry exist.

(17) Commenters' views as to whether a tiered fee structure necessarily results in less active tiers paying more per unit than those in more active tiers, thus creating economies of scale, with supporting information if possible.

(18) Commenters' views as to how the level of the fees for the least active tiers would or would not affect barriers to entry.

(19) Commenters' views on whether the difference between the cost per unit (messages or market share) in less active tiers compared to the cost per unit in more active tiers creates regulatory economies of scale that favor larger competitors and, if so:

(a) How those economies of scale compare to operational economies of scale; and

(b) Whether those economies of scale reduce or increase the current advantages enjoyed by larger competitors or otherwise alter the competitive landscape.

(20) Commenters' views on whether the fees could affect competition between and among national securities exchanges and FINRA, in light of the fact that implementation of the fees does not require the unanimous consent of all such entities, and, specifically:

⁹³ Section 11.1(c) of the CAT NMS Plan.

⁹⁴ The Notice for the CAT NMS Plan did not provide a comprehensive count of audit trail message traffic from different regulatory data sources, but the Commission did estimate the ratio of all SRO audit trail messages to OATS audit trail messages to be 1.9431. See Securities Exchange Act Release No. 77724 (April 27, 2016), 81 FR 30613, 30721 n.919 and accompanying text (May 17, 2016).

⁹⁵ Section 11.2(c) of the CAT NMS Plan.

⁹⁶ Section 11.2(e) of the CAT NMS Plan.

⁹⁷ Section 11.1(c) of the CAT NMS Plan.

(a) Whether any of the national securities exchanges or FINRA are disadvantaged by the fees; and

(b) If so, whether any such disadvantages would be of a magnitude that would alter the competitive landscape.

(21) Commenters' views on any potential burden imposed by the fees on competitive quoting and other liquidity provision in the market, including, specifically:

(a) Commenters' views on the kinds of disincentives that discourage liquidity provision and/or disincentives that the Commission should consider in its analysis;

(b) Commenters' views as to whether the fees could disincentivize the provision of liquidity; and

(c) Commenters' views as to whether the fees limit any disincentives to provide liquidity.

(22) Commenters' views as to whether the amendment adequately responds to and/or addresses comments received on related filings.

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-BX-2017-023 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-BX-2017-023. 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 website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for

inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-BX-2017-023, and should be submitted on or before January 4, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁹⁸

Robert W. Errett,
Deputy Secretary.

[FR Doc. 2017-27006 Filed 12-13-17; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-82258; File No. SR-IEX-2017-16]

Self-Regulatory Organizations; Investors Exchange LLC; Notice of Filing of Amendment No. 1 to a Proposed Rule Change To Establish the Fees for Industry Members Related to the National Market System Plan Governing the Consolidated Audit Trail

December 11, 2017.

On May 9, 2017, Investors Exchange LLC ("IEX" or "SRO") 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 adopt a fee schedule to establish the fees for Industry Members related to the National Market System Plan Governing the Consolidated Audit Trail ("CAT NMS Plan"). The proposed rule change was published in the **Federal Register** for comment on May 22, 2017.³ The Commission received seven comment letters on the proposed rule change,⁴

⁹⁸ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release Nos. 80692 (May 16, 2017), 82 FR 23325 (May 22, 2017) ("Original Proposal").

⁴ Since the CAT NMS Plan Participants' proposed rule changes to adopt fees to be charged to Industry Members to fund the consolidated audit trail are substantively identical, the Commission is considering all comments received on the proposed rule changes regardless of the comment file to which they were submitted. See text accompanying notes 13-16 *infra*, for a list of the CAT NMS Plan Participants. See Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, to Brent J. Fields, Secretary,

and a response to comments from the Participants.⁵ On June 30, 2017, the Commission temporarily suspended and initiated proceedings to determine whether to approve or disapprove the proposed rule change.⁶ The Commission thereafter received seven comment letters,⁷ and a response to comments

Commission (dated June 6, 2017), available at: <https://www.sec.gov/comments/sr-batsbzx-2017-38/batsbzx201738-1788188-153228.pdf>; Letter from Patricia L. Cerny and Steven O'Malley, Compliance Consultants, to Brent J. Fields, Secretary, Commission (dated June 12, 2017), available at <https://www.sec.gov/comments/sr-cboe-2017-040/cboe2017040-1799253-153675.pdf>; Letter from Daniel Zinn, General Counsel, OTC Markets Group Inc., to Eduardo A. Aleman, Assistant Secretary, Commission (dated June 13, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-1801717-153703.pdf>; Letter from Joanna Mallers, Secretary, FIA Principal Traders Group, to Brent J. Fields, Secretary, Commission (dated June 22, 2017), available at: <https://www.sec.gov/comments/sr-cboe-2017-040/cboe2017040-1819670-154195.pdf>; Letter from Stuart J. Kaswell, Executive Vice President and Managing Director, General Counsel, Managed Funds Association, to Brent J. Fields, Secretary, Commission (dated June 23, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-1822454-154283.pdf>; and Letter from Suzanne H. Shatto, Investor, to Commission (dated June 27, 2017), available at: <https://www.sec.gov/comments/sr-batsedgx-2017-22/batsedgx201722-154443.pdf>. The Commission also received a comment letter which is not pertinent to these proposed rule changes. See Letter from Christina Crouch, Smart Ltd., to Brent J. Fields, Secretary, Commission (dated June 5, 2017), available at: <https://www.sec.gov/comments/sr-batsbzx-2017-38/batsbzx201738-1785545-153152.htm>.

⁵ See Letter from CAT NMS Plan Participants to Brent J. Fields, Secretary, Commission (dated June 29, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-1832632-154584.pdf>.

⁶ See Securities Exchange Act Release No. 81067 (June 30, 2017), 82 FR 31656 (July 7, 2017).

⁷ See Letter from W. Hardy Callcott, Partner, Sidley Austin LLP, to Brent J. Fields, Secretary, Commission (dated July 27, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2148338-157737.pdf>; Letter from Kevin Coleman, General Counsel and Chief Compliance Officer, Belvedere Trading LLC, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2148360-157740.pdf>; Letter from Joanna Mallers, Secretary, FIA Principal Traders Group, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2151228-157745.pdf>; Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2150977-157744.pdf>; Letter from Stuart J. Kaswell, Executive Vice President and Managing Director, General Counsel, Managed Funds Association, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2150818-157743.pdf>; Letter from John Kinahan, Chief Executive Officer, Group One Trading, L.P., to Brent J. Fields, Secretary, Commission (dated August 10, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-2214568-160619.pdf>; Letter from

Continued

from the Participants.⁸ On October 31, 2017, the Exchange filed Amendment No. 1 to the proposed rule change, as described in Items I and II below, which Items have been prepared by the Exchange.⁹ On November 9, 2017, the Commission extended the time period within which to approve the proposed rule change or disapprove the proposed rule change to January 14, 2018.¹⁰ The Commission is publishing this notice to solicit comments from interested persons on Amendment No. 1.¹¹

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

On May 9, 2017, Investors Exchange LLC ("SRO") filed with the Commission proposed rule change SR-IEX-2017-16 (the "Original Proposal"), pursuant to which SRO proposed to adopt a fee schedule to establish the fees for Industry Members related to the National Market System Plan Governing the Consolidated Audit Trail (the "CAT NMS Plan" or "Plan").¹² SRO files this proposed rule change (the "Amendment") to amend the Original Proposal. This Amendment replaces the Original Proposal in its entirety, and also describes the changes from the Original Proposal.

The text of the proposed rule change is available at the Exchange's website at www.iextrading.com, at the principal

Joseph Molluso, Executive Vice President and CFO, Virtu Financial, to Brent J. Fields, Commission (dated August 18, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-2238648-160830.pdf>.

⁸ See Letter from Michael Simon, Chair, CAT NMS Plan Operating Committee, to Brent J. Fields, Commission, Secretary (dated November 2, 2017), available at <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2674608-161412.pdf>.

⁹ Amendment No. 1 to the proposed rule change replaces and supersedes the Original Proposal in its entirety.

¹⁰ See Securities Exchange Act Release No. 82049 (November 9, 2017), 82 FR 53549 (November 16, 2017).

¹¹ The Commission notes that on December 4, 2017, the Exchange filed Amendment No. 2 to the proposed rule change. Amendment No. 2 is a partial amendment to the proposed rule change, as amended by Amendment No. 1. Amendment No. 2 proposes to change the parenthetical regarding the OTC Equity Securities discount in paragraph (b)(2) of the proposed fee schedule from "with a discount for Equity ATSs exclusively trading OTC Equity Securities based on the average shares per trade ratio between NMS Stocks and OTC Equity Securities" to "with a discount for OTC Equity Securities market share of Equity ATSs trading OTC Equity Securities based on the average shares per trade ratio between NMS Stocks and OTC Equity Securities." See Securities Exchange Act Release No. 82259 (December 11, 2017).

¹² Unless otherwise specified, capitalized terms used in this fee filing are defined as set forth herein, the CAT Compliance Rule Series, in the CAT NMS Plan, or the Original Proposal.

office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

BOX Options Exchange LLC, Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe C2 Exchange, Inc., Cboe Exchange, Inc.,¹³ Chicago Stock Exchange, Inc., Financial Industry Regulatory Authority, Inc. ("FINRA"), Investors' Exchange LLC, Miami International Securities Exchange, LLC, MIAx PEARL, LLC, NASDAQ BX, Inc., Nasdaq GEMX, LLC, Nasdaq ISE, LLC, Nasdaq MRX, LLC,¹⁴ NASDAQ PHLX LLC, The NASDAQ Stock Market LLC, New York Stock Exchange LLC, NYSE American LLC,¹⁵ NYSE Arca, Inc. and NYSE National, Inc.¹⁶ (collectively, the "Participants") filed with the Commission, pursuant to Section 11A of the Exchange Act¹⁷ and Rule 608 of

¹³ Note that Bats BYX Exchange, Inc., Bats BZX Exchange, Inc., Bats EDGA Exchange, Inc., Bats EDGX Exchange, Inc., LLC, C2 Options Exchange, Incorporated, and Chicago Board Options Exchange, Incorporated, have been renamed Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe C2 Exchange, Inc., Cboe Exchange, Inc., respectively.

¹⁴ ISE Gemini, LLC, ISE Mercury, LLC and International Securities Exchange, LLC have been renamed Nasdaq GEMX, LLC, Nasdaq MRX, LLC, and Nasdaq ISE, LLC, respectively. See Securities Exchange Act Rel. No. 80248 (Mar. 15, 2017), 82 FR 14547 (Mar. 21, 2017); Securities Exchange Act Rel. No. 80326 (Mar. 29, 2017), 82 FR 16460 (Apr. 4, 2017); and Securities Exchange Act Rel. No. 80325 (Mar. 29, 2017), 82 FR 16445 (Apr. 4, 2017).

¹⁵ NYSE MKT LLC has been renamed NYSE American LLC. See Securities Exchange Act Rel. No. 80283 (Mar. 21, 2017), 82 FR 15244 (Mar. 27, 2017).

¹⁶ National Stock Exchange, Inc. has been renamed NYSE National, Inc. See Securities Exchange Act Rel. No. 79902 (Jan. 30, 2017), 82 FR 9258 (Feb. 3, 2017).

¹⁷ 15 U.S.C. 78k-1.

Regulation NMS thereunder,¹⁸ the CAT NMS Plan.¹⁹ The Participants filed the Plan to comply with Rule 613 of Regulation NMS under the Exchange Act. The Plan was published for comment in the **Federal Register** on May 17, 2016,²⁰ and approved by the Commission, as modified, on November 15, 2016.²¹ The Plan is designed to create, implement and maintain a consolidated audit trail ("CAT") that would capture customer and order event information for orders in NMS Securities and OTC Equity Securities, across all markets, from the time of order inception through routing, cancellation, modification, or execution in a single consolidated data source. The Plan accomplishes this by creating CAT NMS, LLC (the "Company"), of which each Participant is a member, to operate the CAT.²² Under the CAT NMS Plan, the Operating Committee of the Company ("Operating Committee") has discretion to establish funding for the Company to operate the CAT, including establishing fees that the Participants will pay, and establishing fees for Industry Members that will be implemented by the Participants ("CAT Fees").²³ The Participants are required to file with the SEC under Section 19(b) of the Exchange Act any such CAT Fees applicable to Industry Members that the Operating Committee approves.²⁴ Accordingly, SRO submitted the Original Proposal to propose the Consolidated Audit Trail Funding Fees, which would require Industry Members that are SRO members to pay the CAT Fees determined by the Operating Committee.

The Commission published the Original Proposal for public comment in the **Federal Register** on May 16, 2017,²⁵ and received comments in response to the Original Proposal or similar fee filings by other Participants.²⁶ On June

¹⁸ 17 CFR 242.608.

¹⁹ See Letter from the Participants to Brent J. Fields, Secretary, Commission, dated September 30, 2014; and Letter from Participants to Brent J. Fields, Secretary, Commission, dated February 27, 2015. On December 24, 2015, the Participants submitted an amendment to the CAT NMS Plan. See Letter from Participants to Brent J. Fields, Secretary, Commission, dated December 23, 2015.

²⁰ Securities Exchange Act Rel. No. 77724 (Apr. 27, 2016), 81 FR 30614 (May 17, 2016).

²¹ Securities Exchange Act Rel. No. 79318 (Nov. 15, 2016), 81 FR 84696 (Nov. 23, 2016) ("Approval Order").

²² The Plan also serves as the limited liability company agreement for the Company.

²³ Section 11.1(b) of the CAT NMS Plan.

²⁴ *Id.*

²⁵ Securities Exchange Act Release No. 80692 (May 16, 2017), 82 FR 23325 (May 22, 2017) (SR-IEX-2017-16).

²⁶ For a summary of comments, see generally Securities Exchange Act Rel. No. 81067 (June 30,

30, 2017, the Commission suspended, and instituted proceedings to determine whether to approve or disapprove, the Original Proposal.²⁷ The Commission received seven comment letters in response to those proceedings.²⁸

In response to the comments on the Original Proposal, the Operating Committee determined to make the following changes to the funding model: (1) Adds two additional CAT Fee tiers for Equity Execution Venues; (2) discounts the market share of Execution Venue ATSS exclusively trading OTC Equity Securities as well as the market share of the FINRA over-the-counter reporting facility (“ORF”) by the average shares per trade ratio between NMS Stocks and OTC Equity Securities (calculated as 0.17% based on available data from the second quarter of 2017) when calculating the market share of Execution Venue ATS exclusively trading OTC Equity Securities and FINRA; (3) discounts the Options Market Maker quotes by the trade to quote ratio for options (calculated as 0.01% based on available data for June 2016 through June 2017) when calculating message traffic for Options Market Makers; (4) discounts equity market maker quotes by the trade to quote ratio for equities (calculated as 5.43% based on available data for June 2016 through June 2017) when calculating message traffic for equity market makers; (5) decreases the number of tiers for Industry Members (other than the Execution Venue ATSS) from nine to seven; (6) changes the allocation of CAT costs between Equity Execution Venues and Options Execution Venues from 75%/25% to 67%/33%; (7) adjusts tier percentages and recovery allocations for Equity Execution Venues, Options Execution Venues and Industry Members (other

than Execution Venue ATSS); (8) focuses the comparability of CAT Fees on the individual entity level, rather than primarily on the comparability of affiliated entities; (9) commences invoicing of CAT Reporters as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Participants and the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants; and (10) requires the proposed fees to automatically expire two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. As discussed in detail below, SRO proposes to amend the Original Proposal to reflect these changes.

(1) Executive Summary

The following provides an executive summary of the CAT funding model approved by the Operating Committee, as well as Industry Members’ rights and obligations related to the payment of CAT Fees calculated pursuant to the CAT funding model, as amended by this Amendment. A detailed description of the CAT funding model and the CAT Fees, as amended by this Amendment, as well as the changes made to the Original Proposal follows this executive summary.

(A) CAT Funding Model

- *CAT Costs.* The CAT funding model is designed to establish CAT-specific fees to collectively recover the costs of building and operating the CAT from all CAT Reporters, including Industry Members and Participants. The overall CAT costs used in calculating the CAT Fees in this fee filing are comprised of Plan Processor CAT costs and non-Plan Processor CAT costs incurred, and estimated to be incurred, from November 21, 2016 through November 21, 2017. Although the CAT costs from November 21, 2016 through November 21, 2017 were used in calculating the CAT Fees the CAT Fees set forth in this fee filing would be in effect until the automatic sunset date, as discussed below. (See Section 3(a)(2)(E) below)

- *Bifurcated Funding Model.* The CAT NMS Plan requires a bifurcated funding model, where costs associated with building and operating the CAT would be borne by (1) Participants and Industry Members that are Execution Venues for Eligible Securities through fixed tier fees based on market share, and (2) Industry Members (other than alternative trading systems (“ATSS”)) that execute transactions in Eligible Securities (“Execution Venue ATSS”) through fixed tier fees based on message

traffic for Eligible Securities. (See Section 3(a)(2) below)

- *Industry Member Fees.* Each Industry Member (other than Execution Venue ATSS) will be placed into one of seven tiers of fixed fees, based on “message traffic” in Eligible Securities for a defined period (as discussed below). Prior to the start of CAT reporting, “message traffic” will be comprised of historical equity and equity options orders, cancels, quotes and executions provided by each exchange and FINRA over the previous three months. After an Industry Member begins reporting to the CAT, “message traffic” will be calculated based on the Industry Member’s Reportable Events reported to the CAT. Industry Members with lower levels of message traffic will pay a lower fee and Industry Members with higher levels of message traffic will pay a higher fee. To avoid disincentives to quoting behavior, Options Market Maker and equity market maker quotes will be discounted when calculating message traffic. (See Section 3(a)(2)(B) below)

- *Execution Venue Fees.* Each Equity Execution Venue will be placed in one of four tiers of fixed fees based on market share, and each Options Execution Venue will be placed in one of two tiers of fixed fees based on market share. Equity Execution Venue market share will be determined by calculating each Equity Execution Venue’s proportion of the total volume of NMS Stock and OTC Equity shares reported by all Equity Execution Venues during the relevant time period. For purposes of calculating market share, the market share of Execution Venue ATSS exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF will be discounted. Similarly, market share for Options Execution Venues will be determined by calculating each Options Execution Venue’s proportion of the total volume of Listed Options contracts reported by all Options Execution Venues during the relevant time period. Equity Execution Venues with a larger market share will pay a larger CAT Fee than Equity Execution Venues with a smaller market share. Similarly, Options Execution Venues with a larger market share will pay a larger CAT Fee than Options Execution Venues with a smaller market share. (See Section 3(a)(2)(C) below)

- *Cost Allocation.* For the reasons discussed below, in designing the model, the Operating Committee determined that 75 percent of total costs recovered would be allocated to Industry Members (other than Execution Venue ATSS) and 25 percent would be

2017), 82 FR 31656 (July 7, 2017) (“Suspension Order”).

²⁷ Suspension Order.

²⁸ See Letter from Stuart J. Kaswell, Executive Vice President, Managing Director and General Counsel, Managed Funds Association, to Brent J. Fields, Secretary, SEC (July 28, 2017) (“MFA Letter”); Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA, to Brent J. Fields, Secretary, SEC (July 28, 2017) (“SIFMA Letter”); Joanna Mallers, Secretary, FIA Principal Traders Group, to Brent J. Fields, Secretary, SEC (July 28, 2017) (“FIA Principal Traders Group Letter”); Letter from Kevin Coleman, General Counsel & Chief Compliance Officer, Belvedere Trading LLC, to Brent J. Fields, Secretary, SEC (July 28, 2017) (“Belvedere Letter”); Letter from W. Hardy Callcott, Sidley Austin LLP, to Brent J. Fields, Secretary, SEC (July 27, 2017) (“Sidley Letter”); Letter from John Kinahan, Chief Executive Officer, Group One Trading, L.P., to Brent J. Fields, Secretary, SEC (Aug. 10, 2017) (“Group One Letter”); and Letter from Joseph Molluso, Executive Vice President, Virtu Financial, to Brent J. Fields, Secretary, SEC (Aug. 18, 2017) (“Virtu Financial Letter”).

allocated to Execution Venues. In addition, the Operating Committee determined to allocate 67 percent of Execution Venue costs recovered to Equity Execution Venues and 33 percent to Options Execution Venues. (See Section 3(a)(2)(D) below)

- *Comparability of Fees.* The CAT funding model charges CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) comparable CAT Fees. (See Section 3(a)(2)(F) below)

(B) CAT Fees for Industry Members

- *Fee Schedule.* The quarterly CAT Fees for each tier for Industry Members are set forth in the two fee schedules in the Consolidated Audit Trail Funding Fees, one for Equity ATSs and one for Industry Members other than Equity ATSs. (See Section 3(a)(3)(B) below)

- *Quarterly Invoices.* Industry Members will be billed quarterly for CAT Fees, with the invoices payable within 30 days. The quarterly invoices will identify within which tier the Industry Member falls. (See Section 3(a)(3)(C) below)

- *Centralized Payment.* Each Industry Member will receive from the Company one invoice for its applicable CAT Fees, not separate invoices from each Participant of which it is a member. Each Industry Member will pay its CAT Fees to the Company via the centralized system for the collection of CAT Fees established by the Operating Committee. (See Section 3(a)(3)(C) below)

- *Billing Commencement.* Industry Members will begin to receive invoices for CAT Fees as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Participants and the operative date of the Plan amendment adopting CAT Fees for Participants. (See Section 3(a)(2)(G) below)

- *Sunset Provision.* The Consolidated Audit Trail Funding Fees will sunset automatically two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. (See Section 3(a)(2)(I) below)

(2) Description of the CAT Funding Model

Article XI of the CAT NMS Plan requires the Operating Committee to approve the operating budget, including projected costs of developing and operating the CAT for the upcoming year. In addition to a budget, Article XI of the CAT NMS Plan provides that the Operating Committee has discretion to establish funding for the Company, consistent with a bifurcated funding

model, where costs associated with building and operating the Central Repository would be borne by (1) Participants and Industry Members that are Execution Venues through fixed tier fees based on market share, and (2) Industry Members (other than Execution Venue ATSs) through fixed tier fees based on message traffic. In its order approving the CAT NMS Plan, the Commission determined that the proposed funding model was “reasonable”²⁹ and “reflects a reasonable exercise of the Participants’ funding authority to recover the Participants’ costs related to the CAT.”³⁰

More specifically, the Commission stated in approving the CAT NMS Plan that “[t]he Commission believes that the proposed funding model is reasonably designed to allocate the costs of the CAT between the Participants and Industry Members.”³¹ The Commission further noted the following:

The Commission believes that the proposed funding model reflects a reasonable exercise of the Participants’ funding authority to recover the Participants’ costs related to the CAT. The CAT is a regulatory facility jointly owned by the Participants and . . . the Exchange Act specifically permits the Participants to charge their members fees to fund their self-regulatory obligations. The Commission further believes that the proposed funding model is designed to impose fees reasonably related to the Participants’ self-regulatory obligations because the fees would be directly associated with the costs of establishing and maintaining the CAT, and not unrelated SRO services.³²

Accordingly, the funding model approved by the Operating Committee imposes fees on both Participants and Industry Members.

As discussed in Appendix C of the CAT NMS Plan, in developing and approving the approved funding model, the Operating Committee considered the advantages and disadvantages of a variety of alternative funding and cost allocation models before selecting the proposed model.³³ After analyzing the various alternatives, the Operating Committee determined that the proposed tiered, fixed fee funding model provides a variety of advantages in comparison to the alternatives.

In particular, the fixed fee model, as opposed to a variable fee model, provides transparency, ease of calculation, ease of billing and other

administrative functions, and predictability of a fixed fee. Such factors are crucial to estimating a reliable revenue stream for the Company and for permitting CAT Reporters to reasonably predict their payment obligations for budgeting purposes. Additionally, a strictly variable or metered funding model based on message volume would be far more likely to affect market behavior and place an inappropriate burden on competition.

In addition, reviews from varying time periods of current broker-dealer order and trading data submitted under existing reporting requirements showed a wide range in activity among broker-dealers, with a number of broker-dealers submitting fewer than 1,000 orders per month and other broker-dealers submitting millions and even billions of orders in the same period. Accordingly, the CAT NMS Plan includes a tiered approach to fees. The tiered approach helps ensure that fees are equitably allocated among similarly situated CAT Reporters and furthers the goal of lessening the impact on smaller firms.³⁴ In addition, in choosing a tiered fee structure, the Operating Committee concluded that the variety of benefits offered by a tiered fee structure, discussed above, outweighed the fact that CAT Reporters in any particular tier would pay different rates per message traffic order event or per market share (e.g., an Industry Member with the largest amount of message traffic in one tier would pay a smaller amount per order event than an Industry Member in the same tier with the least amount of message traffic). Such variation is the natural result of a tiered fee structure.³⁵ The Operating Committee considered several approaches to developing a tiered model, including defining fee tiers based on such factors as size of firm, message traffic or trading dollar volume. After analyzing the alternatives, it was concluded that the tiering should be based on message traffic which will reflect the relative impact of CAT Reporters on the CAT System.

Accordingly, the CAT NMS Plan contemplates that costs will be allocated across the CAT Reporters on a tiered basis in order to allocate higher costs to those CAT Reporters that contribute more to the costs of creating, implementing and maintaining the CAT and lower costs to those that contribute

²⁹ Approval Order at 84796.

³⁰ *Id.* at 84794.

³¹ *Id.* at 84795.

³² *Id.* at 84794.

³³ Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85006.

³⁴ Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85006.

³⁵ Moreover, as the SEC noted in approving the CAT NMS Plan, “[t]he Participants also have offered a reasonable basis for establishing a funding model based on broad tiers, in that it may be easier to implement.” Approval Order at 84796.

less.³⁶ The fees to be assessed at each tier are calculated so as to recoup a proportion of costs appropriate to the message traffic or market share (as applicable) from CAT Reporters in each tier. Therefore, Industry Members generating the most message traffic will be in the higher tiers, and will be charged a higher fee. Industry Members with lower levels of message traffic will be in lower tiers and will be assessed a smaller fee for the CAT.³⁷ Correspondingly, Execution Venues with the highest market shares will be in the top tier, and will be charged higher fees. Execution Venues with the lowest market shares will be in the lowest tier and will be assessed smaller fees for the CAT.³⁸

The CAT NMS Plan states that Industry Members (other than Execution Venue ATSS) will be charged based on message traffic, and that Execution Venues will be charged based on market share.³⁹ While there are multiple factors that contribute to the cost of building, maintaining and using the CAT, processing and storage of incoming message traffic is one of the most significant cost drivers for the CAT.⁴⁰ Thus, the CAT NMS Plan provides that the fees payable by Industry Members (other than Execution Venue ATSS) will be based on the message traffic generated by such Industry Member.⁴¹

In contrast to Industry Members, which determine the degree to which they produce message traffic that constitute CAT Reportable Events, the CAT Reportable Events of the Execution Venues are largely derivative of quotations and orders received from Industry Members that they are required to display. The business model for Execution Venues (other than FINRA), however, is focused on executions in their markets. As a result, the Operating Committee believes that it is more equitable to charge Execution Venues based on their market share rather than their message traffic.

Focusing on message traffic would make it more difficult to draw distinctions between large and small Execution Venues and, in particular, between large and small options exchanges. For instance, the Operating Committee analyzed the message traffic of Execution Venues and Industry Members for the period of April 2017 to June 2017 and placed all CAT Reporters

into a nine-tier framework (*i.e.*, a single tier may include both Execution Venues and Industry Members). The Operating Committee's analysis found that the majority of exchanges (15 total) were grouped in Tiers 1 and 2. Moreover, virtually all of the options exchanges were in Tiers 1 and 2.⁴² Given the resulting concentration of options exchanges in Tiers 1 and 2 under this approach, the analysis shows that a funding model for Execution Venues based on message traffic would make it more difficult to distinguish between large and small options exchanges, as compared to the proposed fee approach that bases fees for Execution Venues on market share.

The CAT NMS Plan's funding model also is structured to avoid a "reduction in market quality."⁴³ The tiered, fixed fee funding model is designed to limit the disincentives to providing liquidity to the market. For example, the Operating Committee expects that a firm that has a large volume of quotes would likely be categorized in one of the upper tiers, and would not be assessed a fee for this traffic directly as they would under a more directly metered model. In contrast, strictly variable or metered funding models based on message volume are far more likely to affect market behavior. In approving the CAT NMS Plan, the SEC stated that "[t]he Participants also offered a reasonable basis for establishing a funding model based on broad tiers, in that it may be . . . less likely to have an incremental deterrent effect on liquidity provision."⁴⁴

The funding model also is structured to avoid a reduction market quality because it discounts Options Market Maker and equity market maker quotes when calculating message traffic for Options Market Makers and equity market makers, respectively. As discussed in more detail below, the Operating Committee determined to discount the Options Market Maker quotes by the trade to quote ratio for options when calculating message traffic for Options Market Makers. Similarly, to avoid disincentives to quoting behavior on the equities side as well, the Operating Committee determined to discount equity market maker quotes by the trade to quote ratio for equities when calculating message traffic for equity market makers. The proposed discounts recognize the value of the

market makers' quoting activity to the market as a whole.

The CAT NMS Plan is further structured to avoid potential conflicts raised by the Operating Committee determining fees applicable to its own members—the Participants. First, the Company will operate on a "break-even" basis, with fees imposed to cover costs and an appropriate reserve. Any surpluses will be treated as an operational reserve to offset future fees and will not be distributed to the Participants as profits.⁴⁵ To ensure that the Participants' operation of the CAT will not contribute to the funding of their other operations, Section 11.1(c) of the CAT NMS Plan specifically states that "[a]ny surplus of the Company's revenues over its expenses shall be treated as an operational reserve to offset future fees." In addition, as set forth in Article VIII of the CAT NMS Plan, the Company "intends to operate in a manner such that it qualifies as a 'business league' within the meaning of Section 501(c)(6) of the [Internal Revenue] Code." To qualify as a business league, an organization must "not [be] organized for profit and no part of the net earnings of [the organization can] inure[] to the benefit of any private shareholder or individual."⁴⁶ As the SEC stated when approving the CAT NMS Plan, "the Commission believes that the Company's application for Section 501(c)(6) business league status addresses issues raised by commenters about the Plan's proposed allocation of profit and loss by mitigating concerns that the Company's earnings could be used to benefit individual Participants."⁴⁷ The Internal Revenue Service recently has determined that the Company is exempt from federal income tax under Section 501(c)(6) of the Internal Revenue Code.

The funding model also is structured to take into account distinctions in the securities trading operations of Participants and Industry Members. For example, the Operating Committee designed the model to address the different trading characteristics in the OTC Equity Securities market. Specifically, the Operating Committee proposes to discount the market share of Execution Venue ATSS exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF by the average shares per trade ratio between NMS Stocks and OTC Equity Securities to adjust for the greater number of shares being traded in the

³⁶ Approval Order at 85005.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Section 11.3(a) and (b) of the CAT NMS Plan.

⁴⁰ Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85005.

⁴¹ Section 11.3(b) of the CAT NMS Plan.

⁴² The Operating Committee notes that this analysis did not place MIAX PEARL in Tier 1 or Tier 2 since the exchange commenced trading on February 6, 2017.

⁴³ Section 11.2(e) of the CAT NMS Plan.

⁴⁴ Approval Order at 84796.

⁴⁵ *Id.* at 84792.

⁴⁶ 26 U.S.C. 501(c)(6).

⁴⁷ Approval Order at 84793.

OTC Equity Securities market, which is generally a function of a lower per share price for OTC Equity Securities when compared to NMS Stocks. In addition, the Operating Committee also proposes to discount Options Market Maker and equity market maker message traffic in recognition of their role in the securities markets. Furthermore, the funding model creates separate tiers for Equity and Options Execution Venues due to the different trading characteristics of those markets.

Finally, by adopting a CAT-specific fee, the Operating Committee will be fully transparent regarding the costs of the CAT. Charging a general regulatory fee, which would be used to cover CAT costs as well as other regulatory costs, would be less transparent than the selected approach of charging a fee designated to cover CAT costs only.

A full description of the funding model is set forth below. This description includes the framework for the funding model as set forth in the CAT NMS Plan, as well as the details as to how the funding model will be applied in practice, including the number of fee tiers and the applicable fees for each tier. The complete funding model is described below, including those fees that are to be paid by the Participants. The proposed Consolidated Audit Trail Funding Fees, however, do not apply to the Participants; the proposed Consolidated Audit Trail Funding Fees only apply to Industry Members. The CAT Fees for Participants will be imposed separately by the Operating Committee pursuant to the CAT NMS Plan.

(A) Funding Principles

Section 11.2 of the CAT NMS Plan sets forth the principles that the Operating Committee applied in establishing the funding for the Company. The Operating Committee has considered these funding principles as well as the other funding requirements set forth in the CAT NMS Plan and in Rule 613 in developing the proposed funding model. The following are the funding principles in Section 11.2 of the CAT NMS Plan:

- To create transparent, predictable revenue streams for the Company that are aligned with the anticipated costs to build, operate and administer the CAT and other costs of the Company;
- To establish an allocation of the Company's related costs among Participants and Industry Members that is consistent with the Exchange Act, taking into account the timeline for implementation of the CAT and distinctions in the securities trading operations of Participants and Industry

Members and their relative impact upon the Company's resources and operations;

- To establish a tiered fee structure in which the fees charged to: (i) CAT Reporters that are Execution Venues, including ATSS, are based upon the level of market share; (ii) Industry Members' non-ATS activities are based upon message traffic; (iii) the CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether Execution Venue and/or Industry Members);
- To provide for ease of billing and other administrative functions;
- To avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality; and
- To build financial stability to support the Company as a going concern.

(B) Industry Member Tiering

Under Section 11.3(b) of the CAT NMS Plan, the Operating Committee is required to establish fixed fees to be payable by Industry Members, based on message traffic generated by such Industry Member, with the Operating Committee establishing at least five and no more than nine tiers.

The CAT NMS Plan clarifies that the fixed fees payable by Industry Members pursuant to Section 11.3(b) shall, in addition to any other applicable message traffic, include message traffic generated by: (i) An ATS that does not execute orders that is sponsored by such Industry Member; and (ii) routing orders to and from any ATS sponsored by such Industry Member. In addition, the Industry Member fees will apply to Industry Members that act as routing broker-dealers for exchanges. The Industry Member fees will not be applicable, however, to an ATS that qualifies as an Execution Venue, as discussed in more detail in the section on Execution Venue tiering.

In accordance with Section 11.3(b), the Operating Committee approved a tiered fee structure for Industry Members (other than Execution Venue ATSS) as described in this section. In determining the tiers, the Operating Committee considered the funding principles set forth in Section 11.2 of the CAT NMS Plan, seeking to create funding tiers that take into account the relative impact on CAT System resources of different Industry Members, and that establish comparable fees

among the CAT Reporters with the most Reportable Events. The Operating Committee has determined that establishing seven tiers results in an allocation of fees that distinguishes between Industry Members with differing levels of message traffic. Thus, each such Industry Member will be placed into one of seven tiers of fixed fees, based on "message traffic" for a defined period (as discussed below).

A seven tier structure was selected to provide a wide range of levels for tiering Industry Members such that Industry Members submitting significantly less message traffic to the CAT would be adequately differentiated from Industry Members submitting substantially more message traffic. The Operating Committee considered historical message traffic from multiple time periods, generated by Industry Members across all exchanges and as submitted to FINRA's Order Audit Trail System ("OATS"), and considered the distribution of firms with similar levels of message traffic, grouping together firms with similar levels of message traffic. Based on this, the Operating Committee determined that seven tiers would group firms with similar levels of message traffic, charging those firms with higher impact on the CAT more, while lowering the burden on Industry Members that have less CAT-related activity. Furthermore, the selection of seven tiers establishes comparable fees among the largest CAT Reporters.

Each Industry Member (other than Execution Venue ATSS) will be ranked by message traffic and tiered by predefined Industry Member percentages (the "Industry Member Percentages"). The Operating Committee determined to use predefined percentages rather than fixed volume thresholds to ensure that the total CAT Fees collected recover the expected CAT costs regardless of changes in the total level of message traffic. To determine the fixed percentage of Industry Members in each tier, the Operating Committee analyzed historical message traffic generated by Industry Members across all exchanges and as submitted to OATS, and considered the distribution of firms with similar levels of message traffic, grouping together firms with similar levels of message traffic. Based on this, the Operating Committee identified seven tiers that would group firms with similar levels of message traffic.

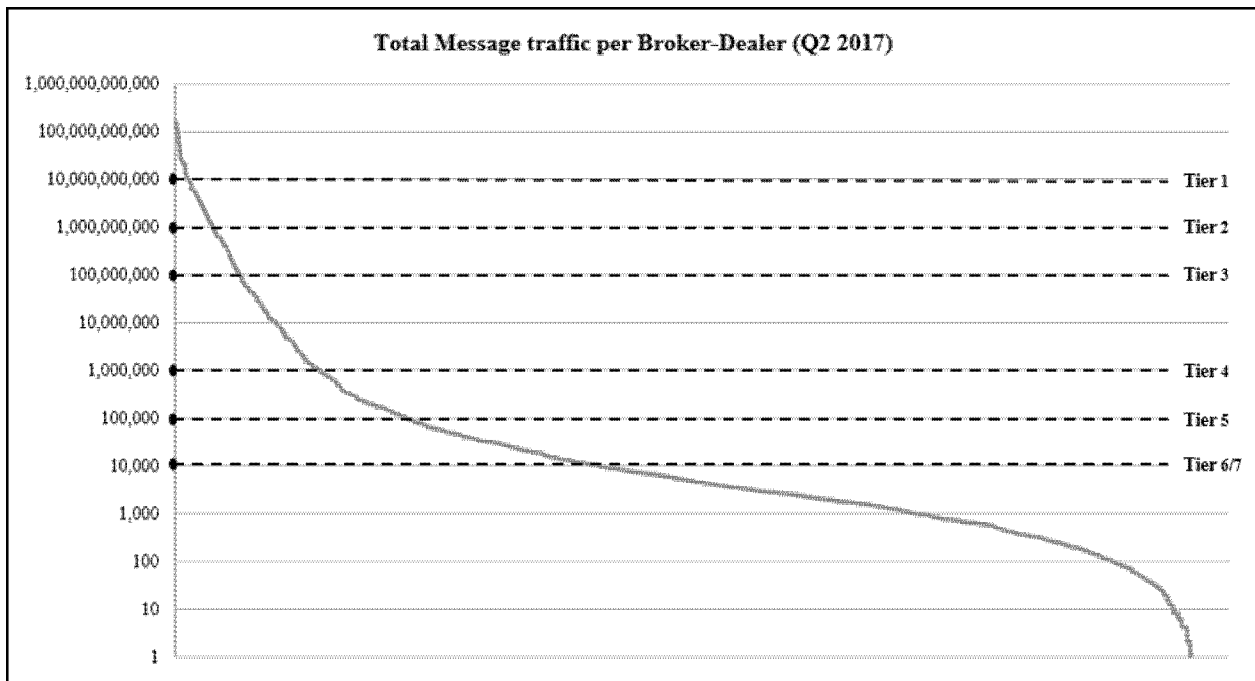
The percentage of costs recovered by each Industry Member tier will be determined by predefined percentage allocations (the "Industry Member Recovery Allocation"). In determining the fixed percentage allocation of costs

recovered for each tier, the Operating Committee considered the impact of CAT Reporter message traffic on the CAT System as well as the distribution of total message volume across Industry Members while seeking to maintain comparable fees among the largest CAT Reporters. Accordingly, following the determination of the percentage of Industry Members in each tier, the Operating Committee identified the percentage of total market volume for each tier based on the historical message traffic upon which Industry Members had been initially ranked. Taking this into account along with the resulting percentage of total recovery, the percentage allocation of costs recovered for each tier were assigned, allocating higher percentages of recovery to tiers with higher levels of message traffic while avoiding any inappropriate burden on competition. Furthermore, by using percentages of Industry Members and costs recovered per tier, the

Operating Committee sought to include elasticity within the funding model, allowing the funding model to respond to changes in either the total number of Industry Members or the total level of message traffic.

The following chart illustrates the breakdown of seven Industry Member tiers across the monthly average of total equity and equity options orders, cancels, quotes and executions in the second quarter of 2017 as well as message traffic thresholds between the largest of Industry Member message traffic gaps. The Operating Committee referenced similar distribution illustrations to determine the appropriate division of Industry Member percentages in each tier by considering the grouping of firms with similar levels of message traffic and seeking to identify relative breakpoints in the message traffic between such groupings. In reviewing the chart and its corresponding table, note that while

these distribution illustrations were referenced to help differentiate between Industry Member tiers, the proposed funding model is driven by fixed percentages of Industry Members across tiers to account for fluctuating levels of message traffic over time. This approach also provides financial stability for the CAT by ensuring that the funding model will recover the required amounts regardless of changes in the number of Industry Members or the amount of message traffic. Actual messages in any tier will vary based on the actual traffic in a given measurement period, as well as the number of firms included in the measurement period. The Industry Member Percentages and Industry Member Recovery Allocation for each tier will remain fixed with each Industry Member's tier to be reassigned periodically, as described below in Section 3(a)(2)(I).



Industry Member tier	Approximate message traffic per Industry Member (Q2 2017) (orders, quotes, cancels and executions)
Tier 1	>10,000,000,000
Tier 2	1,000,000,000–10,000,000,000
Tier 3	100,000,000–1,000,000,000
Tier 4	1,000,000–100,000,000
Tier 5	100,000–1,000,000
Tier 6	10,000–100,000
Tier 7	<10,000

Based on the above analysis, the Operating Committee approved the following Industry Member Percentages

and Industry Member Recovery Allocations:

Industry Member tier	Percentage of Industry Members	Percentage of Industry Member recovery	Percentage of total recovery
Tier 1	0.900	12.00	9.00
Tier 2	2.150	20.50	15.38
Tier 3	2.800	18.50	13.88
Tier 4	7.750	32.00	24.00
Tier 5	8.300	10.00	7.50
Tier 6	18.800	6.00	4.50
Tier 7	59.300	1.00	0.75
Total	100	100	75

For the purposes of creating these tiers based on message traffic, the Operating Committee determined to define the term “message traffic” separately for the period before the commencement of CAT reporting and for the period after the start of CAT reporting. The different definition for message traffic is necessary as there will be no Reportable Events as defined in the Plan, prior to the commencement of CAT reporting. Accordingly, prior to the start of CAT reporting, “message traffic” will be comprised of historical equity and equity options orders, cancels, quotes and executions provided by each exchange and FINRA over the previous three months. Prior to the start of CAT reporting, orders would be comprised of the total number of equity and equity options orders received and originated by a member of an exchange or FINRA over the previous three-month period, including principal orders, cancel/replace orders, market maker orders originated by a member of an exchange, and reserve (iceberg) orders as well as executions originated by a member of FINRA, and excluding order rejects, system-modified orders, order routes and implied orders.⁴⁸ In addition, prior to the start of CAT reporting, cancels would be comprised of the total number of equity and equity option cancels received and originated by a member of an exchange or FINRA over a three-month period, excluding order modifications (e.g., order updates, order splits, partial cancels) and multiple cancels of a complex order. Furthermore, prior to the start of CAT reporting, quotes would be comprised of information readily available to the exchanges and FINRA, such as the total number of historical equity and equity

⁴⁸ Consequently, firms that do not have “message traffic” reported to an exchange or OATS before they are reporting to the CAT would not be subject to a fee until they begin to report information to CAT.

options quotes received and originated by a member of an exchange or FINRA over the prior three-month period. Additionally, prior to the start of CAT reporting, executions would be comprised of the total number of equity and equity option executions received or originated by a member of an exchange or FINRA over a three-month period.

After an Industry Member begins reporting to the CAT, “message traffic” will be calculated based on the Industry Member’s Reportable Events reported to the CAT as will be defined in the Technical Specifications.⁴⁹

Quotes of Options Market Makers and equity market makers will be included in the calculation of total message traffic for those market makers for purposes of tiering under the CAT funding model both prior to CAT reporting and once CAT reporting commences.⁵⁰ To address potential concerns regarding burdens on competition or market quality of including quotes in the calculation of message traffic, however, the Operating Committee determined to discount the Options Market Maker quotes by the trade to quote ratio for options when calculating message traffic

⁴⁹ If an Industry Member (other than an Execution Venue ATS) has no orders, cancels, quotes and executions prior to the commencement of CAT Reporting, or no Reportable Events after CAT reporting commences, then the Industry Member would not have a CAT Fee obligation.

⁵⁰ The SEC approved exemptive relief permitting Options Market Maker quotes to be reported to the Central Repository by the relevant Options Exchange in lieu of requiring that such reporting be done by both the Options Exchange and the Options Market Maker, as required by Rule 613 of Regulation NMS. See Securities Exchange Act Rel. No. 77265 (Mar. 1, 2017, 81 FR 11856 (Mar. 7, 2016)). This exemption applies to Options Market Maker quotes for CAT reporting purposes only. Therefore, notwithstanding the reporting exemption provided for Options Market Maker quotes, Options Market Maker quotes will be included in the calculation of total message traffic for Options Market Makers for purposes of tiering under the CAT funding model both prior to CAT reporting and once CAT reporting commences.

for Options Market Makers. Based on available data for June 2016 through June 2017, the trade to quote ratio for options is 0.01%. Similarly, to avoid disincentives to quoting behavior on the equities side, the Operating Committee determined to discount equity market maker quotes by the trade to quote ratio for equities. Based on available data for June 2016 through June 2017, the trade to quote ratio for equities is 5.43%.⁵¹ The trade to quote ratio for options and the trade to quote ratio for equities will be calculated every three months when tiers are recalculated (as discussed below).

The Operating Committee has determined to calculate fee tiers every three months, on a calendar quarter basis, based on message traffic from the prior three months. Based on its analysis of historical data, the Operating Committee believes that calculating tiers based on three months of data will provide the best balance between reflecting changes in activity by Industry Members while still providing predictability in the tiering for Industry Members. Because fee tiers will be calculated based on message traffic from the prior three months, the Operating Committee will begin calculating message traffic based on an Industry Member’s Reportable Events reported to the CAT once the Industry Member has been reporting to the CAT for three months. Prior to that, fee tiers will be calculated as discussed above with regard to the period prior to CAT reporting.

(C) Execution Venue Tiering

Under Section 11.3(a) of the CAT NMS Plan, the Operating Committee is

⁵¹ The trade to quote ratios were calculated based on the inverse of the average of the monthly equity SIP and OPRA quote to trade ratios from June 2016–June 2017 that were compiled by the Financial Information Forum using data from NASDAQ and SIAC.

required to establish fixed fees payable by Execution Venues. Section 1.1 of the CAT NMS Plan defines an Execution Venue as “a Participant or an alternative trading system (“ATS”) (as defined in Rule 300 of Regulation ATS) that operates pursuant to Rule 301 of Regulation ATS (excluding any such ATS that does not execute orders).”⁵²

The Operating Committee determined that ATSs should be included within the definition of Execution Venue. The Operating Committee believes that it is appropriate to treat ATSs as Execution Venues under the proposed funding model since ATSs have business models that are similar to those of exchanges, and ATSs also compete with exchanges.

Given the differences between Execution Venues that trade NMS Stocks and/or OTC Equity Securities and Execution Venues that trade Listed Options, Section 11.3(a) addresses Execution Venues that trade NMS Stocks and/or OTC Equity Securities separately from Execution Venues that trade Listed Options. Equity and Options Execution Venues are treated separately for two reasons. First, the differing quoting behavior of Equity and Options Execution Venues makes comparison of activity between such Execution Venues difficult. Second, Execution Venue tiers are calculated based on market share of share volume, and it is therefore difficult to compare market share between asset classes (*i.e.*, equity shares versus options contracts). Discussed below is how the funding model treats the two types of Execution Venues.

(I) NMS Stocks and OTC Equity Securities

Section 11.3(a)(i) of the CAT NMS Plan states that each Execution Venue that (i) executes transactions or, (ii) in the case of a national securities association, has trades reported by its members to its trade reporting facility or facilities for reporting transactions effected otherwise than on an exchange, in NMS Stocks or OTC Equity Securities will pay a fixed fee depending on the market share of that Execution Venue in NMS Stocks and OTC Equity Securities, with the Operating Committee establishing at least two and not more than five tiers of fixed fees, based on an Execution Venue’s NMS Stocks and OTC Equity Securities market share. For these purposes, market share for Execution Venues that execute transactions will be calculated by share

volume, and market share for a national securities association that has trades reported by its members to its trade reporting facility or facilities for reporting transactions effected otherwise than on an exchange in NMS Stocks or OTC Equity Securities will be calculated based on share volume of trades reported, provided, however, that the share volume reported to such national securities association by an Execution Venue shall not be included in the calculation of such national security association’s market share.

In accordance with Section 11.3(a)(i) of the CAT NMS Plan, the Operating Committee approved a tiered fee structure for Equity Execution Venues and Option Execution Venues. In determining the Equity Execution Venue Tiers, the Operating Committee considered the funding principles set forth in Section 11.2 of the CAT NMS Plan, seeking to create funding tiers that take into account the relative impact on system resources of different Equity Execution Venues, and that establish comparable fees among the CAT Reporters with the most Reportable Events. Each Equity Execution Venue will be placed into one of four tiers of fixed fees, based on the Execution Venue’s NMS Stocks and OTC Equity Securities market share. In choosing four tiers, the Operating Committee performed an analysis similar to that discussed above with regard to the non-Execution Venue Industry Members to determine the number of tiers for Equity Execution Venues. The Operating Committee determined to establish four tiers for Equity Execution Venues, rather than a larger number of tiers as established for non-Execution Venue Industry Members, because the four tiers were sufficient to distinguish between the smaller number of Equity Execution Venues based on market share. Furthermore, the selection of four tiers serves to help establish comparability among the largest CAT Reporters.

Each Equity Execution Venue will be ranked by market share and tiered by predefined Execution Venue percentages, (the “Equity Execution Venue Percentages”). In determining the fixed percentage of Equity Execution Venues in each tier, the Operating Committee reviewed historical market share of share volume for Execution Venues. Equity Execution Venue market shares of share volume were sourced from market statistics made publicly-available by Bats Global Markets, Inc. (“Bats”). ATS market shares of share volume was sourced from market statistics made publicly-available by FINRA. FINRA trade reporting facility

(“TRF”) and ORF market share of share volume was sourced from market statistics made publicly available by FINRA. Based on data from FINRA and otcmrkt.com, ATSs accounted for 39.12% of the share volume across the TRFs and ORFs during the recent tiering period. A 39.12/60.88 split was applied to the ATS and non-ATS breakdown of FINRA market share, with FINRA tiered based only on the non-ATS portion of its market share of share volume.

The Operating Committee determined to discount the market share of Execution Venue ATSs exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF in recognition of the different trading characteristics of the OTC Equity Securities market as compared to the market in NMS Stocks. Many OTC Equity Securities are priced at less than one dollar—and a significant number at less than one penny—per share and low-priced shares tend to trade in larger quantities. Accordingly, a disproportionately large number of shares are involved in transactions involving OTC Equity Securities versus NMS Stocks. Because the proposed fee tiers are based on market share calculated by share volume, Execution Venue ATSs exclusively trading OTC Equity Securities and FINRA would likely be subject to higher tiers than their operations may warrant. To address this potential concern, the Operating Committee determined to discount the market share of Execution Venue ATSs exclusively trading OTC Equity Securities and the market share of the FINRA ORF by multiplying such market share by the average shares per trade ratio between NMS Stocks and OTC Equity Securities in order to adjust for the greater number of shares being traded in the OTC Equity Securities market. Based on available data for the second quarter of 2017, the average shares per trade ratio between NMS Stocks and OTC Equity Securities is 0.17%.⁵³ The average shares per trade ratio between NMS Stocks and OTC Equity Securities will be recalculated every three months when tiers are recalculated.

Based on this, the Operating Committee considered the distribution of Execution Venues, and grouped together Execution Venues with similar levels of market share. The percentage of costs recovered by each Equity

⁵² Although FINRA does not operate an execution venue, because it is a Participant, it is considered an “Execution Venue” under the Plan for purposes of determining fees.

⁵³ The average shares per trade ratio for both NMS Stocks and OTC Equity Securities from the second quarter of 2017 was calculated using publicly available market volume data from Bats and OTC Markets Group, and the totals were divided to determine the average number of shares per trade between NMS Stocks and OTC Equity Securities.

Execution Venue tier will be determined by predefined percentage allocations (the “Equity Execution Venue Recovery Allocation”). In determining the fixed percentage allocation of costs to be recovered from each tier, the Operating Committee considered the impact of CAT Reporter market share activity on the CAT System as well as the distribution of total market volume across Equity Execution Venues while seeking to maintain comparable fees among the largest CAT Reporters. Accordingly, following the

determination of the percentage of Execution Venues in each tier, the Operating Committee identified the percentage of total market volume for each tier based on the historical market share upon which Execution Venues had been initially ranked. Taking this into account along with the resulting percentage of total recovery, the percentage allocation of cost recovery for each tier were assigned, allocating higher percentages of recovery to the tier with a higher level of market share while avoiding any inappropriate

burden on competition. Furthermore, by using percentages of Equity Execution Venues and cost recovery per tier, the Operating Committee sought to include elasticity within the funding model, allowing the funding model to respond to changes in either the total number of Equity Execution Venues or changes in market share.

Based on this analysis, the Operating Committee approved the following Equity Execution Venue Percentages and Recovery Allocations:

Equity Execution Venue tier	Percentage of Equity Execution Venues	Percentage of Execution Venue recovery	Percentage of total recovery
Tier 1	25.00	33.25	8.31
Tier 2	42.00	25.73	6.43
Tier 3	23.00	8.00	2.00
Tier 4	10.00	0.02	0.01
Total	100	67	16.75

(II) Listed Options

Section 11.3(a)(ii) of the CAT NMS Plan states that each Execution Venue that executes transactions in Listed Options will pay a fixed fee depending on the Listed Options market share of that Execution Venue, with the Operating Committee establishing at least two and no more than five tiers of fixed fees, based on an Execution Venue’s Listed Options market share. For these purposes, market share will be calculated by contract volume.

In accordance with Section 11.3(a)(ii) of the CAT NMS Plan, the Operating Committee approved a tiered fee structure for Options Execution Venues. In determining the tiers, the Operating Committee considered the funding principles set forth in Section 11.2 of the CAT NMS Plan, seeking to create funding tiers that take into account the relative impact on system resources of different Options Execution Venues, and that establish comparable fees among the CAT Reporters with the most Reportable Events. Each Options Execution Venue will be placed into one of two tiers of fixed fees, based on the Execution Venue’s Listed Options market share. In choosing two tiers, the Operating Committee performed an analysis similar to that discussed above with regard to Industry Members (other than Execution Venue ATSS) to

determine the number of tiers for Options Execution Venues. The Operating Committee determined to establish two tiers for Options Execution Venues, rather than a larger number, because the two tiers were sufficient to distinguish between the smaller number of Options Execution Venues based on market share. Furthermore, due to the smaller number of Options Execution Venues, the incorporation of additional Options Execution Venue tiers would result in significantly higher fees for Tier 1 Options Execution Venues and reduce comparability between Execution Venues and Industry Members. Furthermore, the selection of two tiers served to establish comparable fees among the largest CAT Reporters.

Each Options Execution Venue will be ranked by market share and tiered by predefined Execution Venue percentages, (the “Options Execution Venue Percentages”). To determine the fixed percentage of Options Execution Venues in each tier, the Operating Committee analyzed the historical and publicly available market share of Options Execution Venues to group Options Execution Venues with similar market shares across the tiers. Options Execution Venue market share of share volume were sourced from market statistics made publicly-available by

Bats. The process for developing the Options Execution Venue Percentages was the same as discussed above with regard to Equity Execution Venues.

The percentage of costs to be recovered from each Options Execution Venue tier will be determined by predefined percentage allocations (the “Options Execution Venue Recovery Allocation”). In determining the fixed percentage allocation of cost recovery for each tier, the Operating Committee considered the impact of CAT Reporter market share activity on the CAT System as well as the distribution of total market volume across Options Execution Venues while seeking to maintain comparable fees among the largest CAT Reporters. Furthermore, by using percentages of Options Execution Venues and cost recovery per tier, the Operating Committee sought to include elasticity within the funding model, allowing the funding model to respond to changes in either the total number of Options Execution Venues or changes in market share. The process for developing the Options Execution Venue Recovery Allocation was the same as discussed above with regard to Equity Execution Venues.

Based on this analysis, the Operating Committee approved the following Options Execution Venue Percentages and Recovery Allocations:

Options Execution Venue tier	Percentage of Options Execution Venues	Percentage of Execution Venue recovery	Percentage of total recovery
Tier 1	75.00	28.25	7.06

Options Execution Venue tier	Percentage of Options Execution Venues	Percentage of Execution Venue recovery	Percentage of total recovery
Tier 2	25.00	4.75	1.19
Total	100	33	8.25

(III) Market Share/Tier Assignments

The Operating Committee determined that, prior to the start of CAT reporting, market share for Execution Venues would be sourced from publicly-available market data. Options and equity volumes for Participants will be sourced from market data made publicly available by Bats while Execution Venue ATS volumes will be sourced from market data made publicly available by FINRA and OTC Markets. Set forth in the Appendix are two charts, one listing the current Equity Execution Venues, each with its rank and tier, and one listing the current Options Execution Venues, each with its rank and tier.

After the commencement of CAT reporting, market share for Execution Venues will be sourced from data reported to the CAT. Equity Execution Venue market share will be determined by calculating each Equity Execution Venue's proportion of the total volume of NMS Stock and OTC Equity shares reported by all Equity Execution Venues during the relevant time period (with the discounting of market share of Execution Venue ATSs exclusively trading OTC Equity Securities, as described above). Similarly, market share for Options Execution Venues will be determined by calculating each Options Execution Venue's proportion of the total volume of Listed Options contracts reported by all Options Execution Venues during the relevant time period.

The Operating Committee has determined to calculate fee tiers for Execution Venues every three months based on market share from the prior three months. Based on its analysis of historical data, the Operating Committee believes calculating tiers based on three months of data will provide the best balance between reflecting changes in activity by Execution Venues while still providing predictability in the tiering for Execution Venues.

(D) Allocation of Costs

In addition to the funding principles discussed above, including comparability of fees, Section 11.1(c) of the CAT NMS Plan also requires expenses to be fairly and reasonably shared among the Participants and

Industry Members. Accordingly, in developing the proposed fee schedules pursuant to the funding model, the Operating Committee calculated how the CAT costs would be allocated between Industry Members and Execution Venues, and how the portion of CAT costs allocated to Execution Venues would be allocated between Equity Execution Venues and Options Execution Venues. These determinations are described below.

(I) Allocation Between Industry Members and Execution Venues

In determining the cost allocation between Industry Members (other than Execution Venue ATSs) and Execution Venues, the Operating Committee analyzed a range of possible splits for revenue recovery from such Industry Members and Execution Venues, including 80%/20%, 75%/25%, 70%/30% and 65%/35% allocations. Based on this analysis, the Operating Committee determined that 75 percent of total costs recovered would be allocated to Industry Members (other than Execution Venue ATSs) and 25 percent would be allocated to Execution Venues. The Operating Committee determined that this 75%/25% division maintained the greatest level of comparability across the funding model. For example, the cost allocation establishes fees for the largest Industry Members (*i.e.*, those Industry Members in Tiers 1) that are comparable to the largest Equity Execution Venues and Options Execution Venues (*i.e.*, those Execution Venues in Tier 1).

Furthermore, the allocation of total CAT cost recovery recognizes the difference in the number of CAT Reporters that are Industry Members versus CAT Reporters that are Execution Venues. Specifically, the cost allocation takes into consideration that there are approximately 23 times more Industry Members expected to report to the CAT than Execution Venues (*e.g.*, an estimated 1541 Industry Members versus 67 Execution Venues as of June 2017).

(II) Allocation Between Equity Execution Venues and Options Execution Venues

The Operating Committee also analyzed how the portion of CAT costs allocated to Execution Venues would be allocated between Equity Execution Venues and Options Execution Venues. In considering this allocation of costs, the Operating Committee analyzed a range of alternative splits for revenue recovered between Equity and Options Execution Venues, including a 70%/30%, 67%/33%, 65%/35%, 50%/50% and 25%/75% split. Based on this analysis, the Operating Committee determined to allocate 67 percent of Execution Venue costs recovered to Equity Execution Venues and 33 percent to Options Execution Venues. The Operating Committee determined that a 67%/33% allocation between Equity and Options Execution Venues maintained the greatest level of fee equitability and comparability based on the current number of Equity and Options Execution Venues. For example, the allocation establishes fees for the larger Equity Execution Venues that are comparable to the larger Options Execution Venues. Specifically, Tier 1 Equity Execution Venues would pay a quarterly fee of \$81,047 and Tier 1 Options Execution Venues would pay a quarterly fee of \$81,379. In addition to fee comparability between Equity Execution Venues and Options Execution Venues, the allocation also establishes equitability between larger (Tier 1) and smaller (Tier 2) Execution Venues based upon the level of market share. Furthermore, the allocation is intended to reflect the relative levels of current equity and options order events.

(E) Fee Levels

The Operating Committee determined to establish a CAT-specific fee to collectively recover the costs of building and operating the CAT. Accordingly, under the funding model, the sum of the CAT Fees is designed to recover the total cost of the CAT. The Operating Committee has determined overall CAT costs to be comprised of Plan Processor costs and non-Plan Processor costs, which are estimated to be \$50,700,000

in total for the year beginning November 21, 2016.⁵⁴

The Plan Processor costs relate to costs incurred and to be incurred through November 21, 2017 by the Plan Processor and consist of the Plan Processor's current estimates of average yearly ongoing costs, including development costs, which total \$37,500,000. This amount is based upon the fees due to the Plan Processor pursuant to the Company's agreement with the Plan Processor.

The non-Plan Processor estimated costs incurred and to be incurred by the Company through November 21, 2017 consist of three categories of costs. The first category of such costs are third party support costs, which include legal

fees, consulting fees and audit fees from November 21, 2016 until the date of filing as well as estimated third party support costs for the rest of the year. These amount to an estimated \$5,200,000. The second category of non-Plan Processor costs are estimated cyber-insurance costs for the year. Based on discussions with potential cyber-insurance providers, assuming \$2–5 million cyber-insurance premium on \$100 million coverage, the Company has estimated \$3,000,000 for the annual cost. The final cost figures will be determined following receipt of final underwriter quotes. The third category of non-Plan Processor costs is the CAT operational reserve, which is comprised of three months of ongoing Plan

Processor costs (\$9,375,000), third party support costs (\$1,300,000) and cyber-insurance costs (\$750,000). The Operating Committee aims to accumulate the necessary funds to establish the three-month operating reserve for the Company through the CAT Fees charged to CAT Reporters for the year. On an ongoing basis, the Operating Committee will account for any potential need to replenish the operating reserve or other changes to total cost during its annual budgeting process. The following table summarizes the Plan Processor and non-Plan Processor cost components which comprise the total estimated CAT costs of \$50,700,000 for the covered period.

Cost category	Cost component	Amount
Plan Processor	Operational Costs	\$37,500,000
Non-Plan Processor	Third Party Support Costs	\$5,200,000
	Operational Reserve	⁵⁵ \$5,000,000
	Cyber-insurance Costs	\$3,000,000
Estimated Total		\$50,700,000

Based on these estimated costs and the calculations for the funding model described above, the Operating

Committee determined to impose the following fees:⁵⁶

For Industry Members (other than Execution Venue ATSs):

Tier	Percentage of Industry Members	Quarterly CAT fee
1	0.900	\$81,483
2	2.150	59,055
3	2.800	40,899
4	7.750	25,566
5	8.300	7,428
6	18.800	1,968
7	59.300	105

For Execution Venues for NMS Stocks and OTC Equity Securities:

Tier	Percentage of Equity Execution Venues	Quarterly CAT fee
1	25.00	\$81,048
2	42.00	37,062
3	23.00	21,126
4	10.00	129

For Execution Venues for Listed Options:

⁵⁴ It is anticipated that CAT-related costs incurred prior to November 21, 2016 will be addressed via a separate filing.

⁵⁵ This \$5,000,000 represents the gradual accumulation of the funds for a target operating reserve of \$11,425,000.

⁵⁶ Note that all monthly, quarterly and annual CAT Fees have been rounded to the nearest dollar.

Tier	Percentage of Options Execution Venues	Quarterly CAT fee
1	75.00	\$81,381
2	25.00	37,629

The Operating Committee has calculated the schedule of effective fees for Industry Members (other than Execution Venue ATSs) and Execution Venues in the following manner. Note that the calculation of CAT Fees assumes 52 Equity Execution Venues, 15 Options Execution Venues and 1,541 Industry Members (other than Execution Venue ATSs) as of June 2017.

CALCULATION OF ANNUAL TIER FEES FOR INDUSTRY MEMBERS ("IM")

Industry Member tier	Percentage of Industry Members	Percentage of Industry Member recovery	Percentage of total recovery
Tier 1	0.900	12.00	9.00
Tier 2	2.150	20.50	15.38
Tier 3	2.800	18.50	13.88
Tier 4	7.750	32.00	24.00
Tier 5	8.300	10.00	7.50
Tier 6	18.800	6.00	4.50
Tier 7	59.300	1.00	0.75
Total	100	100	75

Industry Member tier	Estimated number of Industry Members
Tier 1	14
Tier 2	33
Tier 3	43
Tier 4	119
Tier 5	128
Tier 6	290
Tier 7	914
Total	1,541

Calculation 1.1 (Calculation of a Tier 1 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 0.9\% \text{ [% of Tier 1 IMs]} = 14 \text{ [Estimated Tier 1 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 12\% \text{ [% of Tier 1 IM Recovery]}}{14 \text{ [Estimated Tier 1 IMs]}} \right) + 12 \text{ [Months per year]} = \mathbf{\$27,161}$$

Calculation 1.2 (Calculation of a Tier 2 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 2.15\% \text{ [% of Tier 2 IMs]} = 33 \text{ [Estimated Tier 2 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 10.5\% \text{ [% of Tier 2 IM Recovery]}}{33 \text{ [Estimated Tier 2 IMs]}} \right) + 12 \text{ [Months per year]} = \mathbf{\$19,685}$$

Calculation 1.3 (Calculation of a Tier 3 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 2.125\% \text{ [% of Tier 3 IMs]} = 43 \text{ [Estimated Tier 3 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 18.5\% \text{ [% of Tier 3 IM Recovery]}}{43 \text{ [Estimated Tier 3 IMs]}} \right) + 12 \text{ [Months per year]} = \mathbf{\$13,633}$$

Calculation 1.4 (Calculation of a Tier 4 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 7.75\% \text{ [% of Tier 4 IMs]} = 119 \text{ [Estimated Tier 4 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 32\% \text{ [% of Tier 4 IM Recovery]}}{119 \text{ [Estimated Tier 4 IMs]}} \right) + 12 \text{ [Months per year]} = \mathbf{\$8522}$$

Calculation 1.5 (Calculation of a Tier 5 Industry Member Annual Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 8.3\% \text{ [% of Tier 5 IMs]} = 128 \text{ [Estimated Tier 5 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 7.75\% \text{ [% of Tier 5 IM Recovery]}}{128 \text{ [Estimated Tier 5 IMs]}} \right) + 12 \text{ [Months per year]} = \mathbf{\$2476}$$

Calculation 1.6 (Calculation of a Tier 6 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 18.8\% \text{ [% of Tier 6 IMs]} = 290 \text{ [Estimated Tier 6 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 6\% \text{ [% of Tier 6 IM Recovery]}}{290 \text{ [Estimated Tier 6 IMs]}} \right) + 12 \text{ [Months per year]} = \mathbf{\$656}$$

Calculation 1.7 (Calculation of a Tier 7 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 59.3\% \text{ [% of Tier 7 IMs]} = 914 \text{ [Estimated Tier 7 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 1\% \text{ [% of Tier 7 IM Recovery]}}{914 \text{ [Estimated Tier 7 IMs]}} \right) + 12 \text{ [Months per year]} = \mathbf{\$35}$$

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CALCULATION OF ANNUAL TIER FEES FOR EQUITY EXECUTION VENUES ("EV")

Equity Execution Venue tier	Percentage of Equity Execution Venues	Percentage of Execution Venue recovery	Percentage of total recovery
Tier 1	25.00	33.25	8.31
Tier 2	42.00	25.73	6.43
Tier 3	23.00	8.00	2.00

CALCULATION OF ANNUAL TIER FEES FOR EQUITY EXECUTION VENUES (“EV”)—Continued

Equity Execution Venue tier	Percentage of Equity Execution Venues	Percentage of Execution Venue recovery	Percentage of total recovery
Tier 4	10.00	49.00	0.01
Total	100	67	16.75

Equity Execution Venue tier	Estimated number of Equity Execution Venues
Tier 1	13
Tier 2	22
Tier 3	12
Tier 4	5
Total	52

Calculation 2.1 (Calculation of a Tier 1 Equity Execution Venue Monthly Fee)

$$52 \text{ [Estimated Tot. Equity EVs]} \times 25\% \text{ [% of Tier 1 Equity EVs]} = 13 \text{ [Estimated Tier 1 Equity EVs]}$$

$$\left(\frac{\$20,700,000 \text{ [Tot. Annual CAT Costs]} \times 25\% \text{ [EV \% of Tot. Annual CAT Costs]} \times 49\% \text{ [% of Tier 1 Equity EV Recovery]}}{13 \text{ [Estimated Tier 1 Equity EVs]}} \right) \div 12 \text{ [Months per year]} = \$27,016$$

Calculation 2.2 (Calculation of a Tier 2 Equity Execution Venue Monthly Fee)

$$52 \text{ [Estimated Tot. Equity EVs]} \times 42\% \text{ [% of Tier 2 Equity EVs]} = 22 \text{ [Estimated Tier 2 Equity EVs]}$$

$$\left(\frac{\$20,700,000 \text{ [Tot. Annual CAT Costs]} \times 25\% \text{ [EV \% of Tot. Annual CAT Costs]} \times 25\% \text{ [% of Tier 2 Equity EV Recovery]}}{22 \text{ [Estimated Tier 2 Equity EVs]}} \right) \div 12 \text{ [Months per year]} = \$12,353$$

Calculation 2.3 (Calculation of a Tier 3 Equity Execution Venue Monthly Fee)

$$52 \text{ [Estimated Tot. Equity EVs]} \times 23\% \text{ [% of Tier 2 Equity EVs]} = 12 \text{ [Estimated Tier 2 Equity EVs]}$$

$$\left(\frac{\$20,700,000 \text{ [Tot. Annual CAT Costs]} \times 25\% \text{ [EV \% of Tot. Annual CAT Costs]} \times 8\% \text{ [% of Tier 3 Equity EV Recovery]}}{12 \text{ [Estimated Tier 3 Equity EVs]}} \right) \div 12 \text{ [Months per year]} = \$7,042$$

Calculation 2.4 (Calculation of a Tier 4 Equity Execution Venue Monthly Fee)

$$52 \text{ [Estimated Tot. Equity EVs]} \times 10\% \text{ [% of Tier 2 Equity EVs]} = 5 \text{ [Estimated Tier 2 Equity EVs]}$$

$$\left(\frac{\$20,700,000 \text{ [Tot. Annual CAT Costs]} \times 25\% \text{ [EV \% of Tot. Annual CAT Costs]} \times 0.5\% \text{ [% of Tier 4 Equity EV Recovery]}}{5 \text{ [Estimated Tier 4 Equity EVs]}} \right) \div 12 \text{ [Months per year]} = \$42$$

CALCULATION OF ANNUAL TIER FEES FOR OPTIONS EXECUTION VENUES (“EV”)

Options Execution Venue tier	Percentage of Options Execution Venues	Percentage of Execution Venue recovery	Percentage of total recovery
Tier 1	75.00	28.25	7.06
Tier 2	25.00	4.75	1.19
Total	100	33	8.25

Options Execution Venue tier		Estimated number of Options Execution Venues
Tier 1		11
Tier 2		4
Total		15

Calculation 3.1 (Calculation of a Tier 1 Options Execution Venue Monthly Fee)

$$15 \text{ [Estimated Tot. Options EVs]} \times 75\% \text{ [3\% of Tier 1 Options EVs]} = 11 \text{ [Estimated Tier 1 Options EVs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 25\% \text{ [EV \% of Tot. Ann. CAT Costs]} \times 6.25\% \text{ [3\% of Tier 1 Options EV Recovery]}}{11 \text{ [Estimated Tier 1 Options EVs]}} \right) \div 12 \text{ [Months per year]} = \$27,127$$

Calculation 3.2 (Calculation of a Tier 2 Options Execution Venue Annual Fee)

$$15 \text{ [Estimated Tot. Options EVs]} \times 25\% \text{ [3\% of Tier 2 Options EVs]} = 4 \text{ [Estimated Tier 2 Options EVs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 25\% \text{ [EV \% of Tot. Ann. CAT Costs]} \times 6.25\% \text{ [3\% of Tier 2 Options EV Recovery]}}{4 \text{ [Estimated Tier 2 Options EVs]}} \right) \div 12 \text{ [Months per year]} = \$12,543$$

TRACEABILITY OF TOTAL CAT FEES

Type	Industry Member tier	Estimated Number of members	CAT fees paid annually	Total recovery
Industry Members	Tier 1	14	\$325,932	\$4,563,048
	Tier 2	33	236,220	7,795,260
	Tier 3	43	163,596	7,034,628
	Tier 4	119	102,264	12,169,416
	Tier 5	128	29,712	3,803,136
	Tier 6	290	7,872	2,282,880
	Tier 7	914	420	383,880
Total		1,541		38,032,248
Equity Execution Venues	Tier 1	13	324,192	4,214,496
	Tier 2	22	148,248	3,261,456
	Tier 3	12	84,504	1,014,048
	Tier 4	5	516	2,580
Total		52		8,492,580
Options Execution Venues	Tier 1	11	325,524	3,580,764
	Tier 2	4	150,516	602,064
Total		15		4,182,828
Total				50,700,000
Excess ⁵⁷				7,656

(F) Comparability of Fees

The funding principles require a funding model in which the fees charged to the CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable

⁵⁷ The amount in excess of the total CAT costs will contribute to the gradual accumulation of the target operating reserve of \$11.425 million.

(where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether Execution Venue and/or Industry Members). Accordingly, in creating the model, the Operating Committee sought to establish comparable fees for the top tier of Industry Members (other than Execution Venue ATSS), Equity Execution Venues and Options

Execution Venues. Specifically, each Tier 1 CAT Reporter would be required to pay a quarterly fee of approximately \$81,000.

(G) Billing Onset

Under Section 11.1(c) of the CAT NMS Plan, to fund the development and implementation of the CAT, the Company shall time the imposition and collection of all fees on Participants and

Industry Members in a manner reasonably related to the timing when the Company expects to incur such development and implementation costs. The Company is currently incurring such development and implementation costs and will continue to do so prior to the commencement of CAT reporting and thereafter. In accordance with the CAT NMS Plan, all CAT Reporters, including both Industry Members and Execution Venues (including Participants), will be invoiced as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Participants and the operative date of the Plan amendment adopting CAT Fees for Participants.

(H) Changes to Fee Levels and Tiers

Section 11.3(d) of the CAT NMS Plan states that “[t]he Operating Committee shall review such fee schedule on at least an annual basis and shall make any changes to such fee schedule that it deems appropriate. The Operating Committee is authorized to review such fee schedule on a more regular basis, but shall not make any changes on more than a semi-annual basis unless, pursuant to a Supermajority Vote, the Operating Committee concludes that such change is necessary for the adequate funding of the Company.” With such reviews, the Operating Committee will review the distribution of Industry Members and Execution Venues across tiers, and make any updates to the percentage of CAT Reporters allocated to each tier as may be necessary. In addition, the reviews will evaluate the estimated ongoing CAT costs and the level of the operating reserve. To the extent that the total CAT costs decrease, the fees would be

adjusted downward, and to the extent that the total CAT costs increase, the fees would be adjusted upward.⁵⁸ Furthermore, any surplus of the Company’s revenues over its expenses is to be included within the operational reserve to offset future fees. The limitations on more frequent changes to the fee, however, are intended to provide budgeting certainty for the CAT Reporters and the Company.⁵⁹ To the extent that the Operating Committee approves changes to the number of tiers in the funding model or the fees assigned to each tier, then the Operating Committee will file such changes with the SEC pursuant to Rule 608 of the Exchange Act, and the Participants will file such changes with the SEC pursuant to Section 19(b) of the Exchange Act and Rule 19b-4 thereunder, and any such changes will become effective in accordance with the requirements of those provisions.

(I) Initial and Periodic Tier Reassignments

The Operating Committee has determined to calculate fee tiers every three months based on market share or message traffic, as applicable, from the prior three months. For the initial tier assignments, the Company will calculate the relevant tier for each CAT Reporter using the three months of data prior to the commencement date. As with the initial tier assignment, for the tri-monthly reassignments, the Company will calculate the relevant tier using the three months of data prior to the relevant tri-monthly date. Any movement of CAT Reporters between tiers will not change the criteria for each tier or the fee amount corresponding to each tier.

In performing the tri-monthly reassignments, the assignment of CAT Reporters in each assigned tier is relative. Therefore, a CAT Reporter’s assigned tier will depend, not only on its own message traffic or market share, but also on the message traffic/market share across all CAT Reporters. For example, the percentage of Industry Members (other than Execution Venue ATs) in each tier is relative such that such Industry Member’s assigned tier will depend on message traffic generated across all CAT Reporters as well as the total number of CAT Reporters. The Operating Committee will inform CAT Reporters of their assigned tier every three months following the periodic tiering process, as the funding model will compare an individual CAT Reporter’s activity to that of other CAT Reporters in the marketplace.

The following demonstrates a tier reassignment. In accordance with the funding model, the top 75% of Options Execution Venues in market share are categorized as Tier 1 while the bottom 25% of Options Execution Venues in market share are categorized as Tier 2. In the sample scenario below, Options Execution Venue L is initially categorized as a Tier 2 Options Execution Venue in Period A due to its market share. When market share is recalculated for Period B, the market share of Execution Venue L increases, and it is therefore subsequently reranked and reassigned to Tier 1 in Period B. Correspondingly, Options Execution Venue K, initially a Tier 1 Options Execution Venue in Period A, is reassigned to Tier 2 in Period B due to decreases in its market share.

Period A			Period B		
Options Execution Venue	Market share rank	Tier	Options Execution Venue	Market share rank	Tier
Options Execution Venue A	1	1	Options Execution Venue A	1	1
Options Execution Venue B	2	1	Options Execution Venue B	2	1
Options Execution Venue C	3	1	Options Execution Venue C	3	1
Options Execution Venue D	4	1	Options Execution Venue D	4	1
Options Execution Venue E	5	1	Options Execution Venue E	5	1
Options Execution Venue F	6	1	Options Execution Venue F	6	1
Options Execution Venue G	7	1	Options Execution Venue I	7	1
Options Execution Venue H	8	1	Options Execution Venue H	8	1
Options Execution Venue I	9	1	Options Execution Venue G	9	1
Options Execution Venue J	10	1	Options Execution Venue J	10	1
Options Execution Venue K	11	1	Options Execution Venue L	11	1
Options Execution Venue L	12	2	Options Execution Venue K	12	2
Options Execution Venue M	13	2	Options Execution Venue N	13	2
Options Execution Venue N	14	2	Options Execution Venue M	14	2

⁵⁸ The CAT Fees are designed to recover the costs associated with the CAT. Accordingly, CAT Fees would not be affected by increases or decreases in other non-CAT expenses incurred by the

Participants, such as any changes in costs related to the retirement of existing regulatory systems, such as OATS.

⁵⁹ Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85006.

Period A			Period B		
Options Execution Venue	Market share rank	Tier	Options Execution Venue	Market share rank	Tier
Options Execution Venue O	15	2	Options Execution Venue O	15	2

For each periodic tier reassignment, the Operating Committee will review the new tier assignments, particularly those assignments for CAT Reporters that shift from the lowest tier to a higher tier. This review is intended to evaluate whether potential changes to the market or CAT Reporters (e.g., dissolution of a large CAT Reporter) adversely affect the tier reassignments.

(J) Sunset Provision

The Operating Committee developed the proposed funding model by analyzing currently available historical data. Such historical data, however, is not as comprehensive as data that will be submitted to the CAT. Accordingly, the Operating Committee believes that it will be appropriate to revisit the funding model once CAT Reporters have actual experience with the funding model. Accordingly, the Operating Committee determined to include an automatic sunset provision for the proposed fees. Specifically, the Operating Committee determined that the CAT Fees should automatically expire two years after the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. The Operating Committee intends to monitor the operation of the funding model during this two year period and to evaluate its effectiveness during that period. Such a process will inform the Operating Committee’s approach to funding the CAT after the two year period.

(3) Proposed CAT Fee Schedule

SRO proposes the Consolidated Audit Trail Funding Fees to impose the CAT Fees determined by the Operating Committee on SRO’s members. The proposed fee schedule has four sections, covering definitions, the fee schedule for CAT Fees, the timing and manner of payments, and the automatic sunset of the CAT Fees. Each of these sections is discussed in detail below.

(A) Definitions

Paragraph (a) of the proposed fee schedule sets forth the definitions for the proposed fee schedule. Paragraph (a)(1) states that, for purposes of the Consolidated Audit Trail Funding Fees, the terms “CAT”, “CAT NMS Plan,” “Industry Member,” “NMS Stock,” “OTC Equity Security”, “Options

Market Maker”, and “Participant” are defined as set forth in Rule 11.610 (Consolidated Audit Trail—Definitions).

The proposed fee schedule imposes different fees on Equity ATSs and Industry Members that are not Equity ATSs. Accordingly, the proposed fee schedule defines the term “Equity ATS.” First, paragraph (a)(2) defines an “ATS” to mean an alternative trading system as defined in Rule 300(a) of Regulation ATS under the Securities Exchange Act of 1934, as amended, that operates pursuant to Rule 301 of Regulation ATS. This is the same definition of an ATS as set forth in Section 1.1 of the CAT NMS Plan in the definition of an “Execution Venue.” Then, paragraph (a)(4) defines an “Equity ATS” as an ATS that executes transactions in NMS Stocks and/or OTC Equity Securities.

Paragraph (a)(3) of the proposed fee schedule defines the term “CAT Fee” to mean the Consolidated Audit Trail Funding Fee(s) to be paid by Industry Members as set forth in paragraph (b) in the proposed fee schedule.

Finally, Paragraph (a)(6) defines an “Execution Venue” as a Participant or an ATS (excluding any such ATS that does not execute orders). This definition is the same substantive definition as set forth in Section 1.1 of the CAT NMS Plan. Paragraph (a)(5) defines an “Equity Execution Venue” as an Execution Venue that trades NMS Stocks and/or OTC Equity Securities.

(B) Fee Schedule

SRO proposes to impose the CAT Fees applicable to its Industry Members through paragraph (b) of the proposed fee schedule. Paragraph (b)(1) of the proposed fee schedule sets forth the CAT Fees applicable to Industry Members other than Equity ATSs. Specifically, paragraph (b)(1) states that the Company will assign each Industry Member (other than an Equity ATS) to a fee tier once every quarter, where such tier assignment is calculated by ranking each Industry Member based on its total message traffic (with discounts for equity market maker quotes and Options Market Maker quotes based on the trade to quote ratio for equities and options, respectively) for the three months prior to the quarterly tier calculation day and assigning each Industry Member to a tier based on that ranking and predefined

Industry Member percentages. The Industry Members with the highest total quarterly message traffic will be ranked in Tier 1, and the Industry Members with lowest quarterly message traffic will be ranked in Tier 7. Each quarter, each Industry Member (other than an Equity ATS) shall pay the following CAT Fee corresponding to the tier assigned by the Company for such Industry Member for that quarter:

Tier	Percentage of Industry Members	Quarterly CAT fee
1	0.900	\$81,483
2	2.150	59,055
3	2.800	40,899
4	7.750	25,566
5	8.300	7,428
6	18.800	1,968
7	59.300	105

Paragraph (b)(2) of the proposed fee schedule sets forth the CAT Fees applicable to Equity ATSs.⁶⁰ These are the same fees that Participants that trade NMS Stocks and/or OTC Equity Securities will pay. Specifically, paragraph (b)(2) states that the Company will assign each Equity ATS to a fee tier once every quarter, where such tier assignment is calculated by ranking each Equity Execution Venue based on its total market share of NMS Stocks and OTC Equity Securities (with a discount for Equity ATSs exclusively trading OTC Equity Securities based on the average shares per trade ratio between NMS Stocks and OTC Equity Securities) for the three months prior to the quarterly tier calculation day and assigning each Equity ATS to a tier based on that ranking and predefined Equity Execution Venue percentages. The Equity ATSs with the higher total quarterly market share will be ranked in Tier 1, and the Equity ATSs with the lowest quarterly market share will be ranked in Tier 4. Specifically, paragraph (b)(2) states that, each quarter, each Equity ATS shall pay the following CAT Fee corresponding to the tier assigned by the Company for such Equity ATS for that quarter:

⁶⁰ Note that no fee schedule is provided for Execution Venue ATSs that execute transactions in Listed Options, as no such Execution Venue ATSs currently exist due to trading restrictions related to Listed Options.

Tier	Percentage of Equity Execution Venues	Quarterly CAT fee
1	25.00	\$81,048
2	42.00	37,062
3	23.00	21,126
4	10.00	129

(C) Timing and Manner of Payment

Section 11.4 of the CAT NMS Plan states that the Operating Committee shall establish a system for the collection of fees authorized under the CAT NMS Plan. The Operating Committee may include such collection responsibility as a function of the Plan Processor or another administrator. To implement the payment process to be adopted by the Operating Committee, paragraph (c)(1) of the proposed fee schedule states that the Company will provide each Industry Member with one invoice each quarter for its CAT Fees as determined pursuant to paragraph (b) of the proposed fee schedule, regardless of whether the Industry Member is a member of multiple self-regulatory organizations. Paragraph (c)(1) further states that each Industry Member will pay its CAT Fees to the Company via the centralized system for the collection of CAT Fees established by the Company in the manner prescribed by the Company. SRO will provide Industry Members with details regarding the manner of payment of CAT Fees by Information Circular.

All CAT fees will be billed and collected centrally through the Company via the Plan Processor. Although each Participant will adopt its own fee schedule regarding CAT Fees, no CAT Fees or portion thereof will be collected by the individual Participants. Each Industry Member will receive from the Company one invoice for its applicable CAT fees, not separate invoices from each Participant of which it is a member. The Industry Members will pay the CAT Fees to the Company via the centralized system for the collection of CAT fees established by the Company.⁶¹

Section 11.4 of the CAT NMS Plan also states that Participants shall require each Industry Member to pay all applicable authorized CAT Fees within thirty days after receipt of an invoice or other notice indicating payment is due (unless a longer payment period is otherwise indicated). Section 11.4 further states that, if an Industry Member fails to pay any such fee when due, such Industry Member shall pay interest on the outstanding balance from

such due date until such fee is paid at a per annum rate equal to the lesser of: (i) The Prime Rate plus 300 basis points; or (ii) the maximum rate permitted by applicable law. Therefore, in accordance with Section 11.4 of the CAT NMS Plan, SRO proposed to adopt paragraph (c)(2) of the proposed fee schedule. Paragraph (c)(2) of the proposed fee schedule states that each Industry Member shall pay CAT Fees within thirty days after receipt of an invoice or other notice indicating payment is due (unless a longer payment period is otherwise indicated). If an Industry Member fails to pay any such fee when due, such Industry Member shall pay interest on the outstanding balance from such due date until such fee is paid at a per annum rate equal to the lesser of: (i) The Prime Rate plus 300 basis points; or (ii) the maximum rate permitted by applicable law.

(D) Sunset Provision

The Operating Committee has determined to require that the CAT Fees automatically sunset two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. Accordingly, SRO proposes paragraph (d) of the fee schedule, which states that “[t]hese Consolidated Audit Trailing Funding Fees will automatically expire two years after the operative date of the amendment of the CAT NMS Plan that adopts CAT fees for the Participants.”

(4) Changes to Prior CAT Fee Plan Amendment

The proposed funding model set forth in this Amendment is a revised version of the Original Proposal. The Commission received a number of comment letters in response to the Original Proposal.⁶² The SEC suspended the Original Proposal and instituted proceedings to determine whether to approve or disapprove it.⁶³ Pursuant to those proceedings, additional comment letters were submitted regarding the proposed funding model.⁶⁴ In developing this Amendment, the Operating Committee carefully considered these comments and made a number of changes to the Original Proposal to address these comments where appropriate.

This Amendment makes the following changes to the Original Proposal: (1) Adds two additional CAT Fee tiers for

⁶² For a description of the comments submitted in response to the Original Proposal, see Suspension Order.

⁶³ Suspension Order.

⁶⁴ See MFA Letter; SIFMA Letter; FIA Principal Traders Group Letter; Belvedere Letter; Sidley Letter; Group One Letter; and Virtu Financial Letter.

Equity Execution Venues; (2) discounts the market share of Execution Venue ATSS exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF by the average shares per trade ratio between NMS Stocks and OTC Equity Securities (calculated as 0.17% based on available data from the second quarter of 2017) when calculating the market share of Execution Venue ATSS exclusively trading OTC Equity Securities and FINRA; (3) discounts the Options Market Maker quotes by the trade to quote ratio for options (calculated as 0.01% based on available data for June 2016 through June 2017) when calculating message traffic for Options Market Makers; (4) discounts equity market maker quotes by the trade to quote ratio for equities (calculated as 5.43% based on available data for June 2016 through June 2017) when calculating message traffic for equity market makers; (5) decreases the number of tiers for Industry Members (other than the Execution Venue ATSS) from nine to seven; (6) changes the allocation of CAT costs between Equity Execution Venues and Options Execution Venues from 75%/25% to 67%/33%; (7) adjusts tier percentages and recovery allocations for Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSS); (8) focuses the comparability of CAT Fees on the individual entity level, rather than primarily on the comparability of affiliated entities; (9) commences invoicing of CAT Reporters as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Participants and the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants; and (10) requires the proposed fees to automatically expire two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for the Participants.

(A) Equity Execution Venues

(i) Small Equity Execution Venues

In the Original Proposal, the Operating Committee proposed to establish two fee tiers for Equity Execution Venues. The Commission and commenters raised the concern that, by establishing only two tiers, smaller Equity Execution Venues (e.g., those Equity ATSS representing less than 1% of NMS market share) would be placed in the same fee tier as larger Equity Execution Venues, thereby imposing an undue or inappropriate burden on

⁶¹ Section 11.4 of the CAT NMS Plan.

competition.⁶⁵ To address this concern, the Operating Committee proposes to add two additional tiers for Equity Execution Venues, a third tier for smaller Equity Execution Venues and a fourth tier for the smallest Equity Execution Venues.

Specifically, the Original Proposal had two tiers of Equity Execution Venues. Tier 1 required the largest Equity Execution Venues to pay a quarterly fee of \$63,375. Based on available data, these largest Equity Execution Venues were those that had equity market share of share volume greater than or equal to 1%.⁶⁶ Tier 2 required the remaining smaller Equity Execution Venues to pay a quarterly fee of \$38,820.

To address concerns about the potential for the \$38,820 quarterly fee to impose an undue burden on smaller Equity Execution Venues, the Operating Committee determined to move to a four tier structure for Equity Execution Venues. Tier 1 would continue to include the largest Equity Execution Venues by share volume (that is, based on currently available data, those with market share of equity share volume greater than or equal to one percent), and these Equity Execution Venues would be required to pay a quarterly fee of \$81,048. The Operating Committee determined to divide the original Tier 2 into three tiers. The new Tier 2 Equity Execution Venues, which would include the next largest Equity Execution Venues by equity share volume, would be required to pay a quarterly fee of \$37,062. The new Tier 3 Equity Execution Venues would be required to pay a quarterly fee of \$21,126. The new Tier 4 Equity Execution Venues, which would include the smallest Equity Execution Venues by share volume, would be required to pay a quarterly fee of \$129.

In developing the proposed four tier structure, the Operating Committee considered keeping the existing two tiers, as well as shifting to three, four or five Equity Execution Venue tiers (the maximum number of tiers permitted under the Plan), to address the concerns regarding small Equity Execution

Venues. For each of the two, three, four and five tier alternatives, the Operating Committee considered the assignment of various percentages of Equity Execution Venues to each tier as well as various percentage of Equity Execution Venue recovery allocations for each alternative. As discussed below in more detail, each of these options was considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined that the four tier alternative addressed the spectrum of different Equity Execution Venues. The Operating Committee determined that neither a two tier structure nor a three tier structure sufficiently accounted for the range of market shares of smaller Equity Execution Venues. The Operating Committee also determined that, given the limited number of Equity Execution Venues, that a fifth tier was unnecessary to address the range of market shares of the Equity Execution Venues.

By increasing the number of tiers for Equity Execution Venues and reducing the proposed CAT Fees for the smaller Equity Execution Venues, the Operating Committee believes that the proposed fees for Equity Execution Venues would not impose an undue or inappropriate burden on competition under Section 6 or Section 15A of the Exchange Act. Moreover, the Operating Committee believes that the proposed fees appropriately take into account the distinctions in the securities trading operations of different Equity Execution Venues, as required under the funding principles of the CAT NMS Plan.⁶⁷ The larger number of tiers more closely tracks the variety of sizes of equity share volume of Equity Execution Venues. In addition, the reduction in the fees for the smaller Equity Execution Venues recognizes the potential burden of larger fees on smaller entities. In particular, the very small quarterly fee of \$129 for Tier 4 Equity Execution Venues reflects the fact that certain Equity Execution Venues have a very small share volume due to their typically more focused business models.

Accordingly, with this Amendment, SRO proposes to amend paragraph (b)(2) of the proposed fee schedule to add the two additional tiers for Equity Execution Venues, to establish the percentages and fees for Tiers 3 and 4 as described, and to revise the percentages and fees for Tiers 1 and 2 as described.

(ii) Execution Venues for OTC Equity Securities

In the Original Proposal, the Operating Committee proposed to group Execution Venues for OTC Equity Securities and Execution Venues for NMS Stocks in the same tier structure. The Commission and commenters raised concerns as to whether this determination to place Execution Venues for OTC Equity Securities in the same tier structure as Execution Venues for NMS Stocks would result in an undue or inappropriate burden on competition, recognizing that the application of share volume may lead to different outcomes as applied to OTC Equity Securities and NMS Stocks.⁶⁸ To address this concern, the Operating Committee proposes to discount the market share of Execution Venue ATSS exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF by the average shares per trade ratio between NMS Stocks and OTC Equity Securities (0.17% for the second quarter of 2017) in order to adjust for the greater number of shares being traded in the OTC Equity Securities market, which is generally a function of a lower per share price for OTC Equity Securities when compared to NMS Stocks.

As commenters noted, many OTC Equity Securities are priced at less than one dollar—and a significant number at less than one penny—and low-priced shares tend to trade in larger quantities. Accordingly, a disproportionately large number of shares are involved in transactions involving OTC Equity Securities versus NMS Stocks, which has the effect of overstating an Execution Venue's true market share when the Execution Venue is involved in the trading of OTC Equity Securities. Because the proposed fee tiers are based on market share calculated by share volume, Execution Venue ATSS trading OTC Equity Securities and FINRA may be subject to higher tiers than their operations may warrant.⁶⁹ The Operating Committee proposes to address this concern in two ways. First, the Operating Committee proposes to increase the number of Equity Execution Venue tiers, as discussed above. Second, the Operating Committee determined to discount the market share of Execution Venue ATSS exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF when calculating their tier placement. Because the disparity in share volume between Execution Venues trading in OTC

⁶⁵ See Suspension Order at 31664; SIFMA Letter at 3.

⁶⁶ Note that while these equity market share thresholds were referenced as data points to help differentiate between Equity Execution Venue tiers, the proposed funding model is directly driven not by market share thresholds, but rather by fixed percentages of Equity Execution Venues across tiers to account for fluctuating levels of market share across time. Actual market share in any tier will vary based on the actual market activity in a given measurement period, as well as the number of Equity Execution Venues included in the measurement period.

⁶⁷ Section 11.2(b) of the CAT NMS Plan.

⁶⁸ See Suspension Order at 31664–5.

⁶⁹ Suspension Order at 31664–5.

Equity Securities and NMS Stocks is based on the different number of shares per trade for OTC Equity Securities and NMS Stocks, the Operating Committee believes that discounting the share volume of such Execution Venue ATSs as well as the market share of the FINRA ORF would address the difference in shares per trade for OTC Equity Securities and NMS Stocks. Specifically, the Operating Committee proposes to impose a discount based on the objective measure of the average shares per trade ratio between NMS Stocks and OTC Equity Securities. Based on available data from the second quarter of 2017, the average shares per trade ratio between NMS Stocks and OTC Equity Securities is 0.17%.

The practical effect of applying such a discount for trading in OTC Equity Securities is to shift Execution Venue ATSs exclusively trading OTC Equity Securities to tiers for smaller Execution Venues and with lower fees. For example, under the Original Proposal, one Execution Venue ATS exclusively trading OTC Equity Securities was placed in the first CAT Fee tier, which had a quarterly fee of \$63,375. With the imposition of the proposed tier changes and the discount, this ATS would be ranked in Tier 3 and would owe a quarterly fee of \$21,126.

In developing the proposed discount for Equity Execution Venue ATSs exclusively trading OTC Equity Securities and FINRA, the Operating Committee evaluated different alternatives to address the concerns related to OTC Equity Securities, including creating a separate tier structure for Execution Venues trading OTC Equity Securities (like the separate tier for Options Execution Venues) as well as the proposed discounting method for Execution Venue ATSs exclusively trading OTC Equity Securities and FINRA. For these alternatives, the Operating Committee considered how each alternative would affect the recovery allocations. In addition, each of these options was considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee did not adopt a separate tier structure for Equity Execution Venues trading OTC Equity Securities as they determined that the proposed discount approach appropriately addresses the concern. The Operating Committee determined to adopt the proposed discount because it directly relates to the concern regarding the trading patterns and operations in

the OTC Equity Securities markets, and is an objective discounting method.

By increasing the number of tiers for Equity Execution Venues and imposing a discount on the market share of share volume calculation for trading in OTC Equity Securities, the Operating Committee believes that the proposed fees for Equity Execution Venues would not impose an undue or inappropriate burden on competition under Section 6 or Section 15A of the Exchange Act. Moreover, the Operating Committee believes that the proposed fees appropriately take into account the distinctions in the securities trading operations of different Equity Execution Venues, as required under the funding principles of the CAT NMS Plan.⁷⁰ As discussed above, the larger number of tiers more closely tracks the variety of sizes of equity share volume of Equity Execution Venues. In addition, the proposed discount recognizes the different types of trading operations at Equity Execution Venues trading OTC Equity Securities versus those trading NMS Stocks, thereby more closely matching the relative revenue generation by Equity Execution Venues trading OTC Equity Securities to their CAT Fees.

Accordingly, with this Amendment, SRO proposes to amend paragraph (b)(2) of the proposed fee schedule to indicate that the market share for Equity ATSs exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF would be discounted. In addition, as discussed above, to address concerns related to smaller ATSs, including those that exclusively trade OTC Equity Securities, SRO proposes to amend paragraph (b)(2) of the proposed fee schedule to add two additional tiers for Equity Execution Venues, to establish the percentages and fees for Tiers 3 and 4 as described, and to revise the percentages and fees for Tiers 1 and 2 as described.

(B) Market Makers

In the Original Proposal, the Operating Committee proposed to include both Options Market Maker quotes and equities market maker quotes in the calculation of total message traffic for such market makers for purposes of tiering for Industry Members (other than Execution Venue ATSs). The Commission and commenters raised questions as to whether the proposed treatment of Options Market Maker quotes may result in an undue or inappropriate burden on competition or may lead to

a reduction in market quality.⁷¹ To address this concern, the Operating Committee determined to discount the Options Market Maker quotes by the trade to quote ratio for options when calculating message traffic for Options Market Makers. Similarly, to avoid disincentives to quoting behavior on the equities side as well, the Operating Committee determined to discount equity market maker quotes by the trade to quote ratio for equities when calculating message traffic for equities market makers.

In the Original Proposal, market maker quotes were treated the same as other message traffic for purposes of tiering for Industry Members (other than Execution Venue ATSs). Commenters noted, however, that charging Industry Members on the basis of message traffic will impact market makers disproportionately because of their continuous quoting obligations. Moreover, in the context of options market makers, message traffic would include bids and offers for every listed options strikes and series, which are not an issue for equities.⁷² The Operating Committee proposes to address this concern in two ways. First, the Operating Committee proposes to discount Options Market Maker quotes when calculating the Options Market Makers' tier placement. Specifically, the Operating Committee proposes to impose a discount based on the objective measure of the trade to quote ratio for options. Based on available data from June 2016 through June 2017, the trade to quote ratio for options is 0.01%. Second, the Operating Committee proposes to discount equities market maker quotes when calculating the equities market makers' tier placement. Specifically, the Operating Committee proposes to impose a discount based on the objective measure of the trade to quote ratio for equities. Based on available data for June 2016 through June 2017, this trade to quote ratio for equities is 5.43%.

The practical effect of applying such discounts for quoting activity is to shift market makers' calculated message traffic lower, leading to the potential shift to tiers for lower message traffic and reduced fees. Such an approach would move sixteen Industry Member CAT Reporters that are market makers to a lower tier than in the Original Proposal. For example, under the

⁷¹ See Suspension Order at 31663–4; SIFMA Letter at 4–6; FIA Principal Traders Group Letter at 3; Sidley Letter at 2–6; Group One Letter at 2–6; and Belvedere Letter at 2.

⁷² Suspension Order at 31664.

⁷⁰ Section 11.2(b) of the CAT NMS Plan.

Original Proposal, Broker-Dealer Firm ABC was placed in the first CAT Fee tier, which had a quarterly fee of \$101,004. With the imposition of the proposed tier changes and the discount, Broker-Dealer Firm ABC, an options market maker, would be ranked in Tier 3 and would owe a quarterly fee of \$40,899.

In developing the proposed market maker discounts, the Operating Committee considered various discounts for Options Market Makers and equity market makers, including discounts of 50%, 25%, 0.00002%, as well as the 5.43% for option market makers and 0.01% for equity market makers. Each of these options were considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined to adopt the proposed discount because it directly relates to the concern regarding the quoting requirement, is an objective discounting method, and has the desired potential to shift market makers to lower fee tiers.

By imposing a discount on Options Market Makers and equities market makers' quoting traffic for the calculation of message traffic, the Operating Committee believes that the proposed fees for market makers would not impose an undue or inappropriate burden on competition under Section 6 or Section 15A of the Exchange Act. Moreover, the Operating Committee believes that the proposed fees appropriately take into account the distinctions in the securities trading operations of different Industry Members, and avoid disincentives, such as a reduction in market quality, as required under the funding principles of the CAT NMS Plan.⁷³ The proposed discounts recognize the different types of trading operations presented by Options Market Makers and equities market makers, as well as the value of the market makers' quoting activity to the market as a whole. Accordingly, the Operating Committee believes that the proposed discounts will not impact the ability of small Options Market Makers or equities market makers to provide liquidity.

Accordingly, with this Amendment, SRO proposes to amend paragraph (b)(1) of the proposed fee schedule to indicate that the message traffic related to equity market maker quotes and Options Market Maker quotes would be discounted. In addition, SRO proposes to define the term "Options Market

Maker" in paragraph (a)(1) of the proposed fee schedule.

(C) Comparability/Allocation of Costs

Under the Original Proposal, 75% of CAT costs were allocated to Industry Members (other than Execution Venue ATSS) and 25% of CAT costs were allocated to Execution Venues. This cost allocation sought to maintain the greatest level of comparability across the funding model, where comparability considered affiliations among or between CAT Reporters. The Commission and commenters expressed concerns regarding whether the proposed 75%/25% allocation of CAT costs is consistent with the Plan's funding principles and the Exchange Act, including whether the allocation places a burden on competition or reduces market quality. The Commission and commenters also questioned whether the approach of accounting for affiliations among CAT Reporters in setting CAT Fees disadvantages non-affiliated CAT Reporters or otherwise burdens competition in the market for trading services.⁷⁴

In response to these concerns, the Operating Committee determined to revise the proposed funding model to focus the comparability of CAT Fees on the individual entity level, rather than primarily on the comparability of affiliated entities. In light of the interconnected nature of the various aspects of the funding model, the Operating Committee determined to revise various aspects of the model to enhance comparability at the individual entity level. Specifically, to achieve such comparability, the Operating Committee determined to (1) decrease the number of tiers for Industry Members (other than Execution Venue ATSS) from nine to seven; (2) change the allocation of CAT costs between Equity Execution Venues and Options Execution Venues from 75%/25% to 67%/33%; and (3) adjust tier percentages and recovery allocations for Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSS). With these changes, the proposed funding model provides fee comparability for the largest individual entities, with the largest Industry Members (other than Execution Venue ATSS), Equity Execution Venues and Options Execution Venues each paying a CAT Fee of approximately \$81,000 each quarter.

(i) Number of Industry Member Tiers

In the Original Proposal, the proposed funding model had nine tiers for Industry Members (other than Execution Venue ATSS). The Operating Committee determined that reducing the number of tiers from nine tiers to seven tiers (and adjusting the predefined Industry Member Percentages as well) continues to provide a fair allocation of fees among Industry Members and appropriately distinguishes between Industry Members with differing levels of message traffic. In reaching this conclusion, the Operating Committee considered historical message traffic generated by Industry Members across all exchanges and as submitted to FINRA's OATS, and considered the distribution of firms with similar levels of message traffic, grouping together firms with similar levels of message traffic. Based on this, the Operating Committee determined that seven tiers would group firms with similar levels of message traffic, while also achieving greater comparability in the model for the individual CAT Reporters with the greatest market share or message traffic.

In developing the proposed seven tier structure, the Operating Committee considered remaining at nine tiers, as well as reducing the number of tiers down to seven when considering how to address the concerns raised regarding comparability. For each of the alternatives, the Operating Committee considered the assignment of various percentages of Industry Members to each tier as well as various percentages of Industry Member recovery allocations for each alternative. Each of these options was considered in the context of its effects on the full funding model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined that the seven tier alternative provided the most fee comparability at the individual entity level for the largest CAT Reporters, while both providing logical breaks in tiering for Industry Members with different levels of message traffic and a sufficient number of tiers to provide for the full spectrum of different levels of message traffic for all Industry Members.

(ii) Allocation of CAT Costs Between Equity and Options Execution Venues

The Operating Committee also determined to adjust the allocation of CAT costs between Equity Execution Venues and Options Execution Venues to enhance comparability at the individual entity level. In the Original

⁷⁴ See Suspension Order at 31662-3; SIFMA Letter at 3; Sidley Letter at 6-7; Group One Letter at 2; and Belvedere Letter at 2.

⁷³ Section 11.2(b) of the CAT NMS Plan.

Proposal, 75% of Execution Venue CAT costs were allocated to Equity Execution Venues, and 25% of Execution Venue CAT costs were allocated to Options Execution Venues. To achieve the goal of increased comparability at the individual entity level, the Operating Committee analyzed a range of alternative splits for revenue recovery between Equity and Options Execution Venues, along with other changes in the proposed funding model. Based on this analysis, the Operating Committee determined to allocate 67 percent of Execution Venue costs recovered to Equity Execution Venues and 33 percent to Options Execution Venues. The Operating Committee determined that a 67/33 allocation between Equity and Options Execution Venues enhances the level of fee comparability for the largest CAT Reporters. Specifically, the largest Equity and Options Execution Venues would pay a quarterly CAT Fee of approximately \$81,000.

In developing the proposed allocation of CAT costs between Equity and Options Execution Venues, the Operating Committee considered various different options for such allocation, including keeping the original 75%/25% allocation, as well as shifting to a 70%/30%, 67%/33%, or 57.75%/42.25% allocation. For each of the alternatives, the Operating Committee considered the effect each allocation would have on the assignment of various percentages of Equity Execution Venues to each tier as well as various percentages of Equity Execution Venue recovery allocations for each alternative. Moreover, each of these options was considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined that the 67%/33% allocation between Equity and Options Execution Venues provided the greatest level of fee comparability at the individual entity level for the largest CAT Reporters, while still providing for appropriate fee levels across all tiers for all CAT Reporters.

(iii) Allocation of Costs Between Execution Venues and Industry Members

The Operating Committee determined to allocate 25% of CAT costs to Execution Venues and 75% to Industry Members (other than Execution Venue ATSSs), as it had in the Original Proposal. The Operating Committee determined that this 75%/25% allocation, along with the other changes proposed above, led to the most

comparable fees for the largest Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSSs). The largest Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSSs) would each pay a quarterly CAT Fee of approximately \$81,000.

As a preliminary matter, the Operating Committee determined that it is appropriate to allocate most of the costs to create, implement and maintain the CAT to Industry Members for several reasons. First, there are many more broker-dealers expected to report to the CAT than Participants (*i.e.*, 1,541 broker-dealer CAT Reporters versus 22 Participants). Second, since most of the costs to process CAT reportable data is generated by Industry Members, Industry Members could be expected to contribute toward such costs. Finally, as noted by the SEC, the CAT “substantially enhance[s] the ability of the SROs and the Commission to oversee today’s securities markets,”⁷⁵ thereby benefitting all market participants. After making this determination, the Operating Committee analyzed several different cost allocations, as discussed further below, and determined that an allocation where 75% of the CAT costs should be borne by the Industry Members (other than Execution Venue ATSSs) and 25% should be paid by Execution Venues was most appropriate and led to the greatest comparability of CAT Fees for the largest CAT Reporters.

In developing the proposed allocation of CAT costs between Execution Venues and Industry Members (other than Execution Venue ATSSs), the Operating Committee considered various different options for such allocation, including keeping the original 75%/25% allocation, as well as shifting to an 80%/20%, 70%/30%, or 65%/35% allocation. Each of these options was considered in the context of the full model, including the effect on each of the changes discussed above, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. In particular, for each of the alternatives, the Operating Committee considered the effect each allocation had on the assignment of various percentages of Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSSs) to each relevant tier as well as various percentages of recovery

allocations for each tier. The Operating Committee determined that the 75%/25% allocation between Execution Venues and Industry Members (other than Execution Venue ATSSs) provided the greatest level of fee comparability at the individual entity level for the largest CAT Reporters, while still providing for appropriate fee levels across all tiers for all CAT Reporters.

(iv) Affiliations

The funding principles set forth in Section 11.2 of the Plan require that the fees charged to CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether Execution Venue and/or Industry Members). The proposed funding model satisfies this requirement. As discussed above, under the proposed funding model, the largest Equity Execution Venues, Options Execution Venues, and Industry Members (other than Execution Venue ATSSs) pay approximately the same fee. Moreover, the Operating Committee believes that the proposed funding model takes into consideration affiliations between or among CAT Reporters as complexes with multiple CAT Reporters will pay the appropriate fee based on the proposed fee schedule for each of the CAT Reporters in the complex. For example, a complex with a Tier 1 Equity Execution Venue and Tier 2 Industry Member will pay the same as another complex with a Tier 1 Equity Execution Venue and Tier 2 Industry Member.

(v) Fee Schedule Changes

Accordingly, with this Amendment, SRO proposes to amend paragraphs (b)(1) and (2) of the proposed fee schedule to reflect the changes discussed in this section. Specifically, SRO proposes to amend paragraph (b)(1) and (2) of the proposed fee schedule to update the number of tiers, and the fees and percentages assigned to each tier to reflect the described changes.

(D) Market Share/Message Traffic

In the Original Proposal, the Operating Committee proposed to charge Execution Venues based on market share and Industry Members (other than Execution Venue ATSSs) based on message traffic. Commenters questioned the use of the two different

⁷⁵ Securities Exchange Act Rel. No. 67457 (Jul 18, 2012), 77 FR 45722, 45726 (Aug. 1, 2012) (“Rule 613 Adopting Release”).

metrics for calculating CAT Fees.⁷⁶ The Operating Committee continues to believe that the proposed use of market share and message traffic satisfies the requirements of the Exchange Act and the funding principles set forth in the CAT NMS Plan. Accordingly, the proposed funding model continues to charge Execution Venues based on market share and Industry Members (other than Execution Venue ATSS) based on message traffic.

In drafting the Plan and the Original Proposal, the Operating Committee expressed the view that the correlation between message traffic and size does not apply to Execution Venues, which they described as producing similar amounts of message traffic regardless of size. The Operating Committee believed that charging Execution Venues based on message traffic would result in both large and small Execution Venues paying comparable fees, which would be inequitable, so the Operating Committee determined that it would be more appropriate to treat Execution Venues differently from Industry Members in the funding model. Upon a more detailed analysis of available data, however, the Operating Committee noted that Execution Venues have varying levels of message traffic. Nevertheless, the Operating Committee continues to believe that a bifurcated funding model—where Industry Members (other than Execution Venue ATSS) are charged fees based on message traffic and Execution Venues are charged based on market share—complies with the Plan and meets the standards of the Exchange Act for the reasons set forth below.

Charging Industry Members based on message traffic is the most equitable means for establishing fees for Industry Members (other than Execution Venue ATSS). This approach will assess fees to Industry Members that create larger volumes of message traffic that are relatively higher than those fees charged to Industry Members that create smaller volumes of message traffic. Since message traffic, along with fixed costs of the Plan Processor, is a key component of the costs of operating the CAT, message traffic is an appropriate criterion for placing Industry Members in a particular fee tier.

The Operating Committee also believes that it is appropriate to charge Execution Venues CAT Fees based on their market share. In contrast to Industry Members (other than Execution Venue ATSS), which determine the degree to which they produce the

message traffic that constitutes CAT Reportable Events, the CAT Reportable Events of Execution Venues are largely derivative of quotations and orders received from Industry Members that the Execution Venues are required to display. The business model for Execution Venues, however, is focused on executions in their markets. As a result, the Operating Committee believes that it is more equitable to charge Execution Venues based on their market share rather than their message traffic.

Similarly, focusing on message traffic would make it more difficult to draw distinctions between large and small exchanges, including options exchanges in particular. For instance, the Operating Committee analyzed the message traffic of Execution Venues and Industry Members for the period of April 2017 to June 2017 and placed all CAT Reporters into a nine-tier framework (*i.e.*, a single tier may include both Execution Venues and Industry Members). The Operating Committee's analysis found that the majority of exchanges (15 total) were grouped in Tiers 1 and 2. Moreover, virtually all of the options exchanges were in Tiers 1 and 2.⁷⁷ Given the concentration of options exchanges in Tiers 1 and 2, the Operating Committee believes that using a funding model based purely on message traffic would make it more difficult to distinguish between large and small options exchanges, as compared to the proposed bifurcated fee approach.

In addition, the Operating Committee also believes that it is appropriate to treat ATSS as Execution Venues under the proposed funding model since ATSS have business models that are similar to those of exchanges, and ATSS also compete with exchanges. For these reasons, the Operating Committee believes that charging Execution Venues based on market share is more appropriate and equitable than charging Execution Venues based on message traffic.

(E) Time Limit

In the Original Proposal, the Operating Committee did not impose any time limit on the application of the proposed CAT Fees. As discussed above, the Operating Committee developed the proposed funding model by analyzing currently available historical data. Such historical data, however, is not as comprehensive as data that will be submitted to the CAT.

Accordingly, the Operating Committee believes that it will be appropriate to revisit the funding model once CAT Reporters have actual experience with the funding model. Accordingly, the Operating Committee proposes to include a sunset provision in the proposed fee model. The proposed CAT Fees will sunset two years after the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. Specifically, SRO proposes to add paragraph (d) of the proposed fee schedule to include this sunset provision. Such a provision will provide the Operating Committee and other market participants with the opportunity to reevaluate the performance of the proposed funding model.

(F) Tier Structure/Decreasing Cost per Unit

In the Original Proposal, the Operating Committee determined to use a tiered fee structure. The Commission and commenters questioned whether the decreasing cost per additional unit (of message traffic in the case of Industry Members, or of share volume in the case of Execution Venues) in the proposed fee schedules burdens competition by disadvantaging small Industry Members and Execution Venues and/or by creating barriers to entry in the market for trading services and/or the market for broker-dealer services.⁷⁸

The Operating Committee does not believe that decreasing cost per additional unit in the proposed fee schedules places an unfair competitive burden on Small Industry Members and Execution Venues. While the cost per unit of message traffic or share volume necessarily will decrease as volume increases in any tiered fee model using fixed fee percentages and, as a result, Small Industry Members and small Execution Venues may pay a larger fee per message or share, this comment fails to take account of the substantial differences in the absolute fees paid by Small Industry Members and small Execution Venues as opposed to large Industry Members and large Execution Venues. For example, under the fee proposals, Tier 7 Industry Members would pay a quarterly fee of \$105, while Tier 1 Industry Members would pay a quarterly fee of \$81,483. Similarly, a Tier 4 Equity Execution Venue would pay a quarterly fee of \$129, while a Tier 1 Equity Execution Venue would pay a quarterly fee of \$81,048. Thus, Small Industry Members and small Execution Venues are not disadvantaged in terms

⁷⁶ Suspension Order at 31663; FIA Principal Traders Group Letter at 2.

⁷⁷ The Participants note that this analysis did not place MIAx PEARL in Tier 1 or Tier 2 since the exchange commenced trading on February 6, 2017.

⁷⁸ Suspension Order at 31667.

of the total fees that they actually pay. In contrast to a tiered model using fixed fee percentages, the Operating Committee believes that strictly variable or metered funding models based on message traffic or share volume would be more likely to affect market behavior and may present administrative challenges (e.g., the costs to calculate and monitor fees may exceed the fees charged to the smallest CAT Reporters).

(G) Other Alternatives Considered

In addition to the various funding model alternatives discussed above regarding discounts, number of tiers and allocation percentages, the Operating Committee also discussed other possible funding models. For example, the Operating Committee considered allocating the total CAT costs equally among each of the Participants, and then permitting each Participant to charge its own members as it deems appropriate.⁷⁹ The Operating Committee determined that such an approach raised a variety of issues, including the likely inconsistency of the ensuing charges, potential for lack of transparency, and the impracticality of multiple SROs submitting invoices for CAT charges. The Operating Committee therefore determined that the proposed funding model was preferable to this alternative.

(H) Industry Member Input

Commenters expressed concern regarding the level of Industry Member input into the development of the proposed funding model, and certain commenters have recommended a greater role in the governance of the CAT.⁸⁰ The Participants previously addressed this concern in its letters responding to comments on the Plan and the CAT Fees.⁸¹ As discussed in those letters, the Participants discussed the funding model with the Development Advisory Group (“DAG”), the advisory group formed to assist in the development of the Plan, during its original development.⁸² Moreover, Industry Members currently have a voice in the affairs of the Operating Committee and operation of the CAT generally through the Advisory Committee established pursuant to Rule 613(b)(7) and Section 4.13 of the Plan.

⁷⁹ See FIA Principal Traders Group Letter at 2; Belvedere Letter at 4.

⁸⁰ See Suspension Order at 31662; MFA Letter at 1–2.

⁸¹ Letter from Participants to Brent J. Fields, Secretary, SEC (Sept. 23, 2016) (“Plan Response Letter”); Letter from CAT NMS Plan Participants to Brent J. Fields, Secretary, SEC (June 29, 2017) (“Fee Rule Response Letter”).

⁸² Fee Rule Response Letter at 2; Plan Response Letter at 18.

The Advisory Committee attends all meetings of the Operating Committee, as well as meetings of various subcommittees and working groups, and provides valuable and critical input for the Participants’ and Operating Committee’s consideration. The Operating Committee continues to believe that that Industry Members have an appropriate voice regarding the funding of the Company.

(I) Conflicts of Interest

Commenters also raised concerns regarding Participant conflicts of interest in setting the CAT Fees.⁸³ The Participants previously responded to this concern in both the Plan Response Letter and the Fee Rule Response Letter.⁸⁴ As discussed in those letters, the Plan, as approved by the SEC, adopts various measures to protect against the potential conflicts issues raised by the Participants’ fee-setting authority. Such measures include the operation of the Company as a not for profit business league and on a break-even basis, and the requirement that the Participants file all CAT Fees under Section 19(b) of the Exchange Act. The Operating Committee continues to believe that these measures adequately protect against concerns regarding conflicts of interest in setting fees, and that additional measures, such as an independent third party to evaluate an appropriate CAT Fee, are unnecessary.

(J) Fee Transparency

Commenters also argued that they could not adequately assess whether the CAT Fees were fair and equitable because the Operating Committee has not provided details as to what the Participants are receiving in return for the CAT Fees.⁸⁵ The Operating Committee provided a detailed discussion of the proposed funding model in the Plan, including the expenses to be covered by the CAT Fees. In addition, the agreement between the Company and the Plan Processor sets forth a comprehensive set of services to be provided to the Company with regard to the CAT. Such services include, without limitation: User support services (e.g., a help desk); tools to allow each CAT Reporter to monitor and correct their submissions; a comprehensive compliance program to monitor CAT Reporters’ adherence to Rule 613; publication of detailed Technical Specifications for Industry

⁸³ See Suspension Order at 31662; FIA Principal Traders Group at 3.

⁸⁴ See Plan Response Letter at 16, 17; Fee Rule Response Letter at 10–12.

⁸⁵ See FIA Principal Traders Group at 3; SIFMA Letter at 3.

Members and Participants; performing data linkage functions; creating comprehensive data security and confidentiality safeguards; creating query functionality for regulatory users (i.e., the Participants, and the SEC and SEC staff); and performing billing and collection functions. The Operating Committee further notes that the services provided by the Plan Processor and the costs related thereto were subject to a bidding process.

(K) Funding Authority

Commenters also questioned the authority of the Operating Committee to impose CAT Fees on Industry Members.⁸⁶ The Participants previously responded to this same comment in the Plan Response Letter and the Fee Rule Response Letter.⁸⁷ As the Participants previously noted, SEC Rule 613 specifically contemplates broker-dealers contributing to the funding of the CAT. In addition, as noted by the SEC, the CAT “substantially enhance[s] the ability of the SROs and the Commission to oversee today’s securities markets,”⁸⁸ thereby benefitting all market participants. Therefore, the Operating Committee continues to believe that it is equitable for both Participants and Industry Members to contribute to funding the cost of the CAT.

2. Statutory Basis

SRO believes that the proposed rule change is consistent with the provisions of Section 6(b)(5) of the Act,⁸⁹ which require, among other things, that the SRO rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest, and not designed to permit unfair discrimination between customers, issuers, brokers and dealer, and Section 6(b)(4) of the Act,⁹⁰ which requires that SRO rules provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using its facilities. As discussed above, the SEC approved the bifurcated, tiered, fixed fee funding model in the CAT NMS Plan, finding it was reasonable and that it equitably allocated fees among Participants and Industry Members. SRO believes that the proposed tiered fees adopted pursuant to the funding model approved by the SEC in the CAT

⁸⁶ See Suspension Order at 31661–2; SIFMA Letter at 2.

⁸⁷ See Plan Response Letter at 9–10; Fee Rule Response Letter at 3–4.

⁸⁸ Rule 613 Adopting Release at 45726.

⁸⁹ 15 U.S.C. 78f(b)(5).

⁹⁰ 15 U.S.C. 78f(b)(4).

NMS Plan are reasonable, equitably allocated and not unfairly discriminatory.

SRO believes that this proposal is consistent with the Act because it implements, interprets or clarifies the provisions of the Plan, and is designed to assist SRO and its Industry Members in meeting regulatory obligations pursuant to the Plan. In approving the Plan, the SEC noted that the Plan “is necessary and appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanism of a national market system, or is otherwise in furtherance of the purposes of the Act.”⁹¹ To the extent that this proposal implements, interprets or clarifies the Plan and applies specific requirements to Industry Members, SRO believes that this proposal furthers the objectives of the Plan, as identified by the SEC, and is therefore consistent with the Act.

SRO believes that the proposed tiered fees are reasonable. First, the total CAT Fees to be collected would be directly associated with the costs of establishing and maintaining the CAT, where such costs include Plan Processor costs and costs related to insurance, third party services and the operational reserve. The CAT Fees would not cover Participant services unrelated to the CAT. In addition, any surplus CAT Fees cannot be distributed to the individual Participants; such surpluses must be used as a reserve to offset future fees. Given the direct relationship between the fees and the CAT costs, SRO believes that the total level of the CAT Fees is reasonable.

In addition, SRO believes that the proposed CAT Fees are reasonably designed to allocate the total costs of the CAT equitably between and among the Participants and Industry Members, and are therefore not unfairly discriminatory. As discussed in detail above, the proposed tiered fees impose comparable fees on similarly situated CAT Reporters. For example, those with a larger impact on the CAT (measured via message traffic or market share) pay higher fees, whereas CAT Reporters with a smaller impact pay lower fees. Correspondingly, the tiered structure lessens the impact on smaller CAT Reporters by imposing smaller fees on those CAT Reporters with less market share or message traffic. In addition, the fee structure takes into consideration distinctions in securities trading operations of CAT Reporters, including ATSS trading OTC Equity Securities, and equity and options market makers.

Moreover, SRO believes that the division of the total CAT costs between Industry Members and Execution Venues, and the division of the Execution Venue portion of total costs between Equity and Options Execution Venues, is reasonably designed to allocate CAT costs among CAT Reporters. The 75%/25% division between Industry Members (other than Execution Venue ATSSs) and Execution Venues maintains the greatest level of comparability across the funding model. For example, the cost allocation establishes fees for the largest Industry Members (*i.e.*, those Industry Members in Tiers 1) that are comparable to the largest Equity Execution Venues and Options Execution Venues (*i.e.*, those Execution Venues in Tier 1). Furthermore, the allocation of total CAT cost recovery recognizes the difference in the number of CAT Reporters that are Industry Members (other than Execution Venue ATSSs) versus CAT Reporters that are Execution Venues. Similarly, the 67%/33% allocation between Equity and Options Execution Venues also helps to provide fee comparability for the largest CAT Reporters.

Finally, SRO believes that the proposed fees are reasonable because they would provide ease of calculation, ease of billing and other administrative functions, and predictability of a fixed fee. Such factors are crucial to estimating a reliable revenue stream for the Company and for permitting CAT Reporters to reasonably predict their payment obligations for budgeting purposes.

B. Self-Regulatory Organization's Statement on Burden on Competition

Section 6(b)(8) of the Act⁹² require that SRO rules not impose any burden on competition that is not necessary or appropriate. SRO does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. SRO notes that the proposed rule change implements provisions of the CAT NMS Plan approved by the Commission, and is designed to assist SRO in meeting its regulatory obligations pursuant to the Plan. Similarly, all national securities exchanges and FINRA are proposing this proposed fee schedule to implement the requirements of the CAT NMS Plan. Therefore, this is not a competitive fee filing and, therefore, it does not raise competition issues between and among the exchanges and FINRA.

Moreover, as previously described, SRO believes that the proposed rule change fairly and equitably allocates costs among CAT Reporters. In particular, the proposed fee schedule is structured to impose comparable fees on similarly situated CAT Reporters, and lessen the impact on smaller CAT Reporters. CAT Reporters with similar levels of CAT activity will pay similar fees. For example, Industry Members (other than Execution Venue ATSSs) with higher levels of message traffic will pay higher fees, and those with lower levels of message traffic will pay lower fees. Similarly, Execution Venue ATSSs and other Execution Venues with larger market share will pay higher fees, and those with lower levels of market share will pay lower fees. Therefore, given that there is generally a relationship between message traffic and/or market share to the CAT Reporter's size, smaller CAT Reporters generally pay less than larger CAT Reporters. Accordingly, SRO does not believe that the CAT Fees would have a disproportionate effect on smaller or larger CAT Reporters. In addition, ATSSs and exchanges will pay the same fees based on market share. Therefore, SRO does not believe that the fees will impose any burden on the competition between ATSSs and exchanges. Accordingly, SRO believes that the proposed fees will minimize the potential for adverse effects on competition between CAT Reporters in the market.

Furthermore, the tiered, fixed fee funding model limits the disincentives to providing liquidity to the market. Therefore, the proposed fees are structured to limit burdens on competitive quoting and other liquidity provision in the market.

In addition, the Operating Committee believes that the proposed changes to the Original Proposal, as discussed above in detail, address certain competitive concerns raised by commenters, including concerns related to, among other things, smaller ATSSs, ATSSs trading OTC Equity Securities, market making quoting and fee comparability. As discussed above, the Operating Committee believes that the proposals address the competitive concerns raised by commenters.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

SRO has set forth responses to comments received regarding the Original Proposal in Section 3(a)(4) above.

⁹¹ Approval Order at 84697.

⁹² 15 U.S.C. 78f(b)(8).

III. Solicitation of Comments on Amendment No. 1

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment No. 1 is consistent with the Act. In particular, the Commission seeks comment on the following:

Allocation of Costs

(1) Commenters' views as to whether the allocation of CAT costs is consistent with the funding principle expressed in the CAT NMS Plan that requires the Operating Committee to "avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality."⁹³

(2) Commenters' views as to whether the allocation of 25% of CAT costs to the Execution Venues (including all the Participants) and 75% to Industry Members, will incentivize or disincentivize the Participants to effectively and efficiently manage the CAT costs incurred by the Participants since they will only bear 25% of such costs.

(3) Commenters' views on the determination to allocate 75% of all costs incurred by the Participants from November 21, 2016 to November 21, 2017 to Industry Members (other than Execution Venue ATSSs), when such costs are development and build costs and when Industry Member reporting is scheduled to commence a year later, including views on whether such "fees, costs and expenses . . . [are] fairly and reasonably shared among the Participants and Industry Members" in accordance with the CAT NMS Plan.⁹⁴

(4) Commenters' views on whether an analysis of the ratio of the expected Industry Member-reported CAT messages to the expected SRO-reported CAT messages should be the basis for determining the allocation of costs between Industry Members and Execution Venues.⁹⁵

(5) Any additional data analysis on the allocation of CAT costs, including any existing supporting evidence.

Comparability

(6) Commenters' views on the shift in the standard used to assess the comparability of CAT Fees, with the

emphasis now on comparability of individual entities instead of affiliated entities, including views as to whether this shift is consistent with the funding principle expressed in the CAT NMS Plan that requires the Operating Committee to establish a fee structure in which the fees charged to "CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether Execution Venues and/or Industry Members)."⁹⁶

(7) Commenters' views as to whether the reduction in the number of tiers for Industry Members (other than Execution Venue ATSSs) from nine to seven, the revised allocation of CAT costs between Equity Execution Venues and Options Execution Venues from a 75%/25% split to a 67%/33% split, and the adjustment of all tier percentages and recovery allocations achieves comparability across individual entities, and whether these changes should have resulted in a change to the allocation of 75% of total CAT costs to Industry Members (other than Execution Venue ATSSs) and 25% of such costs to Execution Venues.

Discounts

(8) Commenters' views as to whether the discounts for options market-makers, equities market-makers, and Equity ATSSs trading OTC Equity Securities are clear, reasonable, and consistent with the funding principle expressed in the CAT NMS Plan that requires the Operating Committee to "avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality,"⁹⁷ including views as to whether the discounts for market-makers limit any potential disincentives to act as a market-maker and/or to provide liquidity due to CAT fees.

Calculation of Costs and Imposition of CAT Fees

(9) Commenters' views as to whether the amendment provides sufficient information regarding the amount of costs incurred from November 21, 2016 to November 21, 2017, particularly, how those costs were calculated, how those costs relate to the proposed CAT Fees, and how costs incurred after November 21, 2017 will be assessed upon Industry Members and Execution Venues;

(10) Commenters' views as to whether the timing of the imposition and collection of CAT Fees on Execution Venues and Industry Members is reasonably related to the timing of when the Company expects to incur such development and implementation costs.⁹⁸

(11) Commenters' views on dividing CAT costs equally among each of the Participants, and then each Participant charging its own members as it deems appropriate, taking into consideration the possibility of inconsistency in charges, the potential for lack of transparency, and the impracticality of multiple SROs submitting invoices for CAT charges.

Burden on Competition and Barriers to Entry

(12) Commenters' views as to whether the allocation of 75% of CAT costs to Industry Members (other than Execution Venue ATSSs) imposes any burdens on competition to Industry Members, including views on what baseline competitive landscape the Commission should consider when analyzing the proposed allocation of CAT costs.

(13) Commenters' views on the burdens on competition, including the relevant markets and services and the impact of such burdens on the baseline competitive landscape in those relevant markets and services.

(14) Commenters' views on any potential burdens imposed by the fees on competition between and among CAT Reporters, including views on which baseline markets and services the fees could have competitive effects on and whether the fees are designed to minimize such effects.

(15) Commenters' general views on the impact of the proposed fees on economies of scale and barriers to entry.

(16) Commenters' views on the baseline economies of scale and barriers to entry for Industry Members and Execution Venues and the relevant markets and services over which these economies of scale and barriers to entry exist.

(17) Commenters' views as to whether a tiered fee structure necessarily results in less active tiers paying more per unit than those in more active tiers, thus creating economies of scale, with supporting information if possible.

(18) Commenters' views as to how the level of the fees for the least active tiers would or would not affect barriers to entry.

(19) Commenters' views on whether the difference between the cost per unit (messages or market share) in less active

⁹³ Section 11.2(e) of the CAT NMS Plan.

⁹⁴ Section 11.1(c) of the CAT NMS Plan.

⁹⁵ The Notice for the CAT NMS Plan did not provide a comprehensive count of audit trail message traffic from different regulatory data sources, but the Commission did estimate the ratio of all SRO audit trail messages to OATS audit trail messages to be 1.9431. See Securities Exchange Act Release No. 77724 (April 27, 2016), 81 FR 30613, 30721 n.919 and accompanying text (May 17, 2016).

⁹⁶ Section 11.2(c) of the CAT NMS Plan.

⁹⁷ Section 11.2(e) of the CAT NMS Plan.

⁹⁸ Section 11.1(c) of the CAT NMS Plan.

tiers compared to the cost per unit in more active tiers creates regulatory economies of scale that favor larger competitors and, if so:

(a) How those economies of scale compare to operational economies of scale; and

(b) Whether those economies of scale reduce or increase the current advantages enjoyed by larger competitors or otherwise alter the competitive landscape.

(20) Commenters' views on whether the fees could affect competition between and among national securities exchanges and FINRA, in light of the fact that implementation of the fees does not require the unanimous consent of all such entities, and, specifically:

(a) Whether any of the national securities exchanges or FINRA are disadvantaged by the fees; and

(b) If so, whether any such disadvantages would be of a magnitude that would alter the competitive landscape.

(21) Commenters' views on any potential burden imposed by the fees on competitive quoting and other liquidity provision in the market, including, specifically:

(a) Commenters' views on the kinds of disincentives that discourage liquidity provision and/or disincentives that the Commission should consider in its analysis;

(b) Commenters' views as to whether the fees could disincentivize the provision of liquidity; and

(c) Commenters' views as to whether the fees limit any disincentives to provide liquidity.

(22) Commenters' views as to whether the amendment adequately responds to and/or addresses comments received on related filings.

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-IEX-2017-16 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-IEX-2017-16. 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 website (<http://www.sec.gov/>

[rules/sro.shtml](http://www.sec.gov/rules/sro.shtml)). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-IEX-2017-16, and should be submitted on or before January 4, 2018.⁹⁹

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2017-27018 Filed 12-13-17; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-82288; File No. SR-PHLX-2017-037]

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing of Amendment No. 2 to a Proposed Rule Change To Adopt Rule 7004 and Chapter XV, Section 11

December 11, 2017.

On May 12, 2017, Nasdaq PHLX LLC ("Phlx" or "Exchange" or "BX") 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 adopt a fee schedule to establish the fees for Industry Members related to the National Market System Plan Governing the Consolidated Audit Trail ("CAT NMS Plan"). The proposed

rule change was published in the **Federal Register** for comment on May 24, 2017.³ The Commission received seven comment letters on the proposed rule change,⁴ and a response to comments from the Participants.⁵ On June 30, 2017, the Commission temporarily suspended and initiated proceedings to determine whether to approve or disapprove the proposed rule change.⁶ The Commission thereafter received seven comment letters,⁷ and a response to comments

³ See Securities Exchange Act Release No. 80725 (May 18, 2017), 82 FR 23935 (May 24, 2017) ("Original Proposal").

⁴ Since the CAT NMS Plan Participants' proposed rule changes to adopt fees to be charged to Industry Members to fund the consolidated audit trail are substantively identical, the Commission is considering all comments received on the proposed rule changes regardless of the comment file to which they were submitted. See text accompanying notes 13-16 *infra*, for a list of the CAT NMS Plan Participants. See Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, to Brent J. Fields, Secretary, Commission (dated June 6, 2017), available at: <https://www.sec.gov/comments/sr-batsbzx-2017-38/batsbzx201738-1788188-153228.pdf>; Letter from Patricia L. Cerny and Steven O'Malley, Compliance Consultants, to Brent J. Fields, Secretary, Commission (dated June 12, 2017), available at: <https://www.sec.gov/comments/sr-cboe-2017-040/cboe2017040-1799253-153675.pdf>; Letter from Daniel Zinn, General Counsel, OTC Markets Group Inc., to Eduardo A. Aleman, Assistant Secretary, Commission (dated June 13, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-1801717-153703.pdf>; Letter from Joanna Mallers, Secretary, FIA Principal Traders Group, to Brent J. Fields, Secretary, Commission (dated June 22, 2017), available at: <https://www.sec.gov/comments/sr-cboe-2017-040/cboe2017040-1819670-154195.pdf>; Letter from Stuart J. Kaswell, Executive Vice President and Managing Director, General Counsel, Managed Funds Association, to Brent J. Fields, Secretary, Commission (dated June 23, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-1822454-154283.pdf>; and Letter from Suzanne H. Shatto, Investor, to Commission (dated June 27, 2017), available at: <https://www.sec.gov/comments/sr-batsedgx-2017-22/batsedgx201722-154443.pdf>. The Commission also received a comment letter which is not pertinent to these proposed rule changes. See Letter from Christina Crouch, Smart Ltd., to Brent J. Fields, Secretary, Commission (dated June 5, 2017), available at: <https://www.sec.gov/comments/sr-batsbzx-2017-38/batsbzx201738-1785545-153152.htm>.

⁵ See Letter from CAT NMS Plan Participants to Brent J. Fields, Secretary, Commission (dated June 29, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-1832632-154584.pdf>.

⁶ See Securities Exchange Act Release No. 81067 (June 30, 2017), 82 FR 31656 (July 7, 2017).

⁷ See Letter from W. Hardy Callcott, Partner, Sidley Austin LLP, to Brent J. Fields, Secretary, Commission (dated July 27, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2148338-157737.pdf>; Letter from Kevin Coleman, General Counsel and Chief Compliance Officer, Belvedere Trading LLC, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2148360-157740.pdf>; Letter from Joanna Mallers, Secretary, FIA Principal Traders Group, to Brent J.

⁹⁹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

from the Participants.⁸ On November 6, 2017, the Exchange filed Amendment No. 1 to the proposed rule change.⁹ On November 9, 2017, the Commission extended the time period within which to approve the proposed rule change or disapprove the proposed rule change to January 14, 2018.¹⁰ On December 4, 2017, the Exchange filed Amendment No. 2 to the proposed rule change, as described in Items I and II below, which Items have been prepared by the Exchange.¹¹ The Commission is publishing this notice to solicit comments from interested persons on Amendment No. 2.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

On May 12, 2017, Nasdaq PHLX LLC filed with the Securities and Exchange Commission ("Commission" or "SEC") proposed rule change SR-Phlx-2017-37 (the "Original Proposal"), pursuant to which the Exchange proposed to adopt a fee schedule to establish the fees for Industry Members related to the National Market System Plan Governing the Consolidated Audit Trail (the "CAT NMS Plan" or "Plan").¹² On November

Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2151228-157745.pdf>; Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2150977-157744.pdf>; Letter from Stuart J. Kaswell, Executive Vice President and Managing Director, General Counsel, Managed Funds Association, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2150818-157743.pdf>; Letter from John Kinahan, Chief Executive Officer, Group One Trading, L.P., to Brent J. Fields, Secretary, Commission (dated August 10, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-2214568-160619.pdf>; Letter from Joseph Molluso, Executive Vice President and CFO, Virtu Financial, to Brent J. Fields, Commission (dated August 18, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-2238648-160830.pdf>.

⁸ See Letter from Michael Simon, Chair, CAT NMS Plan Operating Committee, to Brent J. Fields, Commission, Secretary (dated November 2, 2017), available at <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2674608-161412.pdf>.

⁹ Amendment No. 1 to the proposed rule change replaced and superseded the Original Proposal in its entirety. Amendment No. 1 is available on the Commission's website for Phlx at: <https://www.sec.gov/comments/sr-phlx-2017-37/phlx201737-2669581-161442.pdf>.

¹⁰ See Securities Exchange Act Release No. 82049 (November 9, 2017), 82 FR 53549 (November 16, 2017).

¹¹ Amendment No. 2 replaces and supersedes Amendment No. 1 in its entirety.

¹² Unless otherwise specified, capitalized terms used in this fee filing are defined as set forth herein, the CAT Compliance Rule Series, in the CAT NMS Plan, or the Original Proposal.

6, 2017, the Exchange filed an amendment to the Original Proposal ("Amendment No. 1"), which replaced the Original Proposal in its entirety. The Exchange is now filing this Amendment No. 2 to replace Amendment No. 1 in its entirety. This Amendment No. 2 describes the changes from the Original Proposal.

With this Amendment, the Exchange is including *Exhibit 4*, which reflects the changes to the text of the proposed rule change as set forth in the Original Proposal, and *Exhibit 5*, which reflects all proposed changes to the Exchange's current rule text.

The text of the proposed rule change is available on the Exchange's website at <http://nasdaq.cchwallstreet.com>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

BOX Options Exchange LLC, Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe C2 Exchange, Inc., Cboe Exchange, Inc.,¹³ Chicago Stock Exchange, Inc., Financial Industry Regulatory Authority, Inc. ("FINRA"), Investors' Exchange LLC, Miami International Securities Exchange, LLC, MIAX PEARL, LLC, Nasdaq BX, Inc., Nasdaq GEMX, LLC, Nasdaq ISE, LLC, Nasdaq MRX, LLC,¹⁴ Nasdaq PHLX LLC, The

¹³ Note that Bats BYX Exchange, Inc., Bats BZX Exchange, Inc., Bats EDGA Exchange, Inc., Bats EDGX Exchange, Inc., LLC, C2 Options Exchange, Incorporated, and Chicago Board Options Exchange, Incorporated, have been renamed Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe C2 Exchange, Inc., Cboe Exchange, Inc., respectively.

¹⁴ ISE Gemini, LLC, ISE Mercury, LLC and International Securities Exchange, LLC have been

Nasdaq Stock Market LLC, New York Stock Exchange LLC, NYSE American LLC,¹⁵ NYSE Arca, Inc. and NYSE National, Inc.¹⁶ (collectively, the "Participants") filed with the Commission, pursuant to Section 11A of the Exchange Act¹⁷ and Rule 608 of Regulation NMS thereunder,¹⁸ the CAT NMS Plan.¹⁹ The Participants filed the Plan to comply with Rule 613 of Regulation NMS under the Exchange Act. The Plan was published for comment in the **Federal Register** on May 17, 2016,²⁰ and approved by the Commission, as modified, on November 15, 2016.²¹ The Plan is designed to create, implement and maintain a consolidated audit trail ("CAT") that would capture customer and order event information for orders in NMS Securities and OTC Equity Securities, across all markets, from the time of order inception through routing, cancellation, modification, or execution in a single consolidated data source. The Plan accomplishes this by creating CAT NMS, LLC (the "Company"), of which each Participant is a member, to operate the CAT.²² Under the CAT NMS Plan, the Operating Committee of the Company ("Operating Committee") has discretion to establish funding for the Company to operate the CAT, including establishing fees that the Participants will pay, and establishing fees for Industry Members that will be implemented by the Participants ("CAT Fees").²³ The Participants are required to file with the SEC under Section 19(b)

renamed Nasdaq GEMX, LLC, Nasdaq MRX, LLC, and Nasdaq ISE, LLC, respectively. See Securities Exchange Act Release No. 80248 (March 15, 2017), 82 FR 14547 (March 21, 2017); Securities Exchange Act Release No. 80326 (March 29, 2017), 82 FR 16460 (April 4, 2017); and Securities Exchange Act Release No. 80325 (March 29, 2017), 82 FR 16445 (April 4, 2017).

¹⁵ NYSE MKT LLC has been renamed NYSE American LLC. See Securities Exchange Act Release No. 80283 (March 21, 2017), 82 FR 15244 (March 27, 2017).

¹⁶ National Stock Exchange, Inc. has been renamed NYSE National, Inc. See Securities Exchange Act Release No. 79902 (January 30, 2017), 82 FR 9258 (February 3, 2017).

¹⁷ 15 U.S.C. 78k-1.

¹⁸ 17 CFR 242.608.

¹⁹ See Letter from the Participants to Brent J. Fields, Secretary, Commission, dated September 30, 2014; and Letter from Participants to Brent J. Fields, Secretary, Commission, dated February 27, 2015. On December 24, 2015, the Participants submitted an amendment to the CAT NMS Plan. See Letter from Participants to Brent J. Fields, Secretary, Commission, dated December 23, 2015.

²⁰ Securities Exchange Act Release No. 77724 (April 27, 2016), 81 FR 30614 (May 17, 2016).

²¹ Securities Exchange Act Release No. 79318 (November 15, 2016), 81 FR 84696 (November 23, 2016) ("Approval Order").

²² The Plan also serves as the limited liability company agreement for the Company.

²³ Section 11.1(b) of the CAT NMS Plan.

of the Exchange Act any such CAT Fees applicable to Industry Members that the Operating Committee approves.²⁴ Accordingly, the Exchange submitted the Original Proposal to propose the Consolidated Audit Trail Funding Fees, which would require Industry Members that are SRO members to pay the CAT Fees determined by the Operating Committee.

The Commission published the Original Proposal for public comment in the **Federal Register** on May 22, 2017,²⁵ and received comments in response to the Original Proposal or similar fee filings by other Participants.²⁶ On June 30, 2017, the Commission suspended, and instituted proceedings to determine whether to approve or disapprove, the Original Proposal.²⁷ The Commission received seven comment letters in response to those proceedings.²⁸

In response to the comments on the Original Proposal, the Operating Committee determined to make the following changes to the funding model: (1) Adds two additional CAT Fee tiers for Equity Execution Venues; (2) discounts the OTC Equity Securities market share of Execution Venue ATSS trading OTC Equity Securities as well as the market share of the FINRA over-the-counter reporting facility (“ORF”) by the average shares per trade ratio between NMS Stocks and OTC Equity Securities (calculated as 0.17% based on available data from the second quarter of 2017) when calculating the market share of Execution Venue ATSS trading OTC Equity Securities and FINRA; (3) discounts the Options Market Maker quotes by the trade to quote ratio for

options (calculated as 0.01% based on available data for June 2016 through June 2017) when calculating message traffic for Options Market Makers; (4) discounts equity market maker quotes by the trade to quote ratio for equities (calculated as 5.43% based on available data for June 2016 through June 2017) when calculating message traffic for equity market makers; (5) decreases the number of tiers for Industry Members (other than the Execution Venue ATSSs) from nine to seven; (6) changes the allocation of CAT costs between Equity Execution Venues and Options Execution Venues from 75%/25% to 67%/33%; (7) adjusts tier percentages and recovery allocations for Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSSs); (8) focuses the comparability of CAT Fees on the individual entity level, rather than primarily on the comparability of affiliated entities; (9) commences invoicing of CAT Reporters as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Participants and the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants; and (10) requires the proposed fees to automatically expire two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. As discussed in detail below, the Exchange proposes to amend the Original Proposal to reflect these changes.

(1) Executive Summary

The following provides an executive summary of the CAT funding model approved by the Operating Committee, as well as Industry Members’ rights and obligations related to the payment of CAT Fees calculated pursuant to the CAT funding model, as amended by this Amendment. A detailed description of the CAT funding model and the CAT Fees, as amended by this Amendment, as well as the changes made to the Original Proposal follows this executive summary.

(A) CAT Funding Model

- *CAT Costs.* The CAT funding model is designed to establish CAT-specific fees to collectively recover the costs of building and operating the CAT from all CAT Reporters, including Industry Members and Participants. The overall CAT costs used in calculating the CAT Fees in this fee filing are comprised of Plan Processor CAT costs and non-Plan Processor CAT costs incurred, and estimated to be incurred, from November 21, 2016 through November

21, 2017. Although the CAT costs from November 21, 2016 through November 21, 2017 were used in calculating the CAT Fees, the CAT Fees set forth in this fee filing would be in effect until the automatic sunset date, as discussed below. (See Section 3(a)(2)(E) below)

- *Bifurcated Funding Model.* The CAT NMS Plan requires a bifurcated funding model, where costs associated with building and operating the CAT would be borne by (1) Participants and Industry Members that are Execution Venues for Eligible Securities through fixed tier fees based on market share, and (2) Industry Members (other than alternative trading systems (“ATSSs”) that execute transactions in Eligible Securities (“Execution Venue ATSSs”)) through fixed tier fees based on message traffic for Eligible Securities. (See Section 3(a)(2) below)

- *Industry Member Fees.* Each Industry Member (other than Execution Venue ATSSs) will be placed into one of seven tiers of fixed fees, based on “message traffic” in Eligible Securities for a defined period (as discussed below). Prior to the start of CAT reporting, “message traffic” will be comprised of historical equity and equity options orders, cancels, quotes and executions provided by each exchange and FINRA over the previous three months. After an Industry Member begins reporting to the CAT, “message traffic” will be calculated based on the Industry Member’s Reportable Events reported to the CAT. Industry Members with lower levels of message traffic will pay a lower fee and Industry Members with higher levels of message traffic will pay a higher fee. To avoid disincentives to quoting behavior, Options Market Maker and equity market maker quotes will be discounted when calculating message traffic. (See Section 3(a)(2)(B) below)

- *Execution Venue Fees.* Each Equity Execution Venue will be placed in one of four tiers of fixed fees based on market share, and each Options Execution Venue will be placed in one of two tiers of fixed fees based on market share. Equity Execution Venue market share will be determined by calculating each Equity Execution Venue’s proportion of the total volume of NMS Stock and OTC Equity shares reported by all Equity Execution Venues during the relevant time period. For purposes of calculating market share, the OTC Equity Securities market share of Execution Venue ATSSs trading OTC Equity Securities as well as the market share of the FINRA ORF will be discounted. Similarly, market share for Options Execution Venues will be determined by calculating each Options

²⁴ *Id.*

²⁵ See Securities Exchange Act Release No. 80725 (May 18, 2017), 82 FR 23935 (May 24, 2017) (SR-PHLX-2017-37).

²⁶ For a summary of comments, see generally Securities Exchange Act Release No. 81067 (June 30, 2017), 82 FR 31656 (July 7, 2017) (“Suspension Order”).

²⁷ Suspension Order.

²⁸ See Letter from Stuart J. Kaswell, Executive Vice President, Managing Director and General Counsel, Managed Funds Association, to Brent J. Fields, Secretary, SEC (July 28, 2017) (“MFA Letter”); Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA, to Brent J. Fields, Secretary, SEC (July 28, 2017) (“SIFMA Letter”); Joanna Mallers, Secretary, FIA Principal Traders Group, to Brent J. Fields, Secretary, SEC (July 28, 2017) (“FIA Principal Traders Group Letter”); Letter from Kevin Coleman, General Counsel & Chief Compliance Officer, Belvedere Trading LLC, to Brent J. Fields, Secretary, SEC (July 28, 2017) (“Belvedere Letter”); Letter from W. Hardy Callcott, Sidley Austin LLP, to Brent J. Fields, Secretary, SEC (July 27, 2017) (“Sidley Letter”); Letter from John Kinahan, Chief Executive Officer, Group One Trading, L.P., to Brent J. Fields, Secretary, SEC (Aug. 10, 2017) (“Group One Letter”); and Letter from Joseph Molluso, Executive Vice President, Virtu Financial, to Brent J. Fields, Secretary, SEC (Aug. 18, 2017) (“Virtu Financial Letter”).

Execution Venue's proportion of the total volume of Listed Options contracts reported by all Options Execution Venues during the relevant time period. Equity Execution Venues with a larger market share will pay a larger CAT Fee than Equity Execution Venues with a smaller market share. Similarly, Options Execution Venues with a larger market share will pay a larger CAT Fee than Options Execution Venues with a smaller market share. (See Section 3(a)(2)(C) below)

- *Cost Allocation.* For the reasons discussed below, in designing the model, the Operating Committee determined that 75 percent of total costs recovered would be allocated to Industry Members (other than Execution Venue ATs) and 25 percent would be allocated to Execution Venues. In addition, the Operating Committee determined to allocate 67 percent of Execution Venue costs recovered to Equity Execution Venues and 33 percent to Options Execution Venues. (See Section 3(a)(2)(D) below)

- *Comparability of Fees.* The CAT funding model charges CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) comparable CAT Fees. (See Section 3(a)(2)(F) below)

(B) CAT Fees for Industry Members

- *Fee Schedule.* The quarterly CAT Fees for each tier for Industry Members are set forth in the two fee schedules in the Consolidated Audit Trail Funding Fees, one for Equity ATs and one for Industry Members other than Equity ATs. (See Section 3(a)(3)(B) below)

- *Quarterly Invoices.* Industry Members will be billed quarterly for CAT Fees, with the invoices payable within 30 days. The quarterly invoices will identify within which tier the Industry Member falls. (See Section 3(a)(3)(C) below)

- *Centralized Payment.* Each Industry Member will receive from the Company one invoice for its applicable CAT Fees, not separate invoices from each Participant of which it is a member. Each Industry Member will pay its CAT Fees to the Company via the centralized system for the collection of CAT Fees established by the Operating Committee. (See Section 3(a)(3)(C) below)

- *Billing Commencement.* Industry Members will begin to receive invoices for CAT Fees as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Participants and the operative date of the Plan amendment adopting CAT Fees for Participants. (See Section 3(a)(2)(G) below)

- *Sunset Provision.* The Consolidated Audit Trail Funding Fees will sunset automatically two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. (See Section 3(a)(2)(J) below)

(2) Description of the CAT Funding Model

Article XI of the CAT NMS Plan requires the Operating Committee to approve the operating budget, including projected costs of developing and operating the CAT for the upcoming year. In addition to a budget, Article XI of the CAT NMS Plan provides that the Operating Committee has discretion to establish funding for the Company, consistent with a bifurcated funding model, where costs associated with building and operating the Central Repository would be borne by (1) Participants and Industry Members that are Execution Venues through fixed tier fees based on market share, and (2) Industry Members (other than Execution Venue ATs) through fixed tier fees based on message traffic. In its order approving the CAT NMS Plan, the Commission determined that the proposed funding model was "reasonable"²⁹ and "reflects a reasonable exercise of the Participants' funding authority to recover the Participants' costs related to the CAT."³⁰

More specifically, the Commission stated in approving the CAT NMS Plan that "[t]he Commission believes that the proposed funding model is reasonably designed to allocate the costs of the CAT between the Participants and Industry Members."³¹ The Commission further noted the following:

The Commission believes that the proposed funding model reflects a reasonable exercise of the Participants' funding authority to recover the Participants' costs related to the CAT. The CAT is a regulatory facility jointly owned by the Participants and . . . the Exchange Act specifically permits the Participants to charge their members fees to fund their self-regulatory obligations. The Commission further believes that the proposed funding model is designed to impose fees reasonably related to the Participants' self-regulatory obligations because the fees would be directly associated with the costs of establishing and maintaining the CAT, and not unrelated SRO services.³²

Accordingly, the funding model approved by the Operating Committee

imposes fees on both Participants and Industry Members.

As discussed in Appendix C of the CAT NMS Plan, in developing and approving the approved funding model, the Operating Committee considered the advantages and disadvantages of a variety of alternative funding and cost allocation models before selecting the proposed model.³³ After analyzing the various alternatives, the Operating Committee determined that the proposed tiered, fixed fee funding model provides a variety of advantages in comparison to the alternatives.

In particular, the fixed fee model, as opposed to a variable fee model, provides transparency, ease of calculation, ease of billing and other administrative functions, and predictability of a fixed fee. Such factors are crucial to estimating a reliable revenue stream for the Company and for permitting CAT Reporters to reasonably predict their payment obligations for budgeting purposes. Additionally, a strictly variable or metered funding model based on message volume would be far more likely to affect market behavior and place an inappropriate burden on competition.

In addition, reviews from varying time periods of current broker-dealer order and trading data submitted under existing reporting requirements showed a wide range in activity among broker-dealers, with a number of broker-dealers submitting fewer than 1,000 orders per month and other broker-dealers submitting millions and even billions of orders in the same period. Accordingly, the CAT NMS Plan includes a tiered approach to fees. The tiered approach helps ensure that fees are equitably allocated among similarly situated CAT Reporters and furthers the goal of lessening the impact on smaller firms.³⁴ In addition, in choosing a tiered fee structure, the Operating Committee concluded that the variety of benefits offered by a tiered fee structure, discussed above, outweighed the fact that CAT Reporters in any particular tier would pay different rates per message traffic order event or per market share (e.g., an Industry Member with the largest amount of message traffic in one tier would pay a smaller amount per order event than an Industry Member in the same tier with the least amount of message traffic). Such variation is the natural result of a tiered fee structure.³⁵

³³ Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85006.

³⁴ Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85006.

³⁵ Moreover, as the SEC noted in approving the CAT NMS Plan, "[t]he Participants also have

²⁹ Approval Order at 84796.

³⁰ *Id.* at 84794.

³¹ *Id.* at 84795.

³² *Id.* at 84794.

The Operating Committee considered several approaches to developing a tiered model, including defining fee tiers based on such factors as size of firm, message traffic or trading dollar volume. After analyzing the alternatives, it was concluded that the tiering should be based on message traffic which will reflect the relative impact of CAT Reporters on the CAT System.

Accordingly, the CAT NMS Plan contemplates that costs will be allocated across the CAT Reporters on a tiered basis in order to allocate higher costs to those CAT Reporters that contribute more to the costs of creating, implementing and maintaining the CAT and lower costs to those that contribute less.³⁶ The fees to be assessed at each tier are calculated so as to recoup a proportion of costs appropriate to the message traffic or market share (as applicable) from CAT Reporters in each tier. Therefore, Industry Members generating the most message traffic will be in the higher tiers, and will be charged a higher fee. Industry Members with lower levels of message traffic will be in lower tiers and will be assessed a smaller fee for the CAT.³⁷

Correspondingly, Execution Venues with the highest market shares will be in the top tier, and will be charged higher fees. Execution Venues with the lowest market shares will be in the lowest tier and will be assessed smaller fees for the CAT.³⁸

The CAT NMS Plan states that Industry Members (other than Execution Venue ATs) will be charged based on message traffic, and that Execution Venues will be charged based on market share.³⁹ While there are multiple factors that contribute to the cost of building, maintaining and using the CAT, processing and storage of incoming message traffic is one of the most significant cost drivers for the CAT.⁴⁰ Thus, the CAT NMS Plan provides that the fees payable by Industry Members (other than Execution Venue ATs) will be based on the message traffic generated by such Industry Member.⁴¹

In contrast to Industry Members, which determine the degree to which they produce message traffic that constitute CAT Reportable Events, the CAT Reportable Events of the Execution Venues are largely derivative of

quotations and orders received from Industry Members that they are required to display. The business model for Execution Venues (other than FINRA), however, is focused on executions in their markets. As a result, the Operating Committee believes that it is more equitable to charge Execution Venues based on their market share rather than their message traffic.

Focusing on message traffic would make it more difficult to draw distinctions between large and small Execution Venues and, in particular, between large and small options exchanges. For instance, the Operating Committee analyzed the message traffic of Execution Venues and Industry Members for the period of April 2017 to June 2017 and placed all CAT Reporters into a nine-tier framework (*i.e.*, a single tier may include both Execution Venues and Industry Members). The Operating Committee's analysis found that the majority of exchanges (15 total) were grouped in Tiers 1 and 2. Moreover, virtually all of the options exchanges were in Tiers 1 and 2.⁴² Given the resulting concentration of options exchanges in Tiers 1 and 2 under this approach, the analysis shows that a funding model for Execution Venues based on message traffic would make it more difficult to distinguish between large and small options exchanges, as compared to the proposed fee approach that bases fees for Execution Venues on market share.

The CAT NMS Plan's funding model also is structured to avoid a "reduction in market quality."⁴³ The tiered, fixed fee funding model is designed to limit the disincentives to providing liquidity to the market. For example, the Operating Committee expects that a firm that has a large volume of quotes would likely be categorized in one of the upper tiers, and would not be assessed a fee for this traffic directly as they would under a more directly metered model. In contrast, strictly variable or metered funding models based on message volume are far more likely to affect market behavior. In approving the CAT NMS Plan, the SEC stated that "[t]he Participants also offered a reasonable basis for establishing a funding model based on broad tiers, in that it may be . . . less likely to have an incremental deterrent effect on liquidity provision."⁴⁴

The funding model also is structured to avoid a reduction market quality

because it discounts Options Market Maker and equity market maker quotes when calculating message traffic for Options Market Makers and equity market makers, respectively. As discussed in more detail below, the Operating Committee determined to discount the Options Market Maker quotes by the trade to quote ratio for options when calculating message traffic for Options Market Makers. Similarly, to avoid disincentives to quoting behavior on the equities side as well, the Operating Committee determined to discount equity market maker quotes by the trade to quote ratio for equities when calculating message traffic for equity market makers. The proposed discounts recognize the value of the market makers' quoting activity to the market as a whole.

The CAT NMS Plan is further structured to avoid potential conflicts raised by the Operating Committee determining fees applicable to its own members—the Participants. First, the Company will operate on a "break-even" basis, with fees imposed to cover costs and an appropriate reserve. Any surpluses will be treated as an operational reserve to offset future fees and will not be distributed to the Participants as profits.⁴⁵ To ensure that the Participants' operation of the CAT will not contribute to the funding of their other operations, Section 11.1(c) of the CAT NMS Plan specifically states that "[a]ny surplus of the Company's revenues over its expenses shall be treated as an operational reserve to offset future fees." In addition, as set forth in Article VIII of the CAT NMS Plan, the Company "intends to operate in a manner such that it qualifies as a 'business league' within the meaning of Section 501(c)(6) of the [Internal Revenue] Code." To qualify as a business league, an organization must "not [be] organized for profit and no part of the net earnings of [the organization can] inure[] to the benefit of any private shareholder or individual."⁴⁶ As the SEC stated when approving the CAT NMS Plan, "the Commission believes that the Company's application for Section 501(c)(6) business league status addresses issues raised by commenters about the Plan's proposed allocation of profit and loss by mitigating concerns that the Company's earnings could be used to benefit individual Participants."⁴⁷ The Internal Revenue Service recently has determined that the Company is exempt from federal income

offered a reasonable basis for establishing a funding model based on broad tiers, in that it may be easier to implement." Approval Order at 84796.

³⁶ Approval Order at 85005.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Section 11.3(a) and (b) of the CAT NMS Plan.

⁴⁰ Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85005.

⁴¹ Section 11.3(b) of the CAT NMS Plan.

⁴² The Operating Committee notes that this analysis did not place MIAX PEARL in Tier 1 or Tier 2 since the exchange commenced trading on February 6, 2017.

⁴³ Section 11.2(e) of the CAT NMS Plan.

⁴⁴ Approval Order at 84796.

⁴⁵ *Id.* at 84792.

⁴⁶ 26 U.S.C. 501(c)(6).

⁴⁷ Approval Order at 84793.

tax under Section 501(c)(6) of the Internal Revenue Code.

The funding model also is structured to take into account distinctions in the securities trading operations of Participants and Industry Members. For example, the Operating Committee designed the model to address the different trading characteristics in the OTC Equity Securities market. Specifically, the Operating Committee proposes to discount the OTC Equity Securities market share of Execution Venue ATSs trading OTC Equity Securities as well as the market share of the FINRA ORF by the average shares per trade ratio between NMS Stocks and OTC Equity Securities to adjust for the greater number of shares being traded in the OTC Equity Securities market, which is generally a function of a lower per share price for OTC Equity Securities when compared to NMS Stocks. In addition, the Operating Committee also proposes to discount Options Market Maker and equity market maker message traffic in recognition of their role in the securities markets. Furthermore, the funding model creates separate tiers for Equity and Options Execution Venues due to the different trading characteristics of those markets.

Finally, by adopting a CAT-specific fee, the Operating Committee will be fully transparent regarding the costs of the CAT. Charging a general regulatory fee, which would be used to cover CAT costs as well as other regulatory costs, would be less transparent than the selected approach of charging a fee designated to cover CAT costs only.

A full description of the funding model is set forth below. This description includes the framework for the funding model as set forth in the CAT NMS Plan, as well as the details as to how the funding model will be applied in practice, including the number of fee tiers and the applicable fees for each tier. The complete funding model is described below, including those fees that are to be paid by the Participants. The proposed Consolidated Audit Trail Funding Fees, however, do not apply to the Participants; the proposed Consolidated Audit Trail Funding Fees only apply to Industry Members. The CAT Fees for Participants will be imposed separately by the Operating Committee pursuant to the CAT NMS Plan.

(A) Funding Principles

Section 11.2 of the CAT NMS Plan sets forth the principles that the Operating Committee applied in establishing the funding for the Company. The Operating Committee has

considered these funding principles as well as the other funding requirements set forth in the CAT NMS Plan and in Rule 613 in developing the proposed funding model. The following are the funding principles in Section 11.2 of the CAT NMS Plan:

- To create transparent, predictable revenue streams for the Company that are aligned with the anticipated costs to build, operate and administer the CAT and other costs of the Company;
- To establish an allocation of the Company's related costs among Participants and Industry Members that is consistent with the Exchange Act, taking into account the timeline for implementation of the CAT and distinctions in the securities trading operations of Participants and Industry Members and their relative impact upon the Company's resources and operations;
- To establish a tiered fee structure in which the fees charged to: (i) CAT Reporters that are Execution Venues, including ATSs, are based upon the level of market share; (ii) Industry Members' non-ATS activities are based upon message traffic; (iii) the CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether Execution Venue and/or Industry Members);
- To provide for ease of billing and other administrative functions;
- To avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality; and
- To build financial stability to support the Company as a going concern.

(B) Industry Member Tiering

Under Section 11.3(b) of the CAT NMS Plan, the Operating Committee is required to establish fixed fees to be payable by Industry Members, based on message traffic generated by such Industry Member, with the Operating Committee establishing at least five and no more than nine tiers.

The CAT NMS Plan clarifies that the fixed fees payable by Industry Members pursuant to Section 11.3(b) shall, in addition to any other applicable message traffic, include message traffic generated by: (i) An ATS that does not execute orders that is sponsored by such Industry Member; and (ii) routing orders to and from any ATS sponsored by such Industry Member. In addition, the Industry Member fees will apply to

Industry Members that act as routing broker-dealers for exchanges. The Industry Member fees will not be applicable, however, to an ATS that qualifies as an Execution Venue, as discussed in more detail in the section on Execution Venue tiering.

In accordance with Section 11.3(b), the Operating Committee approved a tiered fee structure for Industry Members (other than Execution Venue ATSs) as described in this section. In determining the tiers, the Operating Committee considered the funding principles set forth in Section 11.2 of the CAT NMS Plan, seeking to create funding tiers that take into account the relative impact on CAT System resources of different Industry Members, and that establish comparable fees among the CAT Reporters with the most Reportable Events. The Operating Committee has determined that establishing seven tiers results in an allocation of fees that distinguishes between Industry Members with differing levels of message traffic. Thus, each such Industry Member will be placed into one of seven tiers of fixed fees, based on "message traffic" for a defined period (as discussed below).

A seven tier structure was selected to provide a wide range of levels for tiering Industry Members such that Industry Members submitting significantly less message traffic to the CAT would be adequately differentiated from Industry Members submitting substantially more message traffic. The Operating Committee considered historical message traffic from multiple time periods, generated by Industry Members across all exchanges and as submitted to FINRA's Order Audit Trail System ("OATS"), and considered the distribution of firms with similar levels of message traffic, grouping together firms with similar levels of message traffic. Based on this, the Operating Committee determined that seven tiers would group firms with similar levels of message traffic, charging those firms with higher impact on the CAT more, while lowering the burden on Industry Members that have less CAT-related activity. Furthermore, the selection of seven tiers establishes comparable fees among the largest CAT Reporters.

Each Industry Member (other than Execution Venue ATSs) will be ranked by message traffic and tiered by predefined Industry Member percentages (the "Industry Member Percentages"). The Operating Committee determined to use predefined percentages rather than fixed volume thresholds to ensure that the total CAT Fees collected recover the expected CAT costs regardless of

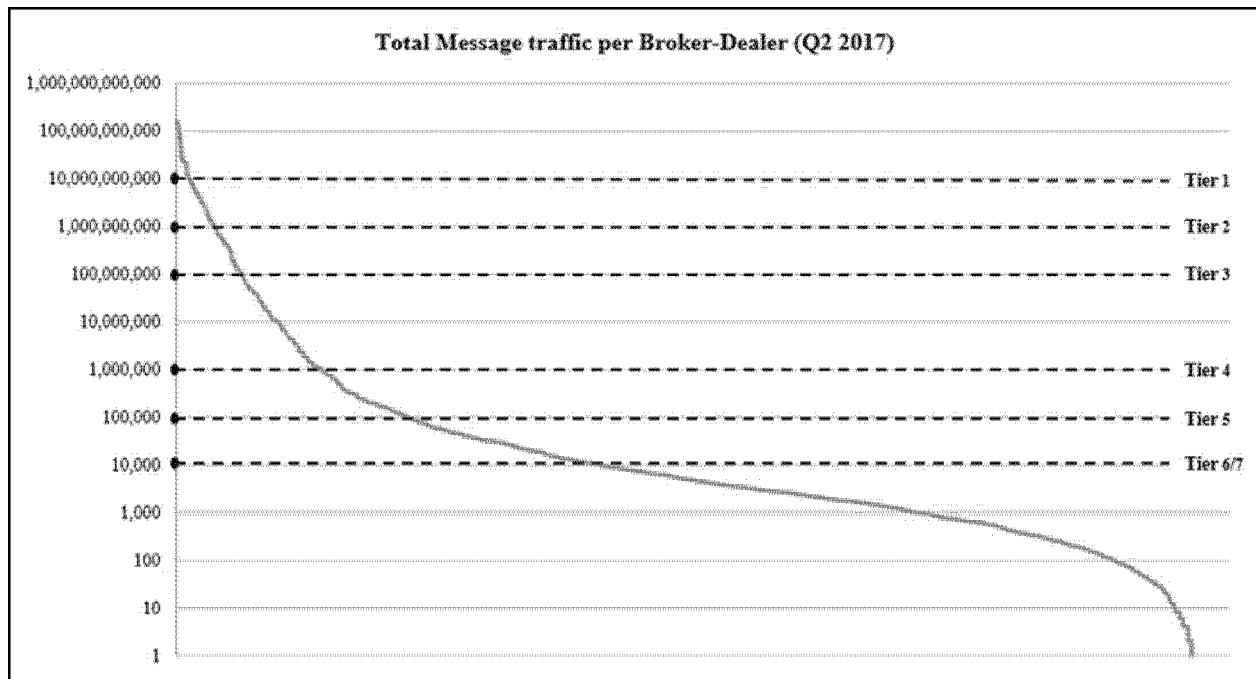
changes in the total level of message traffic. To determine the fixed percentage of Industry Members in each tier, the Operating Committee analyzed historical message traffic generated by Industry Members across all exchanges and as submitted to OATS, and considered the distribution of firms with similar levels of message traffic, grouping together firms with similar levels of message traffic. Based on this, the Operating Committee identified seven tiers that would group firms with similar levels of message traffic.

The percentage of costs recovered by each Industry Member tier will be determined by predefined percentage allocations (the "Industry Member Recovery Allocation"). In determining the fixed percentage allocation of costs recovered for each tier, the Operating Committee considered the impact of CAT Reporter message traffic on the CAT System as well as the distribution of total message volume across Industry Members while seeking to maintain comparable fees among the largest CAT Reporters. Accordingly, following the determination of the percentage of Industry Members in each tier, the Operating Committee identified the

percentage of total market volume for each tier based on the historical message traffic upon which Industry Members had been initially ranked. Taking this into account along with the resulting percentage of total recovery, the percentage allocation of costs recovered for each tier were assigned, allocating higher percentages of recovery to tiers with higher levels of message traffic while avoiding any inappropriate burden on competition. Furthermore, by using percentages of Industry Members and costs recovered per tier, the Operating Committee sought to include elasticity within the funding model, allowing the funding model to respond to changes in either the total number of Industry Members or the total level of message traffic.

The following chart illustrates the breakdown of seven Industry Member tiers across the monthly average of total equity and equity options orders, cancels, quotes and executions in the second quarter of 2017 as well as message traffic thresholds between the largest of Industry Member message traffic gaps. The Operating Committee referenced similar distribution illustrations to determine the

appropriate division of Industry Member percentages in each tier by considering the grouping of firms with similar levels of message traffic and seeking to identify relative breakpoints in the message traffic between such groupings. In reviewing the chart and its corresponding table, note that while these distribution illustrations were referenced to help differentiate between Industry Member tiers, the proposed funding model is driven by fixed percentages of Industry Members across tiers to account for fluctuating levels of message traffic over time. This approach also provides financial stability for the CAT by ensuring that the funding model will recover the required amounts regardless of changes in the number of Industry Members or the amount of message traffic. Actual messages in any tier will vary based on the actual traffic in a given measurement period, as well as the number of firms included in the measurement period. The Industry Member Percentages and Industry Member Recovery Allocation for each tier will remain fixed with each Industry Member's tier to be reassigned periodically, as described below in Section 3(a)(2)(I).



Industry Member tier	Approximate message traffic per Industry Member (Q2 2017) (orders, quotes, cancels and executions)
Tier 1	>10,000,000,000
Tier 2	1,000,000,000–10,000,000,000
Tier 3	100,000,000–1,000,000,000
Tier 4	1,000,000–100,000,000
Tier 5	100,000–1,000,000

Industry Member tier	Approximate message traffic per Industry Member (Q2 2017) (orders, quotes, cancels and executions)
Tier 6	10,000–100,000
Tier 7	<10,000

Based on the above analysis, the Operating Committee approved the following Industry Member Percentages and Industry Member Recovery Allocations:

Industry Member tier	Percentage of Industry Members	Percentage of Industry Member recovery	Percentage of total recovery
Tier 1	0.900	12.00	9.00
Tier 2	2.150	20.50	15.38
Tier 3	2.800	18.50	13.88
Tier 4	7.750	32.00	24.00
Tier 5	8.300	10.00	7.50
Tier 6	18.800	6.00	4.50
Tier 7	59.300	1.00	0.75
Total	100	100	75

For the purposes of creating these tiers based on message traffic, the Operating Committee determined to define the term “message traffic” separately for the period before the commencement of CAT reporting and for the period after the start of CAT reporting. The different definition for message traffic is necessary as there will be no Reportable Events as defined in the Plan, prior to the commencement of CAT reporting. Accordingly, prior to the start of CAT reporting, “message traffic” will be comprised of historical equity and equity options orders, cancels, quotes and executions provided by each exchange and FINRA over the previous three months. Prior to the start of CAT reporting, orders would be comprised of the total number of equity and equity options orders received and originated by a member of an exchange or FINRA over the previous three-month period, including principal orders, cancel/replace orders, market maker orders originated by a member of an exchange, and reserve (iceberg) orders as well as executions originated by a member of FINRA, and excluding order rejects, system-modified orders, order routes and implied orders.⁴⁸ In addition, prior to the start of CAT reporting, cancels would be comprised of the total number of equity and equity option cancels received and originated by a member of an exchange or FINRA over a three-

month period, excluding order modifications (e.g., order updates, order splits, partial cancels) and multiple cancels of a complex order. Furthermore, prior to the start of CAT reporting, quotes would be comprised of information readily available to the exchanges and FINRA, such as the total number of historical equity and equity options quotes received and originated by a member of an exchange or FINRA over the prior three-month period. Additionally, prior to the start of CAT reporting, executions would be comprised of the total number of equity and equity option executions received or originated by a member of an exchange or FINRA over a three-month period.

After an Industry Member begins reporting to the CAT, “message traffic” will be calculated based on the Industry Member’s Reportable Events reported to the CAT as will be defined in the Technical Specifications.⁴⁹

Quotes of Options Market Makers and equity market makers will be included in the calculation of total message traffic for those market makers for purposes of tiering under the CAT funding model both prior to CAT reporting and once CAT reporting commences.⁵⁰ To

address potential concerns regarding burdens on competition or market quality of including quotes in the calculation of message traffic, however, the Operating Committee determined to discount the Options Market Maker quotes by the trade to quote ratio for options when calculating message traffic for Options Market Makers. Based on available data for June 2016 through June 2017, the trade to quote ratio for options is 0.01%. Similarly, to avoid disincentives to quoting behavior on the equities side, the Operating Committee determined to discount equity market maker quotes by the trade to quote ratio for equities. Based on available data for June 2016 through June 2017, the trade to quote ratio for equities is 5.43%.⁵¹ The trade to quote ratio for options and the trade to quote ratio for equities will be calculated every three months when tiers are recalculated (as discussed below).

done by both the Options Exchange and the Options Market Maker, as required by Rule 613 of Regulation NMS. See Securities Exchange Act Release No. 77265 (March 1, 2017), 81 FR 11856 (March 7, 2016). This exemption applies to Options Market Maker quotes for CAT reporting purposes only. Therefore, notwithstanding the reporting exemption provided for Options Market Maker quotes, Options Market Maker quotes will be included in the calculation of total message traffic for Options Market Makers for purposes of tiering under the CAT funding model both prior to CAT reporting and once CAT reporting commences.

⁵¹ The trade to quote ratios were calculated based on the inverse of the average of the monthly equity SIP and OPRA quote to trade ratios from June 2016—June 2017 that were compiled by the Financial Information Forum using data from Nasdaq and SIAC.

⁴⁸ Consequently, firms that do not have “message traffic” reported to an exchange or OATS before they are reporting to the CAT would not be subject to a fee until they begin to report information to CAT.

⁴⁹ If an Industry Member (other than an Execution Venue ATS) has no orders, cancels, quotes and executions prior to the commencement of CAT Reporting, or no Reportable Events after CAT reporting commences, then the Industry Member would not have a CAT Fee obligation.

⁵⁰ The SEC approved exemptive relief permitting Options Market Maker quotes to be reported to the Central Repository by the relevant Options Exchange in lieu of requiring that such reporting be

The Operating Committee has determined to calculate fee tiers every three months, on a calendar quarter basis, based on message traffic from the prior three months. Based on its analysis of historical data, the Operating Committee believes that calculating tiers based on three months of data will provide the best balance between reflecting changes in activity by Industry Members while still providing predictability in the tiering for Industry Members. Because fee tiers will be calculated based on message traffic from the prior three months, the Operating Committee will begin calculating message traffic based on an Industry Member's Reportable Events reported to the CAT once the Industry Member has been reporting to the CAT for three months. Prior to that, fee tiers will be calculated as discussed above with regard to the period prior to CAT reporting.

(C) Execution Venue Tiering

Under Section 11.3(a) of the CAT NMS Plan, the Operating Committee is required to establish fixed fees payable by Execution Venues. Section 1.1 of the CAT NMS Plan defines an Execution Venue as "a Participant or an alternative trading system ("ATS") (as defined in Rule 300 of Regulation ATS) that operates pursuant to Rule 301 of Regulation ATS (excluding any such ATS that does not execute orders)."⁵²

The Operating Committee determined that ATSs should be included within the definition of Execution Venue. The Operating Committee believes that it is appropriate to treat ATSs as Execution Venues under the proposed funding model since ATSs have business models that are similar to those of exchanges, and ATSs also compete with exchanges.

Given the differences between Execution Venues that trade NMS Stocks and/or OTC Equity Securities and Execution Venues that trade Listed Options, Section 11.3(a) addresses Execution Venues that trade NMS Stocks and/or OTC Equity Securities separately from Execution Venues that trade Listed Options. Equity and Options Execution Venues are treated separately for two reasons. First, the differing quoting behavior of Equity and Options Execution Venues makes comparison of activity between such Execution Venues difficult. Second, Execution Venue tiers are calculated based on market share of share volume, and it is therefore difficult to compare

market share between asset classes (*i.e.*, equity shares versus options contracts). Discussed below is how the funding model treats the two types of Execution Venues.

(I) NMS Stocks and OTC Equity Securities

Section 11.3(a)(i) of the CAT NMS Plan states that each Execution Venue that (i) executes transactions or, (ii) in the case of a national securities association, has trades reported by its members to its trade reporting facility or facilities for reporting transactions effected otherwise than on an exchange, in NMS Stocks or OTC Equity Securities will pay a fixed fee depending on the market share of that Execution Venue in NMS Stocks and OTC Equity Securities, with the Operating Committee establishing at least two and not more than five tiers of fixed fees, based on an Execution Venue's NMS Stocks and OTC Equity Securities market share. For these purposes, market share for Execution Venues that execute transactions will be calculated by share volume, and market share for a national securities association that has trades reported by its members to its trade reporting facility or facilities for reporting transactions effected otherwise than on an exchange in NMS Stocks or OTC Equity Securities will be calculated based on share volume of trades reported, provided, however, that the share volume reported to such national securities association by an Execution Venue shall not be included in the calculation of such national security association's market share.

In accordance with Section 11.3(a)(i) of the CAT NMS Plan, the Operating Committee approved a tiered fee structure for Equity Execution Venues and Option Execution Venues. In determining the Equity Execution Venue Tiers, the Operating Committee considered the funding principles set forth in Section 11.2 of the CAT NMS Plan, seeking to create funding tiers that take into account the relative impact on system resources of different Equity Execution Venues, and that establish comparable fees among the CAT Reporters with the most Reportable Events. Each Equity Execution Venue will be placed into one of four tiers of fixed fees, based on the Execution Venue's NMS Stocks and OTC Equity Securities market share. In choosing four tiers, the Operating Committee performed an analysis similar to that discussed above with regard to the non-Execution Venue Industry Members to determine the number of tiers for Equity Execution Venues. The Operating Committee determined to establish four

tiers for Equity Execution Venues, rather than a larger number of tiers as established for non-Execution Venue Industry Members, because the four tiers were sufficient to distinguish between the smaller number of Equity Execution Venues based on market share. Furthermore, the selection of four tiers serves to help establish comparability among the largest CAT Reporters.

Each Equity Execution Venue will be ranked by market share and tiered by predefined Execution Venue percentages, (the "Equity Execution Venue Percentages"). In determining the fixed percentage of Equity Execution Venues in each tier, the Operating Committee reviewed historical market share of share volume for Execution Venues. Equity Execution Venue market shares of share volume were sourced from market statistics made publicly-available by Bats Global Markets, Inc. ("Bats"). ATS market shares of share volume was sourced from market statistics made publicly-available by FINRA. FINRA trade reporting facility ("TRF") and ORF market share of share volume was sourced from market statistics made publicly available by FINRA. Based on data from FINRA and *otcmrkt.com*, ATSs accounted for 39.12% of the share volume across the TRFs and ORFs during the recent tiering period. A 39.12/60.88 split was applied to the ATS and non-ATS breakdown of FINRA market share, with FINRA tiered based only on the non-ATS portion of its market share of share volume.

The Operating Committee determined to discount the OTC Equity Securities market share of Execution Venue ATSs trading OTC Equity Securities as well as the market share of the FINRA ORF in recognition of the different trading characteristics of the OTC Equity Securities market as compared to the market in NMS Stocks. Many OTC Equity Securities are priced at less than one dollar—and a significant number at less than one penny—per share and low-priced shares tend to trade in larger quantities. Accordingly, a disproportionately large number of shares are involved in transactions involving OTC Equity Securities versus NMS Stocks. Because the proposed fee tiers are based on market share calculated by share volume, Execution Venue ATSs trading OTC Equity Securities and FINRA would likely be subject to higher tiers than their operations may warrant. To address this potential concern, the Operating Committee determined to discount the OTC Equity Securities market share of Execution Venue ATSs trading OTC Equity Securities and the market share

⁵² Although FINRA does not operate an execution venue, because it is a Participant, it is considered an "Execution Venue" under the Plan for purposes of determining fees.

of the FINRA ORF by multiplying such market share by the average shares per trade ratio between NMS Stocks and OTC Equity Securities in order to adjust for the greater number of shares being traded in the OTC Equity Securities market. Based on available data for the second quarter of 2017, the average shares per trade ratio between NMS Stocks and OTC Equity Securities is 0.17%.⁵³ The average shares per trade ratio between NMS Stocks and OTC Equity Securities will be recalculated every three months when tiers are recalculated.

Based on this, the Operating Committee considered the distribution of Execution Venues, and grouped together Execution Venues with similar levels of market share. The percentage of costs recovered by each Equity

Execution Venue tier will be determined by predefined percentage allocations (the “Equity Execution Venue Recovery Allocation”). In determining the fixed percentage allocation of costs to be recovered from each tier, the Operating Committee considered the impact of CAT Reporter market share activity on the CAT System as well as the distribution of total market volume across Equity Execution Venues while seeking to maintain comparable fees among the largest CAT Reporters. Accordingly, following the determination of the percentage of Execution Venues in each tier, the Operating Committee identified the percentage of total market volume for each tier based on the historical market share upon which Execution Venues had been initially ranked. Taking this

into account along with the resulting percentage of total recovery, the percentage allocation of cost recovery for each tier were assigned, allocating higher percentages of recovery to the tier with a higher level of market share while avoiding any inappropriate burden on competition. Furthermore, by using percentages of Equity Execution Venues and cost recovery per tier, the Operating Committee sought to include elasticity within the funding model, allowing the funding model to respond to changes in either the total number of Equity Execution Venues or changes in market share.

Based on this analysis, the Operating Committee approved the following Equity Execution Venue Percentages and Recovery Allocations:

• Equity Execution Venue tier	• Percentage of Equity Execution Venues	• Percentage of Execution Venue recovery	• Percentage of total recovery
• Tier 1	• 25.00	• 33.25	• 8.31
• Tier 2	• 42.00	• 25.73	• 6.43
• Tier 3	• 23.00	• 8.00	• 2.00
• Tier 4	• 10.00	• 0.02	• 0.01
• Total	• 100	• 67	• 16.75

(II) Listed Options

Section 11.3(a)(ii) of the CAT NMS Plan states that each Execution Venue that executes transactions in Listed Options will pay a fixed fee depending on the Listed Options market share of that Execution Venue, with the Operating Committee establishing at least two and no more than five tiers of fixed fees, based on an Execution Venue’s Listed Options market share. For these purposes, market share will be calculated by contract volume.

In accordance with Section 11.3(a)(ii) of the CAT NMS Plan, the Operating Committee approved a tiered fee structure for Options Execution Venues. In determining the tiers, the Operating Committee considered the funding principles set forth in Section 11.2 of the CAT NMS Plan, seeking to create funding tiers that take into account the relative impact on system resources of different Options Execution Venues, and that establish comparable fees among the CAT Reporters with the most Reportable Events. Each Options Execution Venue will be placed into one of two tiers of fixed fees, based on the Execution Venue’s Listed Options market share. In choosing two tiers, the

Operating Committee performed an analysis similar to that discussed above with regard to Industry Members (other than Execution Venue ATSS) to determine the number of tiers for Options Execution Venues. The Operating Committee determined to establish two tiers for Options Execution Venues, rather than a larger number, because the two tiers were sufficient to distinguish between the smaller number of Options Execution Venues based on market share.

Furthermore, due to the smaller number of Options Execution Venues, the incorporation of additional Options Execution Venue tiers would result in significantly higher fees for Tier 1 Options Execution Venues and reduce comparability between Execution Venues and Industry Members. Furthermore, the selection of two tiers served to establish comparable fees among the largest CAT Reporters.

Each Options Execution Venue will be ranked by market share and tiered by predefined Execution Venue percentages, (the “Options Execution Venue Percentages”). To determine the fixed percentage of Options Execution Venues in each tier, the Operating

Committee analyzed the historical and publicly available market share of Options Execution Venues to group Options Execution Venues with similar market shares across the tiers. Options Execution Venue market share of share volume were sourced from market statistics made publicly-available by Bats. The process for developing the Options Execution Venue Percentages was the same as discussed above with regard to Equity Execution Venues.

The percentage of costs to be recovered from each Options Execution Venue tier will be determined by predefined percentage allocations (the “Options Execution Venue Recovery Allocation”). In determining the fixed percentage allocation of cost recovery for each tier, the Operating Committee considered the impact of CAT Reporter market share activity on the CAT System as well as the distribution of total market volume across Options Execution Venues while seeking to maintain comparable fees among the largest CAT Reporters. Furthermore, by using percentages of Options Execution Venues and cost recovery per tier, the Operating Committee sought to include elasticity within the funding model,

⁵³ The average shares per trade ratio for both NMS Stocks and OTC Equity Securities from the second quarter of 2017 was calculated using publicly

available market volume data from Bats and OTC Markets Group, and the totals were divided to

determine the average number of shares per trade between NMS Stocks and OTC Equity Securities.

allowing the funding model to respond to changes in either the total number of Options Execution Venues or changes in market share. The process for

developing the Options Execution Venue Recovery Allocation was the same as discussed above with regard to Equity Execution Venues.

Based on this analysis, the Operating Committee approved the following Options Execution Venue Percentages and Recovery Allocations:

Options Execution Venue tier	Percentage of Options Execution Venues	Percentage of Execution Venue recovery	Percentage of total recovery
Tier 1	75.00	28.25	7.06
Tier 2	25.00	4.75	1.19
Total	100	33	8.25

(III) Market Share/Tier Assignments

The Operating Committee determined that, prior to the start of CAT reporting, market share for Execution Venues would be sourced from publicly-available market data. Options and equity volumes for Participants will be sourced from market data made publicly available by Bats while Execution Venue ATS volumes will be sourced from market data made publicly available by FINRA and OTC Markets. Set forth in the Appendix are two charts, one listing the current Equity Execution Venues, each with its rank and tier, and one listing the current Options Execution Venues, each with its rank and tier.

After the commencement of CAT reporting, market share for Execution Venues will be sourced from data reported to the CAT. Equity Execution Venue market share will be determined by calculating each Equity Execution Venue's proportion of the total volume of NMS Stock and OTC Equity shares reported by all Equity Execution Venues during the relevant time period (with the discounting of OTC Equity Securities market share of Execution Venue ATSs trading OTC Equity Securities as well as the market share of the FINRA ORF, as described above). Similarly, market share for Options Execution Venues will be determined by calculating each Options Execution Venue's proportion of the total volume of Listed Options contracts reported by all Options Execution Venues during the relevant time period.

The Operating Committee has determined to calculate fee tiers for Execution Venues every three months based on market share from the prior three months. Based on its analysis of historical data, the Operating Committee believes calculating tiers based on three months of data will provide the best balance between reflecting changes in activity by Execution Venues while still providing predictability in the tiering for Execution Venues.

(D) Allocation of Costs

In addition to the funding principles discussed above, including comparability of fees, Section 11.1(c) of the CAT NMS Plan also requires expenses to be fairly and reasonably shared among the Participants and Industry Members. Accordingly, in developing the proposed fee schedules pursuant to the funding model, the Operating Committee calculated how the CAT costs would be allocated between Industry Members and Execution Venues, and how the portion of CAT costs allocated to Execution Venues would be allocated between Equity Execution Venues and Options Execution Venues. These determinations are described below.

(I) Allocation Between Industry Members and Execution Venues

In determining the cost allocation between Industry Members (other than Execution Venue ATSs) and Execution Venues, the Operating Committee analyzed a range of possible splits for revenue recovery from such Industry Members and Execution Venues, including 80%/20%, 75%/25%, 70%/30% and 65%/35% allocations. Based on this analysis, the Operating Committee determined that 75 percent of total costs recovered would be allocated to Industry Members (other than Execution Venue ATSs) and 25 percent would be allocated to Execution Venues. The Operating Committee determined that this 75%/25% division maintained the greatest level of comparability across the funding model. For example, the cost allocation establishes fees for the largest Industry Members (i.e., those Industry Members in Tiers 1) that are comparable to the largest Equity Execution Venues and Options Execution Venues (i.e., those Execution Venues in Tier 1).

Furthermore, the allocation of total CAT cost recovery recognizes the difference in the number of CAT Reporters that are Industry Members versus CAT Reporters that are Execution

Venues. Specifically, the cost allocation takes into consideration that there are approximately 23 times more Industry Members expected to report to the CAT than Execution Venues (e.g., an estimated 1541 Industry Members versus 67 Execution Venues as of June 2017).

(II) Allocation Between Equity Execution Venues and Options Execution Venues

The Operating Committee also analyzed how the portion of CAT costs allocated to Execution Venues would be allocated between Equity Execution Venues and Options Execution Venues. In considering this allocation of costs, the Operating Committee analyzed a range of alternative splits for revenue recovered between Equity and Options Execution Venues, including a 70%/30%, 67%/33%, 65%/35%, 50%/50% and 25%/75% split. Based on this analysis, the Operating Committee determined to allocate 67 percent of Execution Venue costs recovered to Equity Execution Venues and 33 percent to Options Execution Venues. The Operating Committee determined that a 67%/33% allocation between Equity and Options Execution Venues maintained the greatest level of fee equitability and comparability based on the current number of Equity and Options Execution Venues. For example, the allocation establishes fees for the larger Equity Execution Venues that are comparable to the larger Options Execution Venues. Specifically, Tier 1 Equity Execution Venues would pay a quarterly fee of \$81,047 and Tier 1 Options Execution Venues would pay a quarterly fee of \$81,379. In addition to fee comparability between Equity Execution Venues and Options Execution Venues, the allocation also establishes equitability between larger (Tier 1) and smaller (Tier 2) Execution Venues based upon the level of market share. Furthermore, the allocation is intended to reflect the relative levels of current equity and options order events.

(E) Fee Levels

The Operating Committee determined to establish a CAT-specific fee to collectively recover the costs of building and operating the CAT. Accordingly, under the funding model, the sum of the CAT Fees is designed to recover the total cost of the CAT. The Operating Committee has determined overall CAT costs to be comprised of Plan Processor costs and non-Plan Processor costs, which are estimated to be \$50,700,000 in total for the year beginning November 21, 2016.⁵⁴

The Plan Processor costs relate to costs incurred and to be incurred through November 21, 2017 by the Plan Processor and consist of the Plan Processor's current estimates of average yearly ongoing costs, including development costs, which total \$37,500,000. This amount is based upon

the fees due to the Plan Processor pursuant to the Company's agreement with the Plan Processor.

The non-Plan Processor estimated costs incurred and to be incurred by the Company through November 21, 2017 consist of three categories of costs. The first category of such costs are third party support costs, which include legal fees, consulting fees and audit fees from November 21, 2016 until the date of filing as well as estimated third party support costs for the rest of the year. These amount to an estimated \$5,200,000. The second category of non-Plan Processor costs are estimated cyber-insurance costs for the year. Based on discussions with potential cyber-insurance providers, assuming \$2–5 million cyber-insurance premium on \$100 million coverage, the Company has estimated \$3,000,000 for the annual cost. The final cost figures will be

determined following receipt of final underwriter quotes. The third category of non-Plan Processor costs is the CAT operational reserve, which is comprised of three months of ongoing Plan Processor costs (\$9,375,000), third party support costs (\$1,300,000) and cyber-insurance costs (\$750,000). The Operating Committee aims to accumulate the necessary funds to establish the three-month operating reserve for the Company through the CAT Fees charged to CAT Reporters for the year. On an ongoing basis, the Operating Committee will account for any potential need to replenish the operating reserve or other changes to total cost during its annual budgeting process. The following table summarizes the Plan Processor and non-Plan Processor cost components which comprise the total estimated CAT costs of \$50,700,000 for the covered period.

Cost category	Cost component	Amount
Plan Processor	Operational Costs	\$37,500,000
	Third Party Support Costs	5,200,000
Non-Plan Processor	Operational Reserve	⁵⁵ 5,000,000
	Cyber-insurance Costs	3,000,000
Estimated Total		50,700,000

Based on these estimated costs and the calculations for the funding model described above, the Operating Committee determined to impose the following fees:⁵⁶

For Industry Members (other than Execution Venue ATs):

Tier	Percentage of Industry Members	Quarterly CAT fee
1	0.900	\$81,483
2	2.150	59,055
3	2.800	40,899
4	7.750	25,566
5	8.300	7,428
6	18.800	1,968
7	59.300	105

For Execution Venues for NMS Stocks and OTC Equity Securities:

Tier	Percentage of Equity Execution Venues	Quarterly CAT Fee
1	25.00	\$81,048
2	42.00	37,062
3	23.00	21,126
4	10.00	129

For Execution Venues for Listed Options:

Tier	Percentage of Options Execution Venues	Quarterly CAT fee
1	75.00	\$81,381
2	25.00	37,629

The Operating Committee has calculated the schedule of effective fees for Industry Members (other than Execution Venue ATs) and Execution Venues in the following manner. Note that the calculation of CAT Fees assumes 52 Equity Execution Venues, 15 Options Execution Venues and 1,541 Industry Members (other than Execution Venue ATs) as of June 2017.

CALCULATION OF ANNUAL TIER FEES FOR INDUSTRY MEMBERS
["IM"]

Industry Member tier	Percentage of Industry Members	Percentage of Industry Member recovery	Percentage of total recovery
Tier 1	0.900	12.00	9.00
Tier 2	2.150	20.50	15.38
Tier 3	2.800	18.50	13.88
Tier 4	7.750	32.00	24.00
Tier 5	8.300	10.00	7.50

⁵⁴ It is anticipated that CAT-related costs incurred prior to November 21, 2016 will be addressed via a separate filing.

⁵⁵ This \$5,000,000 represents the gradual accumulation of the funds for a target operating reserve of \$11,425,000.

⁵⁶ Note that all monthly, quarterly and annual CAT Fees have been rounded to the nearest dollar.

CALCULATION OF ANNUAL TIER FEES FOR INDUSTRY MEMBERS—Continued
 [“IM”]

Industry Member tier	Percentage of Industry Members	Percentage of Industry Member recovery	Percentage of total recovery
Tier 6	18.800	6.00	4.50
Tier 7	59.300	1.00	0.75
Total	100	100	75

Industry Member tier	Estimated number of Industry Members
Tier 1	14
Tier 2	33
Tier 3	43
Tier 4	119
Tier 5	128
Tier 6	290
Tier 7	914
Total	1,541

Calculation 1.1 (Calculation of a Tier 1 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 0.9\% \text{ [% of Tier 1 IMs]} = 14 \text{ [Estimated Tier 1 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 12\% \text{ [% of Tier 1 IM Recovery]}}{14 \text{ [Estimated Tier 1 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$27,161}$$

Calculation 1.2 (Calculation of a Tier 2 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 2.15\% \text{ [% of Tier 2 IMs]} = 33 \text{ [Estimated Tier 2 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 20.5\% \text{ [% of Tier 2 IM Recovery]}}{33 \text{ [Estimated Tier 2 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$19,685}$$

Calculation 1.3 (Calculation of a Tier 3 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 2.125\% \text{ [% of Tier 3 IMs]} = 43 \text{ [Estimated Tier 3 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 18.5\% \text{ [% of Tier 3 IM Recovery]}}{43 \text{ [Estimated Tier 3 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$13,633}$$

Calculation 1.4 (Calculation of a Tier 4 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 7.75\% \text{ [% of Tier 4 IMs]} = 119 \text{ [Estimated Tier 4 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 32\% \text{ [% of Tier 4 IM Recovery]}}{119 \text{ [Estimated Tier 4 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$8522}$$

Calculation 1.5 (Calculation of a Tier 5 Industry Member Annual Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 8.3\% \text{ [% of Tier 5 IMs]} = 128 \text{ [Estimated Tier 5 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 7.75\% \text{ [% of Tier 5 IM Recovery]}}{128 \text{ [Estimated Tier 5 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$2476}$$

Calculation 1.6 (Calculation of a Tier 6 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 18.8\% \text{ [% of Tier 6 IMs]} = 290 \text{ [Estimated Tier 6 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 6\% \text{ [% of Tier 6 IM Recovery]}}{290 \text{ [Estimated Tier 6 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$656}$$

Calculation 1.7 (Calculation of a Tier 7 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 59.3\% \text{ [% of Tier 7 IMs]} = 914 \text{ [Estimated Tier 7 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 1\% \text{ [% of Tier 7 IM Recovery]}}{914 \text{ [Estimated Tier 7 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$35}$$

Calculation of Annual Tier Fees for Equity Execution Venues (“EV”)

Equity Execution Venue tier	Estimated number of Equity Execution Venues
Tier 1	13
Tier 2	22
Tier 3	12
Tier 4	5
Total	52

Calculation 2.1 (Calculation of a Tier 1 Equity Execution Venue Monthly Fee)

$$52 \text{ [Estimated Tot. Equity EVs]} \times 25\% \text{ [% of Tier 1 Equity EVs]} = 13 \text{ [Estimated Tier 1 Equity EVs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann.CAT Costs]} \times 33.25\% \text{ [EV \% of Tot.Ann.CAT Costs]} \times 26\% \text{ [% of Tier 1 Equity EV Recovery]}}{13 \text{ [Estimated Tier 1 Equity EVs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$27,016}$$

Calculation 2.2 (Calculation of a Tier 2 Equity Execution Venue Monthly Fee)

$$52 \text{ [Estimated Tot. Equity EVs]} \times 42\% \text{ [% of Tier 2 Equity EVs]} = 22 \text{ [Estimated Tier 2 Equity EVs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann.CAT Costs]} \times 25\% \text{ [EV \% of Tot.Ann.CAT Costs]} \times 25.73\% \text{ [% of Tier 2 Equity EV Recovery]}}{22 \text{ [Estimated Tier 2 Equity EVs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$12,353}$$

Calculation 2.3 (Calculation of a Tier 3 Equity Execution Venue Monthly Fee)

$$52 \text{ [Estimated Tot. Equity EVs]} \times 23\% \text{ [% of Tier 2 Equity EVs]} = 12 \text{ [Estimated Tier 2 Equity EVs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann.CAT Costs]} \times 25\% \text{ [EV \% of Tot.Ann.CAT Costs]} \times 8\% \text{ [% of Tier 2 Equity EV Recovery]}}{12 \text{ [Estimated Tier 2 Equity EVs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$7,042}$$

Calculation 2.4 (Calculation of a Tier 4 Equity Execution Venue Monthly Fee)

$$52 \text{ [Estimated Tot. Equity EVs]} \times 10\% \text{ [% of Tier 2 Equity EVs]} = 5 \text{ [Estimated Tier 2 Equity EVs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann.CAT Costs]} \times 25\% \text{ [EV \% of Tot.Ann.CAT Costs]} \times 0.02\% \text{ [% of Tier 2 Equity EV Recovery]}}{5 \text{ [Estimated Tier 2 Equity EVs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$42}$$

CALCULATION OF ANNUAL TIER FEES FOR OPTIONS EXECUTION VENUES (“EV”)

Options Execution Venue tier	Percentage of Options Execution Venues	Percentage of Execution Venue recovery	Percentage of total recovery
Tier 1	75.00	28.25	7.06
Tier 2	25.00	4.75	1.19
Total	100	33	8.25

Options Execution Venue tier	Estimated number of Options Execution Venues
Tier 1	11
Tier 2	4
Total	15

Calculation 3.1 (Calculation of a Tier 1 Options Execution Venue Monthly Fee)

$$15 \text{ [Estimated Tot. Options EVs]} \times 75\% \text{ [% of Tier 1 Options EVs]} = 11 \text{ [Estimated Tier 1 Options EVs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot.Ann.CAT Costs]} \times 25\% \text{ [EV \% of Tot.Ann.CAT Costs]} \times 28.25\% \text{ [% of Tier 1 Options EV Recovery]}}{11 \text{ [Estimated Tier 1 Options EVs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$27,127}$$

Calculation 3.2 (Calculation of a Tier 2 Options Execution Venue Annual Fee)

$$15 \text{ [Estimated Tot. Options EVs]} \times 25\% \text{ [% of Tier 2 Options EVs]} = 4 \text{ [Estimated Tier 2 Options EVs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot.Ann.CAT Costs]} \times 25\% \text{ [EV \% of Tot.Ann.CAT Costs]} \times 4.75\% \text{ [% of Tier 2 Options EV Recovery]}}{4 \text{ [Estimated Tier 2 Options EVs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$12,543}$$

TRACEABILITY OF TOTAL CAT FEES

Type	Industry Member tier	Estimated number of members	CAT fees paid annually	Total recovery
Industry Members	Tier 1	14	\$325,932	\$4,563,048

TRACEABILITY OF TOTAL CAT FEES—Continued

Type	Industry Member tier	Estimated number of members	CAT fees paid annually	Total recovery
	Tier 2	33	236,220	7,795,260
	Tier 3	43	163,596	7,034,628
	Tier 4	119	102,264	12,169,416
	Tier 5	128	29,712	3,803,136
	Tier 6	290	7,872	2,282,880
	Tier 7	914	420	383,880
Total .....	.....	1,541	.....	38,032,248
Equity Execution Venues	Tier 1	13	324,192	4,214,496
	Tier 2	22	148,248	3,261,456
	Tier 3	12	84,504	1,014,048
	Tier 4	5	516	2,580
Total .....	.....	52	.....	8,492,580
Options Execution Venues	Tier 1	11	\$325,524	\$3,580,764
	Tier 2	4	\$150,516	\$602,064
Total .....	.....	15	.....	\$4,182,828
Total .....	.....	.....	.....	\$50,700,000
Excess ⁵⁷ .....	.....	.....	.....	7,656

(F) Comparability of Fees

The funding principles require a funding model in which the fees charged to the CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether Execution Venue and/or Industry Members). Accordingly, in creating the model, the Operating Committee sought to establish comparable fees for the top tier of Industry Members (other than Execution Venue ATSS), Equity Execution Venues and Options Execution Venues. Specifically, each Tier 1 CAT Reporter would be required to pay a quarterly fee of approximately \$81,000.

(G) Billing Onset

Under Section 11.1(c) of the CAT NMS Plan, to fund the development and implementation of the CAT, the Company shall time the imposition and collection of all fees on Participants and Industry Members in a manner reasonably related to the timing when the Company expects to incur such development and implementation costs. The Company is currently incurring such development and implementation costs and will continue to do so prior

⁵⁷The amount in excess of the total CAT costs will contribute to the gradual accumulation of the target operating reserve of \$11.425 million.

to the commencement of CAT reporting and thereafter. In accordance with the CAT NMS Plan, all CAT Reporters, including both Industry Members and Execution Venues (including Participants), will be invoiced as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Participants and the operative date of the Plan amendment adopting CAT Fees for Participants.

(H) Changes to Fee Levels and Tiers

Section 11.3(d) of the CAT NMS Plan states that “[t]he Operating Committee shall review such fee schedule on at least an annual basis and shall make any changes to such fee schedule that it deems appropriate. The Operating Committee is authorized to review such fee schedule on a more regular basis, but shall not make any changes on more than a semi-annual basis unless, pursuant to a Supermajority Vote, the Operating Committee concludes that such change is necessary for the adequate funding of the Company.” With such reviews, the Operating Committee will review the distribution of Industry Members and Execution Venues across tiers, and make any updates to the percentage of CAT Reporters allocated to each tier as may be necessary. In addition, the reviews will evaluate the estimated ongoing CAT costs and the level of the operating reserve. To the extent that the total CAT costs decrease, the fees would be

adjusted downward, and to the extent that the total CAT costs increase, the fees would be adjusted upward.⁵⁸ Furthermore, any surplus of the Company’s revenues over its expenses is to be included within the operational reserve to offset future fees. The limitations on more frequent changes to the fee, however, are intended to provide budgeting certainty for the CAT Reporters and the Company.⁵⁹ To the extent that the Operating Committee approves changes to the number of tiers in the funding model or the fees assigned to each tier, then the Operating Committee will file such changes with the SEC pursuant to Rule 608 of the Exchange Act, and the Participants will file such changes with the SEC pursuant to Section 19(b) of the Exchange Act and Rule 19b-4 thereunder, and any such changes will become effective in accordance with the requirements of those provisions.

(I) Initial and Periodic Tier Reassignments

The Operating Committee has determined to calculate fee tiers every three months based on market share or message traffic, as applicable, from the

⁵⁸The CAT Fees are designed to recover the costs associated with the CAT. Accordingly, CAT Fees would not be affected by increases or decreases in other non-CAT expenses incurred by the Participants, such as any changes in costs related to the retirement of existing regulatory systems, such as OATS.

⁵⁹Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85006.

prior three months. For the initial tier assignments, the Company will calculate the relevant tier for each CAT Reporter using the three months of data prior to the commencement date. As with the initial tier assignment, for the tri-monthly reassignments, the Company will calculate the relevant tier using the three months of data prior to the relevant tri-monthly date. Any movement of CAT Reporters between tiers will not change the criteria for each tier or the fee amount corresponding to each tier.

In performing the tri-monthly reassignments, the assignment of CAT Reporters in each assigned tier is relative. Therefore, a CAT Reporter's assigned tier will depend, not only on its own message traffic or market share,

but also on the message traffic/market share across all CAT Reporters. For example, the percentage of Industry Members (other than Execution Venue ATSS) in each tier is relative such that such Industry Member's assigned tier will depend on message traffic generated across all CAT Reporters as well as the total number of CAT Reporters. The Operating Committee will inform CAT Reporters of their assigned tier every three months following the periodic tiering process, as the funding model will compare an individual CAT Reporter's activity to that of other CAT Reporters in the marketplace.

The following demonstrates a tier reassignment. In accordance with the funding model, the top 75% of Options

Execution Venues in market share are categorized as Tier 1 while the bottom 25% of Options Execution Venues in market share are categorized as Tier 2. In the sample scenario below, Options Execution Venue L is initially categorized as a Tier 2 Options Execution Venue in Period A due to its market share. When market share is recalculated for Period B, the market share of Execution Venue L increases, and it is therefore subsequently reranked and reassigned to Tier 1 in Period B. Correspondingly, Options Execution Venue K, initially a Tier 1 Options Execution Venue in Period A, is reassigned to Tier 2 in Period B due to decreases in its market share.

Period A			Period B		
Options Execution Venue	Market share rank	Tier	Options Execution Venue	Market share rank	Tier
Options Execution Venue A	1	1	Options Execution Venue A	1	1
Options Execution Venue B	2	1	Options Execution Venue B	2	1
Options Execution Venue C	3	1	Options Execution Venue C	3	1
Options Execution Venue D	4	1	Options Execution Venue D	4	1
Options Execution Venue E	5	1	Options Execution Venue E	5	1
Options Execution Venue F	6	1	Options Execution Venue F	6	1
Options Execution Venue G	7	1	Options Execution Venue I	7	1
Options Execution Venue H	8	1	Options Execution Venue H	8	1
Options Execution Venue I	9	1	Options Execution Venue G	9	1
Options Execution Venue J	10	1	Options Execution Venue J	10	1
Options Execution Venue K	11	1	Options Execution Venue L	11	1
Options Execution Venue L	12	2	Options Execution Venue K	12	2
Options Execution Venue M	13	2	Options Execution Venue N	13	2
Options Execution Venue N	14	2	Options Execution Venue M	14	2
Options Execution Venue O	15	2	Options Execution Venue O	15	2

For each periodic tier reassignment, the Operating Committee will review the new tier assignments, particularly those assignments for CAT Reporters that shift from the lowest tier to a higher tier. This review is intended to evaluate whether potential changes to the market or CAT Reporters (e.g., dissolution of a large CAT Reporter) adversely affect the tier reassignments.

(J) Sunset Provision

The Operating Committee developed the proposed funding model by analyzing currently available historical data. Such historical data, however, is not as comprehensive as data that will be submitted to the CAT. Accordingly, the Operating Committee believes that it will be appropriate to revisit the funding model once CAT Reporters have actual experience with the funding model. Accordingly, the Operating Committee determined to include an automatic sunset provision for the proposed fees. Specifically, the Operating Committee determined that

the CAT Fees should automatically expire two years after the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. The Operating Committee intends to monitor the operation of the funding model during this two year period and to evaluate its effectiveness during that period. Such a process will inform the Operating Committee's approach to funding the CAT after the two year period.

(3) Proposed CAT Fee Schedule

The Exchange proposes the Consolidated Audit Trail Funding Fees to impose the CAT Fees determined by the Operating Committee on the Exchange's members. The proposed fee schedule has four sections, covering definitions, the fee schedule for CAT Fees, the timing and manner of payments, and the automatic sunset provision of the CAT Fees. Each of these sections is discussed in detail below.

(A) Definitions

Paragraph (a) of the proposed fee schedule sets forth the definitions for the proposed fee schedule. Paragraph (a)(1) states that, for purposes of the Consolidated Audit Trail Funding Fees, the terms "CAT", "CAT NMS Plan," "Industry Member," "NMS Stock," "OTC Equity Security", "Options Market Maker", and "Participant" are defined as set forth in Rule 910A (Consolidated Audit Trail—Definitions).

The proposed fee schedule imposes different fees on Equity ATSS and Industry Members that are not Equity ATSS. Accordingly, the proposed fee schedule defines the term "Equity ATS." First, paragraph (a)(2) defines an "ATS" to mean an alternative trading system as defined in Rule 300(a) of Regulation ATS under the Securities Exchange Act of 1934, as amended, that operates pursuant to Rule 301 of Regulation ATS. This is the same definition of an ATS as set forth in Section 1.1 of the CAT NMS Plan in the definition of an "Execution Venue."

Then, paragraph (a)(4) defines an “Equity ATS” as an ATS that executes transactions in NMS Stocks and/or OTC Equity Securities.

Paragraph (a)(3) of the proposed fee schedule defines the term “CAT Fee” to mean the Consolidated Audit Trail Funding Fee(s) to be paid by Industry Members as set forth in paragraph (b) in the proposed fee schedule.

Finally, Paragraph (a)(6) defines an “Execution Venue” as a Participant or an ATS (excluding any such ATS that does not execute orders). This definition is the same substantive definition as set forth in Section 1.1 of the CAT NMS Plan. Paragraph (a)(5) defines an “Equity Execution Venue” as an Execution Venue that trades NMS Stocks and/or OTC Equity Securities.

(B) Fee Schedule

The Exchange proposes to impose the CAT Fees applicable to its Industry Members through paragraph (b) of the proposed fee schedule. Paragraph (b)(1) of the proposed fee schedule sets forth the CAT Fees applicable to Industry Members other than Equity ATSs. Specifically, paragraph (b)(1) states that the Company will assign each Industry Member (other than an Equity ATS) to a fee tier once every quarter, where such tier assignment is calculated by ranking each Industry Member based on its total message traffic (with discounts for equity market maker quotes and Options Market Maker quotes based on the trade to quote ratio for equities and options, respectively) for the three months prior to the quarterly tier calculation day and assigning each Industry Member to a tier based on that ranking and predefined Industry Member percentages. The Industry Members with the highest total quarterly message traffic will be ranked in Tier 1, and the Industry Members with lowest quarterly message traffic will be ranked in Tier 7. Each quarter, each Industry Member (other than an Equity ATS) shall pay the following CAT Fee corresponding to the tier assigned by the Company for such Industry Member for that quarter:

Tier	Percentage of Industry Members	Quarterly CAT fee
1	0.900	\$81,483
2	2.150	59,055
3	2.800	40,899
4	7.750	25,566
5	8.300	7,428
6	18.800	1,968
7	59.300	105

Paragraph (b)(2) of the proposed fee schedule sets forth the CAT Fees

applicable to Equity ATSs.⁶⁰ These are the same fees that Participants that trade NMS Stocks and/or OTC Equity Securities will pay. Specifically, paragraph (b)(2) states that the Company will assign each Equity ATS to a fee tier once every quarter, where such tier assignment is calculated by ranking each Equity Execution Venue based on its total market share of NMS Stocks and OTC Equity Securities (with a discount for the OTC Equity Securities market share of Equity ATSs trading OTC Equity Securities based on the average shares per trade ratio between NMS Stocks and OTC Equity Securities) for the three months prior to the quarterly tier calculation day and assigning each Equity ATS to a tier based on that ranking and predefined Equity Execution Venue percentages. The Equity ATSs with the higher total quarterly market share will be ranked in Tier 1, and the Equity ATSs with the lowest quarterly market share will be ranked in Tier 4. Specifically, paragraph (b)(2) states that, each quarter, each Equity ATS shall pay the following CAT Fee corresponding to the tier assigned by the Company for such Equity ATS for that quarter:

Tier	Percentage of Equity Execution Venues	Quarterly CAT fee
1	25.00	\$81,048
2	42.00	37,062
3	23.00	21,126
4	10.00	129

(C) Timing and Manner of Payment

Section 11.4 of the CAT NMS Plan states that the Operating Committee shall establish a system for the collection of fees authorized under the CAT NMS Plan. The Operating Committee may include such collection responsibility as a function of the Plan Processor or another administrator. To implement the payment process to be adopted by the Operating Committee, paragraph (c)(1) of the proposed fee schedule states that the Company will provide each Industry Member with one invoice each quarter for its CAT Fees as determined pursuant to paragraph (b) of the proposed fee schedule, regardless of whether the Industry Member is a member of multiple self-regulatory organizations. Paragraph (c)(1) further states that each Industry Member will pay its CAT Fees to the Company via

⁶⁰Note that no fee schedule is provided for Execution Venue ATSs that execute transactions in Listed Options, as no such Execution Venue ATSs currently exist due to trading restrictions related to Listed Options.

the centralized system for the collection of CAT Fees established by the Company in the manner prescribed by the Company. The Exchange will provide Industry Members with details regarding the manner of payment of CAT Fees by *Regulatory Notice*.

All CAT fees will be billed and collected centrally through the Company via the Plan Processor. Although each Participant will adopt its own fee schedule regarding CAT Fees, no CAT Fees or portion thereof will be collected by the individual Participants. Each Industry Member will receive from the Company one invoice for its applicable CAT fees, not separate invoices from each Participant of which it is a member. The Industry Members will pay the CAT Fees to the Company via the centralized system for the collection of CAT fees established by the Company.⁶¹

Section 11.4 of the CAT NMS Plan also states that Participants shall require each Industry Member to pay all applicable authorized CAT Fees within thirty days after receipt of an invoice or other notice indicating payment is due (unless a longer payment period is otherwise indicated). Section 11.4 further states that, if an Industry Member fails to pay any such fee when due, such Industry Member shall pay interest on the outstanding balance from such due date until such fee is paid at a per annum rate equal to the lesser of: (i) The Prime Rate plus 300 basis points; or (ii) the maximum rate permitted by applicable law. Therefore, in accordance with Section 11.4 of the CAT NMS Plan, the Exchange proposed to adopt paragraph (c)(2) of the proposed fee schedule. Paragraph (c)(2) of the proposed fee schedule states that each Industry Member shall pay CAT Fees within thirty days after receipt of an invoice or other notice indicating payment is due (unless a longer payment period is otherwise indicated). If an Industry Member fails to pay any such fee when due, such Industry Member shall pay interest on the outstanding balance from such due date until such fee is paid at a per annum rate equal to the lesser of: (i) the Prime Rate plus 300 basis points; or (ii) the maximum rate permitted by applicable law.

(D) Sunset Provision

The Operating Committee has determined to require that the CAT Fees automatically sunset two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. Accordingly, the Exchange

⁶¹Section 11.4 of the CAT NMS Plan.

proposes paragraph (d) of the fee schedule, which states that “[t]hese Consolidated Audit Trailing Funding Fees will automatically expire two years after the operative date of the amendment of the CAT NMS Plan that adopts CAT fees for the Participants.”

(4) Changes to Prior CAT Fee Plan Amendment

The proposed funding model set forth in this Amendment is a revised version of the Original Proposal. The Commission received a number of comment letters in response to the Original Proposal.⁶² The SEC suspended the Original Proposal and instituted proceedings to determine whether to approve or disapprove it.⁶³ Pursuant to those proceedings, additional comment letters were submitted regarding the proposed funding model.⁶⁴ In developing this Amendment, the Operating Committee carefully considered these comments and made a number of changes to the Original Proposal to address these comments where appropriate.

This Amendment makes the following changes to the Original Proposal: (1) Adds two additional CAT Fee tiers for Equity Execution Venues; (2) discounts the OTC Equity Securities market share of Execution Venue ATSs trading OTC Equity Securities as well as the market share of the FINRA ORF by the average shares per trade ratio between NMS Stocks and OTC Equity Securities (calculated as 0.17% based on available data from the second quarter of 2017) when calculating the market share of Execution Venue ATSs trading OTC Equity Securities and FINRA; (3) discounts the Options Market Maker quotes by the trade to quote ratio for options (calculated as 0.01% based on available data for June 2016 through June 2017) when calculating message traffic for Options Market Makers; (4) discounts equity market maker quotes by the trade to quote ratio for equities (calculated as 5.43% based on available data for June 2016 through June 2017) when calculating message traffic for equity market makers; (5) decreases the number of tiers for Industry Members (other than the Execution Venue ATSs) from nine to seven; (6) changes the allocation of CAT costs between Equity Execution Venues and Options Execution Venues from 75%/25% to 67%/33%; (7) adjusts tier percentages

⁶² For a description of the comments submitted in response to the Original Proposal, see Suspension Order.

⁶³ Suspension Order.

⁶⁴ See MFA Letter; SIFMA Letter; FIA Principal Traders Group Letter; Belvedere Letter; Sidley Letter; Group One Letter; and Virtu Financial Letter.

and recovery allocations for Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSs); (8) focuses the comparability of CAT Fees on the individual entity level, rather than primarily on the comparability of affiliated entities; (9) commences invoicing of CAT Reporters as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Participants and the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants; and (10) requires the proposed fees to automatically expire two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for the Participants.

(A) Equity Execution Venues

(i) Small Equity Execution Venues

In the Original Proposal, the Operating Committee proposed to establish two fee tiers for Equity Execution Venues. The Commission and commenters raised the concern that, by establishing only two tiers, smaller Equity Execution Venues (*e.g.*, those Equity ATSs representing less than 1% of NMS market share) would be placed in the same fee tier as larger Equity Execution Venues, thereby imposing an undue or inappropriate burden on competition.⁶⁵ To address this concern, the Operating Committee proposes to add two additional tiers for Equity Execution Venues, a third tier for smaller Equity Execution Venues and a fourth tier for the smallest Equity Execution Venues.

Specifically, the Original Proposal had two tiers of Equity Execution Venues. Tier 1 required the largest Equity Execution Venues to pay a quarterly fee of \$63,375. Based on available data, these largest Equity Execution Venues were those that had equity market share of share volume greater than or equal to 1%.⁶⁶ Tier 2 required the remaining smaller Equity Execution Venues to pay a quarterly fee of \$38,820.

To address concerns about the potential for the \$38,820 quarterly fee to

⁶⁵ See Suspension Order at 31664; SIFMA Letter at 3.

⁶⁶ Note that while these equity market share thresholds were referenced as data points to help differentiate between Equity Execution Venue tiers, the proposed funding model is directly driven not by market share thresholds, but rather by fixed percentages of Equity Execution Venues across tiers to account for fluctuating levels of market share across time. Actual market share in any tier will vary based on the actual market activity in a given measurement period, as well as the number of Equity Execution Venues included in the measurement period.

impose an undue burden on smaller Equity Execution Venues, the Operating Committee determined to move to a four tier structure for Equity Execution Venues. Tier 1 would continue to include the largest Equity Execution Venues by share volume (that is, based on currently available data, those with market share of equity share volume greater than or equal to one percent), and these Equity Execution Venues would be required to pay a quarterly fee of \$81,048. The Operating Committee determined to divide the original Tier 2 into three tiers. The new Tier 2 Equity Execution Venues, which would include the next largest Equity Execution Venues by equity share volume, would be required to pay a quarterly fee of \$37,062. The new Tier 3 Equity Execution Venues would be required to pay a quarterly fee of \$21,126. The new Tier 4 Equity Execution Venues, which would include the smallest Equity Execution Venues by share volume, would be required to pay a quarterly fee of \$129.

In developing the proposed four tier structure, the Operating Committee considered keeping the existing two tiers, as well as shifting to three, four or five Equity Execution Venue tiers (the maximum number of tiers permitted under the Plan), to address the concerns regarding small Equity Execution Venues. For each of the two, three, four and five tier alternatives, the Operating Committee considered the assignment of various percentages of Equity Execution Venues to each tier as well as various percentage of Equity Execution Venue recovery allocations for each alternative. As discussed below in more detail, each of these options was considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined that the four tier alternative addressed the spectrum of different Equity Execution Venues. The Operating Committee determined that neither a two tier structure nor a three tier structure sufficiently accounted for the range of market shares of smaller Equity Execution Venues. The Operating Committee also determined that, given the limited number of Equity Execution Venues, that a fifth tier was unnecessary to address the range of market shares of the Equity Execution Venues.

By increasing the number of tiers for Equity Execution Venues and reducing the proposed CAT Fees for the smaller Equity Execution Venues, the Operating Committee believes that the proposed fees for Equity Execution Venues would

not impose an undue or inappropriate burden on competition under Section 6 or Section 15A of the Exchange Act. Moreover, the Operating Committee believes that the proposed fees appropriately take into account the distinctions in the securities trading operations of different Equity Execution Venues, as required under the funding principles of the CAT NMS Plan.⁶⁷ The larger number of tiers more closely tracks the variety of sizes of equity share volume of Equity Execution Venues. In addition, the reduction in the fees for the smaller Equity Execution Venues recognizes the potential burden of larger fees on smaller entities. In particular, the very small quarterly fee of \$129 for Tier 4 Equity Execution Venues reflects the fact that certain Equity Execution Venues have a very small share volume due to their typically more focused business models.

Accordingly, with this Amendment, the Exchange proposes to amend paragraph (b)(2) of the proposed fee schedule to add the two additional tiers for Equity Execution Venues, to establish the percentages and fees for Tiers 3 and 4 as described, and to revise the percentages and fees for Tiers 1 and 2 as described.

(ii) Execution Venues for OTC Equity Securities

In the Original Proposal, the Operating Committee proposed to group Execution Venues for OTC Equity Securities and Execution Venues for NMS Stocks in the same tier structure. The Commission and commenters raised concerns as to whether this determination to place Execution Venues for OTC Equity Securities in the same tier structure as Execution Venues for NMS Stocks would result in an undue or inappropriate burden on competition, recognizing that the application of share volume may lead to different outcomes as applied to OTC Equity Securities and NMS Stocks.⁶⁸ To address this concern, the Operating Committee proposes to discount the OTC Equity Securities market share of Execution Venue ATSS trading OTC Equity Securities as well as the market share of the FINRA ORF by the average shares per trade ratio between NMS Stocks and OTC Equity Securities (0.17% for the second quarter of 2017) in order to adjust for the greater number of shares being traded in the OTC Equity Securities market, which is generally a function of a lower per share price for

OTC Equity Securities when compared to NMS Stocks.

As commenters noted, many OTC Equity Securities are priced at less than one dollar—and a significant number at less than one penny—and low-priced shares tend to trade in larger quantities. Accordingly, a disproportionately large number of shares are involved in transactions involving OTC Equity Securities versus NMS Stocks, which has the effect of overstating an Execution Venue's true market share when the Execution Venue is involved in the trading of OTC Equity Securities. Because the proposed fee tiers are based on market share calculated by share volume, Execution Venue ATSS trading OTC Equity Securities and FINRA may be subject to higher tiers than their operations may warrant.⁶⁹ The Operating Committee proposes to address this concern in two ways. First, the Operating Committee proposes to increase the number of Equity Execution Venue tiers, as discussed above. Second, the Operating Committee determined to discount the OTC Equity Securities market share of Execution Venue ATSS trading OTC Equity Securities as well as the market share of the FINRA ORF when calculating their tier placement. Because the disparity in share volume between Execution Venues trading in OTC Equity Securities and NMS Stocks is based on the different number of shares per trade for OTC Equity Securities and NMS Stocks, the Operating Committee believes that discounting the OTC Equity Securities share volume of such Execution Venue ATSS as well as the market share of the FINRA ORF would address the difference in shares per trade for OTC Equity Securities and NMS Stocks. Specifically, the Operating Committee proposes to impose a discount based on the objective measure of the average shares per trade ratio between NMS Stocks and OTC Equity Securities. Based on available data from the second quarter of 2017, the average shares per trade ratio between NMS Stocks and OTC Equity Securities is 0.17%.

The practical effect of applying such a discount for trading in OTC Equity Securities is to shift Execution Venue ATSS trading OTC Equity Securities to tiers for smaller Execution Venues and with lower fees. For example, under the Original Proposal, one Execution Venue ATS trading OTC Equity Securities was placed in the first CAT Fee tier, which had a quarterly fee of \$63,375. With the imposition of the proposed tier changes and the discount, this ATS would be

ranked in Tier 3 and would owe a quarterly fee of \$21,126.

In developing the proposed discount for Equity Execution Venue ATSS trading OTC Equity Securities and FINRA, the Operating Committee evaluated different alternatives to address the concerns related to OTC Equity Securities, including creating a separate tier structure for Execution Venues trading OTC Equity Securities (like the separate tier for Options Execution Venues) as well as the proposed discounting method for Execution Venue ATSS trading OTC Equity Securities and FINRA. For these alternatives, the Operating Committee considered how each alternative would affect the recovery allocations. In addition, each of these options was considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee did not adopt a separate tier structure for Equity Execution Venues trading OTC Equity Securities as they determined that the proposed discount approach appropriately addresses the concern. The Operating Committee determined to adopt the proposed discount because it directly relates to the concern regarding the trading patterns and operations in the OTC Equity Securities markets, and is an objective discounting method.

By increasing the number of tiers for Equity Execution Venues and imposing a discount on the market share of share volume calculation for trading in OTC Equity Securities, the Operating Committee believes that the proposed fees for Equity Execution Venues would not impose an undue or inappropriate burden on competition under Section 6 or Section 15A of the Exchange Act. Moreover, the Operating Committee believes that the proposed fees appropriately take into account the distinctions in the securities trading operations of different Equity Execution Venues, as required under the funding principles of the CAT NMS Plan.⁷⁰ As discussed above, the larger number of tiers more closely tracks the variety of sizes of equity share volume of Equity Execution Venues. In addition, the proposed discount recognizes the different types of trading operations at Equity Execution Venues trading OTC Equity Securities versus those trading NMS Stocks, thereby more closely matching the relative revenue generation by Equity Execution Venues

⁶⁷ Section 11.2(b) of the CAT NMS Plan.

⁶⁸ See Suspension Order at 31664–5.

⁶⁹ Suspension Order at 31664–5.

⁷⁰ Section 11.2(b) of the CAT NMS Plan.

trading OTC Equity Securities to their CAT Fees.

Accordingly, with this Amendment, the Exchange proposes to amend paragraph (b)(2) of the proposed fee schedule to indicate that the OTC Equity Securities market share for Equity ATSS trading OTC Equity Securities as well as the market share of the FINRA ORF would be discounted. In addition, as discussed above, to address concerns related to smaller ATSS, including those that trade OTC Equity Securities, the Exchange proposes to amend paragraph (b)(2) of the proposed fee schedule to add two additional tiers for Equity Execution Venues, to establish the percentages and fees for Tiers 3 and 4 as described, and to revise the percentages and fees for Tiers 1 and 2 as described.

(B) Market Makers

In the Original Proposal, the Operating Committee proposed to include both Options Market Maker quotes and equities market maker quotes in the calculation of total message traffic for such market makers for purposes of tiering for Industry Members (other than Execution Venue ATSS). The Commission and commenters raised questions as to whether the proposed treatment of Options Market Maker quotes may result in an undue or inappropriate burden on competition or may lead to a reduction in market quality.⁷¹ To address this concern, the Operating Committee determined to discount the Options Market Maker quotes by the trade to quote ratio for options when calculating message traffic for Options Market Makers. Similarly, to avoid disincentives to quoting behavior on the equities side as well, the Operating Committee determined to discount equity market maker quotes by the trade to quote ratio for equities when calculating message traffic for equities market makers.

In the Original Proposal, market maker quotes were treated the same as other message traffic for purposes of tiering for Industry Members (other than Execution Venue ATSS). Commenters noted, however, that charging Industry Members on the basis of message traffic will impact market makers disproportionately because of their continuous quoting obligations. Moreover, in the context of options market makers, message traffic would include bids and offers for every listed

options strikes and series, which are not an issue for equities.⁷² The Operating Committee proposes to address this concern in two ways. First, the Operating Committee proposes to discount Options Market Maker quotes when calculating the Options Market Makers' tier placement. Specifically, the Operating Committee proposes to impose a discount based on the objective measure of the trade to quote ratio for options. Based on available data from June 2016 through June 2017, the trade to quote ratio for options is 0.01%. Second, the Operating Committee proposes to discount equities market maker quotes when calculating the equities market makers' tier placement. Specifically, the Operating Committee proposes to impose a discount based on the objective measure of the trade to quote ratio for equities. Based on available data for June 2016 through June 2017, this trade to quote ratio for equities is 5.43%.

The practical effect of applying such discounts for quoting activity is to shift market makers' calculated message traffic lower, leading to the potential shift to tiers for lower message traffic and reduced fees. Such an approach would move sixteen Industry Member CAT Reporters that are market makers to a lower tier than in the Original Proposal. For example, under the Original Proposal, Broker-Dealer Firm ABC was placed in the first CAT Fee tier, which had a quarterly fee of \$101,004. With the imposition of the proposed tier changes and the discount, Broker-Dealer Firm ABC, an options market maker, would be ranked in Tier 3 and would owe a quarterly fee of \$40,899.

In developing the proposed market maker discounts, the Operating Committee considered various discounts for Options Market Makers and equity market makers, including discounts of 50%, 25%, 0.00002%, as well as the 5.43% for option market makers and 0.01% for equity market makers. Each of these options were considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined to adopt the proposed discount because it directly relates to the concern regarding the quoting requirement, is an objective discounting method, and has the desired potential to shift market makers to lower fee tiers.

By imposing a discount on Options Market Makers and equities market makers' quoting traffic for the calculation of message traffic, the Operating Committee believes that the proposed fees for market makers would not impose an undue or inappropriate burden on competition under Section 6 or Section 15A of the Exchange Act. Moreover, the Operating Committee believes that the proposed fees appropriately take into account the distinctions in the securities trading operations of different Industry Members, and avoid disincentives, such as a reduction in market quality, as required under the funding principles of the CAT NMS Plan.⁷³ The proposed discounts recognize the different types of trading operations presented by Options Market Makers and equities market makers, as well as the value of the market makers' quoting activity to the market as a whole. Accordingly, the Operating Committee believes that the proposed discounts will not impact the ability of small Options Market Makers or equities market makers to provide liquidity.

Accordingly, with this Amendment, the Exchange proposes to amend paragraph (b)(1) of the proposed fee schedule to indicate that the message traffic related to equity market maker quotes and Options Market Maker quotes would be discounted. In addition, the Exchange proposes to define the term "Options Market Maker" in paragraph (a)(1) of the proposed fee schedule.

(C) Comparability/Allocation of Costs

Under the Original Proposal, 75% of CAT costs were allocated to Industry Members (other than Execution Venue ATSS) and 25% of CAT costs were allocated to Execution Venues. This cost allocation sought to maintain the greatest level of comparability across the funding model, where comparability considered affiliations among or between CAT Reporters. The Commission and commenters expressed concerns regarding whether the proposed 75%/25% allocation of CAT costs is consistent with the Plan's funding principles and the Exchange Act, including whether the allocation places a burden on competition or reduces market quality. The Commission and commenters also questioned whether the approach of accounting for affiliations among CAT Reporters in setting CAT Fees disadvantages non-affiliated CAT Reporters or otherwise burdens

⁷¹ See Suspension Order at 31663-4; SIFMA Letter at 4-6; FIA Principal Traders Group Letter at 3; Sidley Letter at 2-6; Group One Letter at 2-6; and Belvedere Letter at 2.

⁷² Suspension Order at 31664.

⁷³ Section 11.2(b) of the CAT NMS Plan.

competition in the market for trading services.⁷⁴

In response to these concerns, the Operating Committee determined to revise the proposed funding model to focus the comparability of CAT Fees on the individual entity level, rather than primarily on the comparability of affiliated entities. In light of the interconnected nature of the various aspects of the funding model, the Operating Committee determined to revise various aspects of the model to enhance comparability at the individual entity level. Specifically, to achieve such comparability, the Operating Committee determined to (1) decrease the number of tiers for Industry Members (other than Execution Venue ATSS) from nine to seven; (2) change the allocation of CAT costs between Equity Execution Venues and Options Execution Venues from 75%/25% to 67%/33%; and (3) adjust tier percentages and recovery allocations for Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSS). With these changes, the proposed funding model provides fee comparability for the largest individual entities, with the largest Industry Members (other than Execution Venue ATSS), Equity Execution Venues and Options Execution Venues each paying a CAT Fee of approximately \$81,000 each quarter.

(i) Number of Industry Member Tiers

In the Original Proposal, the proposed funding model had nine tiers for Industry Members (other than Execution Venue ATSS). The Operating Committee determined that reducing the number of tiers from nine tiers to seven tiers (and adjusting the predefined Industry Member Percentages as well) continues to provide a fair allocation of fees among Industry Members and appropriately distinguishes between Industry Members with differing levels of message traffic. In reaching this conclusion, the Operating Committee considered historical message traffic generated by Industry Members across all exchanges and as submitted to FINRA's OATS, and considered the distribution of firms with similar levels of message traffic, grouping together firms with similar levels of message traffic. Based on this, the Operating Committee determined that seven tiers would group firms with similar levels of message traffic, while also achieving greater comparability in the model for

the individual CAT Reporters with the greatest market share or message traffic.

In developing the proposed seven tier structure, the Operating Committee considered remaining at nine tiers, as well as reducing the number of tiers down to seven when considering how to address the concerns raised regarding comparability. For each of the alternatives, the Operating Committee considered the assignment of various percentages of Industry Members to each tier as well as various percentages of Industry Member recovery allocations for each alternative. Each of these options was considered in the context of its effects on the full funding model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined that the seven tier alternative provided the most fee comparability at the individual entity level for the largest CAT Reporters, while both providing logical breaks in tiering for Industry Members with different levels of message traffic and a sufficient number of tiers to provide for the full spectrum of different levels of message traffic for all Industry Members.

(ii) Allocation of CAT Costs Between Equity and Options Execution Venues

The Operating Committee also determined to adjust the allocation of CAT costs between Equity Execution Venues and Options Execution Venues to enhance comparability at the individual entity level. In the Original Proposal, 75% of Execution Venue CAT costs were allocated to Equity Execution Venues, and 25% of Execution Venue CAT costs were allocated to Options Execution Venues. To achieve the goal of increased comparability at the individual entity level, the Operating Committee analyzed a range of alternative splits for revenue recovery between Equity and Options Execution Venues, along with other changes in the proposed funding model. Based on this analysis, the Operating Committee determined to allocate 67 percent of Execution Venue costs recovered to Equity Execution Venues and 33 percent to Options Execution Venues. The Operating Committee determined that a 67/33 allocation between Equity and Options Execution Venues enhances the level of fee comparability for the largest CAT Reporters. Specifically, the largest Equity and Options Execution Venues would pay a quarterly CAT Fee of approximately \$81,000.

In developing the proposed allocation of CAT costs between Equity and Options Execution Venues, the

Operating Committee considered various different options for such allocation, including keeping the original 75%/25% allocation, as well as shifting to a 70%/30%, 67%/33%, or 57.75%/42.25% allocation. For each of the alternatives, the Operating Committee considered the effect each allocation would have on the assignment of various percentages of Equity Execution Venues to each tier as well as various percentages of Equity Execution Venue recovery allocations for each alternative. Moreover, each of these options was considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined that the 67%/33% allocation between Equity and Options Execution Venues provided the greatest level of fee comparability at the individual entity level for the largest CAT Reporters, while still providing for appropriate fee levels across all tiers for all CAT Reporters.

(iii) Allocation of Costs Between Execution Venues and Industry Members

The Operating Committee determined to allocate 25% of CAT costs to Execution Venues and 75% to Industry Members (other than Execution Venue ATSS), as it had in the Original Proposal. The Operating Committee determined that this 75%/25% allocation, along with the other changes proposed above, led to the most comparable fees for the largest Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSS). The largest Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSS) would each pay a quarterly CAT Fee of approximately \$81,000.

As a preliminary matter, the Operating Committee determined that it is appropriate to allocate most of the costs to create, implement and maintain the CAT to Industry Members for several reasons. First, there are many more broker-dealers expected to report to the CAT than Participants (*i.e.*, 1,541 broker-dealer CAT Reporters versus 22 Participants). Second, since most of the costs to process CAT reportable data is generated by Industry Members, Industry Members could be expected to contribute toward such costs. Finally, as noted by the SEC, the CAT "substantially enhance[s] the ability of the SROs and the Commission to

⁷⁴ See Suspension Order at 31662-3; SIFMA Letter at 3; Sidley Letter at 6-7; Group One Letter at 2; and Belvedere Letter at 2.

oversee today's securities markets,"⁷⁵ thereby benefitting all market participants. After making this determination, the Operating Committee analyzed several different cost allocations, as discussed further below, and determined that an allocation where 75% of the CAT costs should be borne by the Industry Members (other than Execution Venue ATSS) and 25% should be paid by Execution Venues was most appropriate and led to the greatest comparability of CAT Fees for the largest CAT Reporters.

In developing the proposed allocation of CAT costs between Execution Venues and Industry Members (other than Execution Venue ATSS), the Operating Committee considered various different options for such allocation, including keeping the original 75%/25% allocation, as well as shifting to an 80%/20%, 70%/30%, or 65%/35% allocation. Each of these options was considered in the context of the full model, including the effect on each of the changes discussed above, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. In particular, for each of the alternatives, the Operating Committee considered the effect each allocation had on the assignment of various percentages of Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSS) to each relevant tier as well as various percentages of recovery allocations for each tier. The Operating Committee determined that the 75%/25% allocation between Execution Venues and Industry Members (other than Execution Venue ATSS) provided the greatest level of fee comparability at the individual entity level for the largest CAT Reporters, while still providing for appropriate fee levels across all tiers for all CAT Reporters.

(iv) Affiliations

The funding principles set forth in Section 11.2 of the Plan require that the fees charged to CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether Execution Venue and/or Industry Members). The proposed funding model satisfies this requirement. As discussed above, under the proposed funding

model, the largest Equity Execution Venues, Options Execution Venues, and Industry Members (other than Execution Venue ATSS) pay approximately the same fee. Moreover, the Operating Committee believes that the proposed funding model takes into consideration affiliations between or among CAT Reporters as complexes with multiple CAT Reporters will pay the appropriate fee based on the proposed fee schedule for each of the CAT Reporters in the complex. For example, a complex with a Tier 1 Equity Execution Venue and Tier 2 Industry Member will pay the same as another complex with a Tier 1 Equity Execution Venue and Tier 2 Industry Member.

(v) Fee Schedule Changes

Accordingly, with this Amendment, the Exchange proposes to amend paragraphs (b)(1) and (2) of the proposed fee schedule to reflect the changes discussed in this section. Specifically, the Exchange proposes to amend paragraph (b)(1) and (2) of the proposed fee schedule to update the number of tiers, and the fees and percentages assigned to each tier to reflect the described changes.

(D) Market Share/Message Traffic

In the Original Proposal, the Operating Committee proposed to charge Execution Venues based on market share and Industry Members (other than Execution Venue ATSS) based on message traffic. Commenters questioned the use of the two different metrics for calculating CAT Fees.⁷⁶ The Operating Committee continues to believe that the proposed use of market share and message traffic satisfies the requirements of the Exchange Act and the funding principles set forth in the CAT NMS Plan. Accordingly, the proposed funding model continues to charge Execution Venues based on market share and Industry Members (other than Execution Venue ATSS) based on message traffic.

In drafting the Plan and the Original Proposal, the Operating Committee expressed the view that the correlation between message traffic and size does not apply to Execution Venues, which they described as producing similar amounts of message traffic regardless of size. The Operating Committee believed that charging Execution Venues based on message traffic would result in both large and small Execution Venues paying comparable fees, which would be inequitable, so the Operating Committee determined that it would be

more appropriate to treat Execution Venues differently from Industry Members in the funding model. Upon a more detailed analysis of available data, however, the Operating Committee noted that Execution Venues have varying levels of message traffic. Nevertheless, the Operating Committee continues to believe that a bifurcated funding model—where Industry Members (other than Execution Venue ATSS) are charged fees based on message traffic and Execution Venues are charged based on market share—complies with the Plan and meets the standards of the Exchange Act for the reasons set forth below.

Charging Industry Members based on message traffic is the most equitable means for establishing fees for Industry Members (other than Execution Venue ATSS). This approach will assess fees to Industry Members that create larger volumes of message traffic that are relatively higher than those fees charged to Industry Members that create smaller volumes of message traffic. Since message traffic, along with fixed costs of the Plan Processor, is a key component of the costs of operating the CAT, message traffic is an appropriate criterion for placing Industry Members in a particular fee tier.

The Operating Committee also believes that it is appropriate to charge Execution Venues CAT Fees based on their market share. In contrast to Industry Members (other than Execution Venue ATSS), which determine the degree to which they produce the message traffic that constitutes CAT Reportable Events, the CAT Reportable Events of Execution Venues are largely derivative of quotations and orders received from Industry Members that the Execution Venues are required to display. The business model for Execution Venues, however, is focused on executions in their markets. As a result, the Operating Committee believes that it is more equitable to charge Execution Venues based on their market share rather than their message traffic.

Similarly, focusing on message traffic would make it more difficult to draw distinctions between large and small exchanges, including options exchanges in particular. For instance, the Operating Committee analyzed the message traffic of Execution Venues and Industry Members for the period of April 2017 to June 2017 and placed all CAT Reporters into a nine-tier framework (*i.e.*, a single tier may include both Execution Venues and Industry Members). The Operating Committee's analysis found that the majority of exchanges (15 total) were

⁷⁵ Securities Exchange Act Release No. 67457 (July 18, 2012), 77 FR 45722, 45726 (August 1, 2012) ("Rule 613 Adopting Release").

⁷⁶ Suspension Order at 31663; FIA Principal Traders Group Letter at 2.

grouped in Tiers 1 and 2. Moreover, virtually all of the options exchanges were in Tiers 1 and 2.⁷⁷ Given the concentration of options exchanges in Tiers 1 and 2, the Operating Committee believes that using a funding model based purely on message traffic would make it more difficult to distinguish between large and small options exchanges, as compared to the proposed bifurcated fee approach.

In addition, the Operating Committee also believes that it is appropriate to treat ATSS as Execution Venues under the proposed funding model since ATSS have business models that are similar to those of exchanges, and ATSS also compete with exchanges. For these reasons, the Operating Committee believes that charging Execution Venues based on market share is more appropriate and equitable than charging Execution Venues based on message traffic.

(E) Time Limit

In the Original Proposal, the Operating Committee did not impose any time limit on the application of the proposed CAT Fees. As discussed above, the Operating Committee developed the proposed funding model by analyzing currently available historical data. Such historical data, however, is not as comprehensive as data that will be submitted to the CAT. Accordingly, the Operating Committee believes that it will be appropriate to revisit the funding model once CAT Reporters have actual experience with the funding model. Accordingly, the Operating Committee proposes to include a sunset provision in the proposed fee model. The proposed CAT Fees will sunset two years after the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. Specifically, the Exchange proposes to add paragraph (d) of the proposed fee schedule to include this sunset provision. Such a provision will provide the Operating Committee and other market participants with the opportunity to reevaluate the performance of the proposed funding model.

(F) Tier Structure/Decreasing Cost per Unit

In the Original Proposal, the Operating Committee determined to use a tiered fee structure. The Commission and commenters questioned whether the decreasing cost per additional unit (of message traffic in the case of

Industry Members, or of share volume in the case of Execution Venues) in the proposed fee schedules burdens competition by disadvantaging small Industry Members and Execution Venues and/or by creating barriers to entry in the market for trading services and/or the market for broker-dealer services.⁷⁸

The Operating Committee does not believe that decreasing cost per additional unit in the proposed fee schedules places an unfair competitive burden on Small Industry Members and Execution Venues. While the cost per unit of message traffic or share volume necessarily will decrease as volume increases in any tiered fee model using fixed fee percentages and, as a result, Small Industry Members and small Execution Venues may pay a larger fee per message or share, this comment fails to take account of the substantial differences in the absolute fees paid by Small Industry Members and small Execution Venues as opposed to large Industry Members and large Execution Venues. For example, under the fee proposals, Tier 7 Industry Members would pay a quarterly fee of \$105, while Tier 1 Industry Members would pay a quarterly fee of \$81,483. Similarly, a Tier 4 Equity Execution Venue would pay a quarterly fee of \$129, while a Tier 1 Equity Execution Venue would pay a quarterly fee of \$81,048. Thus, Small Industry Members and small Execution Venues are not disadvantaged in terms of the total fees that they actually pay. In contrast to a tiered model using fixed fee percentages, the Operating Committee believes that strictly variable or metered funding models based on message traffic or share volume would be more likely to affect market behavior and may present administrative challenges (e.g., the costs to calculate and monitor fees may exceed the fees charged to the smallest CAT Reporters).

(G) Other Alternatives Considered

In addition to the various funding model alternatives discussed above regarding discounts, number of tiers and allocation percentages, the Operating Committee also discussed other possible funding models. For example, the Operating Committee considered allocating the total CAT costs equally among each of the Participants, and then permitting each Participant to charge its own members as it deems appropriate.⁷⁹ The Operating Committee determined that such an approach raised a variety of issues, including the

likely inconsistency of the ensuing charges, potential for lack of transparency, and the impracticality of multiple SROs submitting invoices for CAT charges. The Operating Committee therefore determined that the proposed funding model was preferable to this alternative.

(H) Industry Member Input

Commenters expressed concern regarding the level of Industry Member input into the development of the proposed funding model, and certain commenters have recommended a greater role in the governance of the CAT.⁸⁰ The Participants previously addressed this concern in its letters responding to comments on the Plan and the CAT Fees.⁸¹ As discussed in those letters, the Participants discussed the funding model with the Development Advisory Group (“DAG”), the advisory group formed to assist in the development of the Plan, during its original development.⁸² Moreover, Industry Members currently have a voice in the affairs of the Operating Committee and operation of the CAT generally through the Advisory Committee established pursuant to Rule 613(b)(7) and Section 4.13 of the Plan. The Advisory Committee attends all meetings of the Operating Committee, as well as meetings of various subcommittees and working groups, and provides valuable and critical input for the Participants’ and Operating Committee’s consideration. The Operating Committee continues to believe that that Industry Members have an appropriate voice regarding the funding of the Company.

(I) Conflicts of Interest

Commenters also raised concerns regarding Participant conflicts of interest in setting the CAT Fees.⁸³ The Participants previously responded to this concern in both the Plan Response Letter and the Fee Rule Response Letter.⁸⁴ As discussed in those letters, the Plan, as approved by the SEC, adopts various measures to protect against the potential conflicts issues raised by the Participants’ fee-setting authority. Such measures include the

⁷⁷ See Suspension Order at 31662; MFA Letter at 1–2.

⁷⁸ Letter from Participants to Brent J. Fields, Secretary, SEC (Sept. 23, 2016) (“Plan Response Letter”); Letter from CAT NMS Plan Participants to Brent J. Fields, Secretary, SEC (June 29, 2017) (“Fee Rule Response Letter”).

⁷⁹ Fee Rule Response Letter at 2; Plan Response Letter at 18.

⁸⁰ See Suspension Order at 31662; FIA Principal Traders Group at 3.

⁸¹ See Plan Response Letter at 16, 17; Fee Rule Response Letter at 10–12.

⁷⁷ The Participants note that this analysis did not place MIAx PEARL in Tier 1 or Tier 2 since the exchange commenced trading on February 6, 2017.

⁷⁸ Suspension Order at 31667.

⁷⁹ See FIA Principal Traders Group Letter at 2; Belvedere Letter at 4.

operation of the Company as a not for profit business league and on a break-even basis, and the requirement that the Participants file all CAT Fees under Section 19(b) of the Exchange Act. The Operating Committee continues to believe that these measures adequately protect against concerns regarding conflicts of interest in setting fees, and that additional measures, such as an independent third party to evaluate an appropriate CAT Fee, are unnecessary.

(J) Fee Transparency

Commenters also argued that they could not adequately assess whether the CAT Fees were fair and equitable because the Operating Committee has not provided details as to what the Participants are receiving in return for the CAT Fees.⁸⁵ The Operating Committee provided a detailed discussion of the proposed funding model in the Plan, including the expenses to be covered by the CAT Fees. In addition, the agreement between the Company and the Plan Processor sets forth a comprehensive set of services to be provided to the Company with regard to the CAT. Such services include, without limitation: User support services (e.g., a help desk); tools to allow each CAT Reporter to monitor and correct their submissions; a comprehensive compliance program to monitor CAT Reporters' adherence to Rule 613; publication of detailed Technical Specifications for Industry Members and Participants; performing data linkage functions; creating comprehensive data security and confidentiality safeguards; creating query functionality for regulatory users (i.e., the Participants, and the SEC and SEC staff); and performing billing and collection functions. The Operating Committee further notes that the services provided by the Plan Processor and the costs related thereto were subject to a bidding process.

(K) Funding Authority

Commenters also questioned the authority of the Operating Committee to impose CAT Fees on Industry Members.⁸⁶ The Participants previously responded to this same comment in the Plan Response Letter and the Fee Rule Response Letter.⁸⁷ As the Participants previously noted, SEC Rule 613 specifically contemplates broker-dealers contributing to the funding of the CAT. In addition, as noted by the SEC, the

CAT "substantially enhance[s] the ability of the SROs and the Commission to oversee today's securities markets,"⁸⁸ thereby benefitting all market participants. Therefore, the Operating Committee continues to believe that it is equitable for both Participants and Industry Members to contribute to funding the cost of the CAT.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁸⁹ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,⁹⁰ in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility, is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, and is 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 discussed above, the SEC approved the bifurcated, tiered, fixed fee funding model in the CAT NMS Plan, finding it was reasonable and that it equitably allocated fees among Participants and Industry Members. The Exchange believes that the proposed tiered fees adopted pursuant to the funding model approved by the SEC in the CAT NMS Plan are reasonable, equitably allocated and not unfairly discriminatory.

The Exchange believes that this proposal is consistent with the Act because it implements, interprets or clarifies the provisions of the Plan, and is designed to assist the Exchange and its Industry Members in meeting regulatory obligations pursuant to the Plan. In approving the Plan, the SEC noted that the Plan "is necessary and appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanism of a national market system, or is otherwise in furtherance of the purposes of the Act."⁹¹ To the extent that this proposal implements, interprets or clarifies the Plan and applies specific requirements to Industry Members, the Exchange believes that this proposal furthers the objectives of the Plan, as identified by the SEC, and is therefore consistent with the Act.

The Exchange believes that the proposed tiered fees are reasonable. First, the total CAT Fees to be collected would be directly associated with the costs of establishing and maintaining the CAT, where such costs include Plan Processor costs and costs related to insurance, third party services and the operational reserve. The CAT Fees would not cover Participant services unrelated to the CAT. In addition, any surplus CAT Fees cannot be distributed to the individual Participants; such surpluses must be used as a reserve to offset future fees. Given the direct relationship between the fees and the CAT costs, the Exchange believes that the total level of the CAT Fees is reasonable.

In addition, the Exchange believes that the proposed CAT Fees are reasonably designed to allocate the total costs of the CAT equitably between and among the Participants and Industry Members, and are therefore not unfairly discriminatory. As discussed in detail above, the proposed tiered fees impose comparable fees on similarly situated CAT Reporters. For example, those with a larger impact on the CAT (measured via message traffic or market share) pay higher fees, whereas CAT Reporters with a smaller impact pay lower fees. Correspondingly, the tiered structure lessens the impact on smaller CAT Reporters by imposing smaller fees on those CAT Reporters with less market share or message traffic. In addition, the fee structure takes into consideration distinctions in securities trading operations of CAT Reporters, including ATSS trading OTC Equity Securities, and equity and options market makers.

Moreover, the Exchange believes that the division of the total CAT costs between Industry Members and Execution Venues, and the division of the Execution Venue portion of total costs between Equity and Options Execution Venues, is reasonably designed to allocate CAT costs among CAT Reporters. The 75%/25% division between Industry Members (other than Execution Venue ATSS) and Execution Venues maintains the greatest level of comparability across the funding model. For example, the cost allocation establishes fees for the largest Industry Members (i.e., those Industry Members in Tiers 1) that are comparable to the largest Equity Execution Venues and Options Execution Venues (i.e., those Execution Venues in Tier 1). Furthermore, the allocation of total CAT cost recovery recognizes the difference in the number of CAT Reporters that are Industry Members (other than Execution Venue ATSS) versus CAT Reporters that are Execution Venues. Similarly, the

⁸⁵ See FIA Principal Traders Group at 3; SIFMA Letter at 3.

⁸⁶ See Suspension Order at 31661-2; SIFMA Letter at 2.

⁸⁷ See Plan Response Letter at 9-10; Fee Rule Response Letter at 3-4.

⁸⁸ Rule 613 Adopting Release at 45726.

⁸⁹ 15 U.S.C. 78f(b).

⁹⁰ 15 U.S.C. 78f(b)(4) and (5).

⁹¹ Approval Order at 84697.

67%/33% allocation between Equity and Options Execution Venues also helps to provide fee comparability for the largest CAT Reporters.

Finally, the Exchange believes that the proposed fees are reasonable because they would provide ease of calculation, ease of billing and other administrative functions, and predictability of a fixed fee. Such factors are crucial to estimating a reliable revenue stream for the Company and for permitting CAT Reporters to reasonably predict their payment obligations for budgeting purposes.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Exchange notes that the proposed rule change implements provisions of the CAT NMS Plan approved by the Commission, and is designed to assist the Exchange in meeting its regulatory obligations pursuant to the Plan. Similarly, all national securities exchanges and FINRA are proposing this proposed fee schedule to implement the requirements of the CAT NMS Plan. Therefore, this is not a competitive fee filing and, therefore, it does not raise competition issues between and among the exchanges and FINRA.

Moreover, as previously described, the Exchange believes that the proposed rule change fairly and equitably allocates costs among CAT Reporters. In particular, the proposed fee schedule is structured to impose comparable fees on similarly situated CAT Reporters, and lessen the impact on smaller CAT Reporters. CAT Reporters with similar levels of CAT activity will pay similar fees. For example, Industry Members (other than Execution Venue ATSS) with higher levels of message traffic will pay higher fees, and those with lower levels of message traffic will pay lower fees. Similarly, Execution Venue ATSS and other Execution Venues with larger market share will pay higher fees, and those with lower levels of market share will pay lower fees. Therefore, given that there is generally a relationship between message traffic and/or market share to the CAT Reporter's size, smaller CAT Reporters generally pay less than larger CAT Reporters. Accordingly, the Exchange does not believe that the CAT Fees would have a disproportionate effect on smaller or larger CAT Reporters. In addition, ATSS and exchanges will pay the same fees based on market share. Therefore, the

Exchange does not believe that the fees will impose any burden on the competition between ATSS and exchanges. Accordingly, the Exchange believes that the proposed fees will minimize the potential for adverse effects on competition between CAT Reporters in the market.

Furthermore, the tiered, fixed fee funding model limits the disincentives to providing liquidity to the market. Therefore, the proposed fees are structured to limit burdens on competitive quoting and other liquidity provision in the market.

In addition, the Operating Committee believes that the proposed changes to the Original Proposal, as discussed above in detail, address certain competitive concerns raised by commenters, including concerns related to, among other things, smaller ATSS, ATSS trading OTC Equity Securities, market making quoting and fee comparability. As discussed above, the Operating Committee believes that the proposals address the competitive concerns raised by commenters.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has set forth responses to comments received regarding the Original Proposal in Section 3(a)(4) above.

III. Solicitation of Comments on Amendment No. 2

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment No. 2 is consistent with the Act. In particular, the Commission seeks comment on the following:

Allocation of Costs

(1) Commenters' views as to whether the allocation of CAT costs is consistent with the funding principle expressed in the CAT NMS Plan that requires the Operating Committee to "avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality."⁹²

(2) Commenters' views as to whether the allocation of 25% of CAT costs to the Execution Venues (including all the Participants) and 75% to Industry Members, will incentivize or disincentivize the Participants to effectively and efficiently manage the CAT costs incurred by the Participants since they will only bear 25% of such costs.

⁹² Section 11.2(e) of the CAT NMS Plan.

(3) Commenters' views on the determination to allocate 75% of all costs incurred by the Participants from November 21, 2016 to November 21, 2017 to Industry Members (other than Execution Venue ATSS), when such costs are development and build costs and when Industry Member reporting is scheduled to commence a year later, including views on whether such "fees, costs and expenses . . . [are] fairly and reasonably shared among the Participants and Industry Members" in accordance with the CAT NMS Plan.⁹³

(4) Commenters' views on whether an analysis of the ratio of the expected Industry Member-reported CAT messages to the expected SRO-reported CAT messages should be the basis for determining the allocation of costs between Industry Members and Execution Venues.⁹⁴

(5) Any additional data analysis on the allocation of CAT costs, including any existing supporting evidence.

Comparability

(6) Commenters' views on the shift in the standard used to assess the comparability of CAT Fees, with the emphasis now on comparability of individual entities instead of affiliated entities, including views as to whether this shift is consistent with the funding principle expressed in the CAT NMS Plan that requires the Operating Committee to establish a fee structure in which the fees charged to "CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether Execution Venues and/or Industry Members)."⁹⁵

(7) Commenters' views as to whether the reduction in the number of tiers for Industry Members (other than Execution Venue ATSS) from nine to seven, the revised allocation of CAT costs between Equity Execution Venues and Options Execution Venues from a 75%/25% split to a 67%/33% split, and the adjustment of all tier percentages and recovery allocations achieves comparability across individual entities, and whether these changes should have

⁹³ Section 11.1(c) of the CAT NMS Plan.

⁹⁴ The Notice for the CAT NMS Plan did not provide a comprehensive count of audit trail message traffic from different regulatory data sources, but the Commission did estimate the ratio of all SRO audit trail messages to OATS audit trail messages to be 1.9431. See Securities Exchange Act Release No. 77724 (April 27, 2016), 81 FR 30613, 30721 n.919 and accompanying text (May 17, 2016).

⁹⁵ Section 11.2(c) of the CAT NMS Plan.

resulted in a change to the allocation of 75% of total CAT costs to Industry Members (other than Execution Venue ATSS) and 25% of such costs to Execution Venues.

Discounts

(8) Commenters' views as to whether the discounts for options market-makers, equities market-makers, and Equity ATSS trading OTC Equity Securities are clear, reasonable, and consistent with the funding principle expressed in the CAT NMS Plan that requires the Operating Committee to "avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality,"⁹⁶ including views as to whether the discounts for market-makers limit any potential disincentives to act as a market-maker and/or to provide liquidity due to CAT fees.

Calculation of Costs and Imposition of CAT Fees

(9) Commenters' views as to whether the amendment provides sufficient information regarding the amount of costs incurred from November 21, 2016 to November 21, 2017, particularly, how those costs were calculated, how those costs relate to the proposed CAT Fees, and how costs incurred after November 21, 2017 will be assessed upon Industry Members and Execution Venues;

(10) Commenters' views as to whether the timing of the imposition and collection of CAT Fees on Execution Venues and Industry Members is reasonably related to the timing of when the Company expects to incur such development and implementation costs.⁹⁷

(11) Commenters' views on dividing CAT costs equally among each of the Participants, and then each Participant charging its own members as it deems appropriate, taking into consideration the possibility of inconsistency in charges, the potential for lack of transparency, and the impracticality of multiple SROs submitting invoices for CAT charges.

Burden on Competition and Barriers to Entry

(12) Commenters' views as to whether the allocation of 75% of CAT costs to Industry Members (other than Execution Venue ATSS) imposes any burdens on competition to Industry Members, including views on what baseline competitive landscape the Commission should consider when analyzing the proposed allocation of CAT costs.

(13) Commenters' views on the burdens on competition, including the relevant markets and services and the impact of such burdens on the baseline competitive landscape in those relevant markets and services.

(14) Commenters' views on any potential burdens imposed by the fees on competition between and among CAT Reporters, including views on which baseline markets and services the fees could have competitive effects on and whether the fees are designed to minimize such effects.

(15) Commenters' general views on the impact of the proposed fees on economies of scale and barriers to entry.

(16) Commenters' views on the baseline economies of scale and barriers to entry for Industry Members and Execution Venues and the relevant markets and services over which these economies of scale and barriers to entry exist.

(17) Commenters' views as to whether a tiered fee structure necessarily results in less active tiers paying more per unit than those in more active tiers, thus creating economies of scale, with supporting information if possible.

(18) Commenters' views as to how the level of the fees for the least active tiers would or would not affect barriers to entry.

(19) Commenters' views on whether the difference between the cost per unit (messages or market share) in less active tiers compared to the cost per unit in more active tiers creates regulatory economies of scale that favor larger competitors and, if so:

(a) How those economies of scale compare to operational economies of scale; and

(b) Whether those economies of scale reduce or increase the current advantages enjoyed by larger competitors or otherwise alter the competitive landscape.

(20) Commenters' views on whether the fees could affect competition between and among national securities exchanges and FINRA, in light of the fact that implementation of the fees does not require the unanimous consent of all such entities, and, specifically:

(a) Whether any of the national securities exchanges or FINRA are disadvantaged by the fees; and

(b) If so, whether any such disadvantages would be of a magnitude that would alter the competitive landscape.

(21) Commenters' views on any potential burden imposed by the fees on competitive quoting and other liquidity provision in the market, including, specifically:

(a) Commenters' views on the kinds of disincentives that discourage liquidity provision and/or disincentives that the Commission should consider in its analysis;

(b) Commenters' views as to whether the fees could disincentivize the provision of liquidity; and

(c) Commenters' views as to whether the fees limit any disincentives to provide liquidity.

(22) Commenters' views as to whether the amendment adequately responds to and/or addresses comments received on related filings.

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-PHLX-2017-037 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-PHLX 2017-37. 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 website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-PHLX-2017-37, and

⁹⁶ Section 11.2(e) of the CAT NMS Plan.

⁹⁷ Section 11.1(c) of the CAT NMS Plan.

should be submitted on or before January 4, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁹⁸

Robert W. Errett,
Deputy Secretary.

[FR Doc. 2017-27009 Filed 12-13-17; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-82264; File No. SR-NYSEARCA-2017-52]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Amendment No. 1 to a Proposed Rule Change Amending the Consolidated Audit Trail Funding Fees

December 11, 2017.

On May 10, 2017, NYSE Arca, Inc. (“Exchange” or “SRO”) 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 adopt a fee schedule to establish the fees for Industry Members related to the National Market System Plan Governing the Consolidated Audit Trail (“CAT NMS Plan”). The proposed rule change was published in the **Federal Register** for comment on May 22, 2017.³ The Commission received seven comment letters on the proposed rule change,⁴

and a response to comments from the Participants.⁵ On June 30, 2017, the Commission temporarily suspended and initiated proceedings to determine whether to approve or disapprove the proposed rule change.⁶ The Commission thereafter received seven comment letters,⁷ and a response to comments from the Participants.⁸ On October 25, 2017, the Exchange filed Amendment No. 1 to the proposed rule change, as described in Items I and II below, which Items have been prepared by the

cboe2017040-1819670-154195.pdf; Letter from Stuart J. Kaswell, Executive Vice President and Managing Director, General Counsel, Managed Funds Association, to Brent J. Fields, Secretary, Commission (dated June 23, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-1822454-154283.pdf>; and Letter from Suzanne H. Shatto, Investor, to Commission (dated June 27, 2017), available at: <https://www.sec.gov/comments/sr-batsedgx-2017-22/batsedgx201722-154443.pdf>. The Commission also received a comment letter which is not pertinent to these proposed rule changes. See Letter from Christina Crouch, Smart Ltd., to Brent J. Fields, Secretary, Commission (dated June 5, 2017), available at: <https://www.sec.gov/comments/sr-batsbzx-2017-38/batsbzx201738-1785545-153152.htm>.

⁵ See Letter from CAT NMS Plan Participants to Brent J. Fields, Secretary, Commission (dated June 29, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-1832632-154584.pdf>.

⁶ See Securities Exchange Act Release No. 81067 (June 30, 2017), 82 FR 31656 (July 7, 2017).

⁷ See Letter from W. Hardy Callcott, Partner, Sidley Austin LLP, to Brent J. Fields, Secretary, Commission (dated July 27, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2148338-157737.pdf>; Letter from Kevin Coleman, General Counsel and Chief Compliance Officer, Belvedere Trading LLC, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2148360-157740.pdf>; Letter from Joanna Mallers, Secretary, FIA Principal Traders Group, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2151228-157745.pdf>; Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2150977-157744.pdf>; Letter from Stuart J. Kaswell, Executive Vice President and Managing Director, General Counsel, Managed Funds Association, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2150818-157743.pdf>; Letter from John Kinahan, Chief Executive Officer, Group One Trading, L.P., to Brent J. Fields, Secretary, Commission (dated August 10, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-2214568-160619.pdf>; Letter from Joseph Molluso, Executive Vice President and CFO, Virtu Financial, to Brent J. Fields, Secretary, Commission (dated August 18, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-2238648-160830.pdf>.

⁸ See Letter from Michael Simon, Chair, CAT NMS Plan Operating Committee, to Brent J. Fields, Secretary, Commission (dated November 2, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2674608-161412.pdf>.

Exchange.⁹ On November 9, 2017, the Commission extended the time period within which to approve the proposed rule change or disapprove the proposed rule change to January 14, 2018.¹⁰ The Commission is publishing this notice to solicit comments from interested persons on Amendment No. 1.¹¹

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the NYSE Arca Equities Fees and Charges (“Arca Fee Schedule”), and the NYSE Arca Options Fees and Charges (“Arca Options Fee Schedule”), to adopt the fees for Industry Members related to the National Market System Plan Governing the Consolidated Audit Trail (the “CAT NMS Plan” or “Plan”).¹² The Exchange files this proposed rule change (the “Amendment”) to amend the Original Proposal. This Amendment replaces the Original Proposal in its entirety, and also describes the changes from the Original Proposal. The proposed rule change is available on the Exchange’s website at www.nyse.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

⁹ Amendment No. 1 to the proposed rule change replaces and supersedes the Original Proposal in its entirety.

¹⁰ See Securities Exchange Act Release No. 82049 (November 9, 2017), 82 FR 53549 (November 16, 2017).

¹¹ The Commission notes that on November 29, 2017, the Exchange filed Amendment No. 2 to the proposed rule change. Amendment No. 2 is a partial amendment to the proposed rule change, as amended by Amendment No. 1. Amendment No. 2 proposes to change the parenthetical regarding the OTC Equity Securities discount in paragraph (b)(2) of the proposed fee schedule from “with a discount for Equity ATs exclusively trading OTC Equity Securities based on the average shares per trade ratio between NMS Stocks and OTC Equity Securities” to “with a discount for OTC Equity Securities market share of Equity ATs trading OTC Equity Securities based on the average shares per trade ratio between NMS Stocks and OTC Equity Securities.” Amendment No. 2 also deletes footnote 45 in Section 3(a) on page 23 of the First Amendment which reads, “The discount is only applied to the market share of Execution Venue ATs exclusively trading OTC Equity Securities. Accordingly, FINRA’s market share, which includes market share from the OTC Reporting Facility, is not discounted as a result of its OTC Equity Securities activity,” as the footnote is erroneous and was included inadvertently. See Securities Exchange Act Release No. 82265 (December 11, 2017).

¹² Unless otherwise specified, capitalized terms used in this rule filing are defined as set forth herein, the CAT Compliance Rule Series or in the CAT NMS Plan.

⁹⁸ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 80698 (May 16, 2017), 82 FR 23457 (May 22, 2017) (“Original Proposal”).

⁴ Since the CAT NMS Plan Participants’ proposed rule changes to adopt fees to be charged to Industry Members to fund the consolidated audit trail are substantively identical, the Commission is considering all comments received on the proposed rule changes regardless of the comment file to which they were submitted. See text accompanying notes 13-16 *infra*, for a list of the CAT NMS Plan Participants. See Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, to Brent J. Fields, Secretary, Commission (dated June 6, 2017), available at: <https://www.sec.gov/comments/sr-batsbzx-2017-38/batsbzx201738-1788188-153228.pdf>; Letter from Patricia L. Cerny and Steven O’Malley, Compliance Consultants, to Brent J. Fields, Secretary, Commission (dated June 12, 2017), available at: <https://www.sec.gov/comments/sr-cboe-2017-040/cboe2017040-1799253-153675.pdf>; Letter from Daniel Zinn, General Counsel, OTC Markets Group Inc., to Eduardo A. Aleman, Assistant Secretary, Commission (dated June 13, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-1801717-153703.pdf>; Letter from Joanna Mallers, Secretary, FIA Principal Traders Group, to Brent J. Fields, Secretary, Commission (dated June 22, 2017), available at: <https://www.sec.gov/comments/sr-cboe-2017-040/>

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

BOX Options Exchange LLC, Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe C2 Exchange, Inc., Cboe Exchange, Inc.,¹³ Chicago Stock Exchange, Inc., Financial Industry Regulatory Authority, Inc. ("FINRA"), Investors' Exchange LLC, Miami International Securities Exchange, LLC, MIAx PEARL, LLC, NASDAQ BX, Inc., Nasdaq GEMX, LLC, Nasdaq ISE, LLC, Nasdaq MRX, LLC,¹⁴ NASDAQ PHLX LLC, The NASDAQ Stock Market LLC, New York Stock Exchange LLC, NYSE American LLC,¹⁵ NYSE Arca, Inc. and NYSE National, Inc.¹⁶ (collectively, the "Participants") filed with the Commission, pursuant to Section 11A of the Exchange Act¹⁷ and Rule 608 of Regulation NMS thereunder,¹⁸ the CAT

¹³ Note that Bats BYX Exchange, Inc., Bats BZX Exchange, Inc., Bats EDGA Exchange, Inc., Bats EDGX Exchange, Inc., LLC, C2 Options Exchange, Incorporated, and Chicago Board Options Exchange, Incorporated, have been renamed Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe C2 Exchange, Inc., Cboe Exchange, Inc., respectively.

¹⁴ ISE Gemini, LLC, ISE Mercury, LLC and International Securities Exchange, LLC have been renamed Nasdaq GEMX, LLC, Nasdaq MRX, LLC, and Nasdaq ISE, LLC, respectively. See Securities Exchange Act Rel. No. 80248 (Mar. 15, 2017), 82 FR 14547 (Mar. 21, 2017); Securities Exchange Act Rel. No. 80326 (Mar. 29, 2017), 82 FR 16460 (Apr. 4, 2017); and Securities Exchange Act Rel. No. 80325 (Mar. 29, 2017), 82 FR 16445 (Apr. 4, 2017).

¹⁵ NYSE MKT LLC has been renamed NYSE American LLC. See Securities Exchange Act Rel. No. 80283 (Mar. 21, 2017), 82 FR 15244 (Mar. 27, 2017).

¹⁶ National Stock Exchange, Inc. has been renamed NYSE National, Inc. See Securities Exchange Act Rel. No. 79902 (Jan. 30, 2017), 82 FR 9258 (Feb. 3, 2017).

¹⁷ 15 U.S.C. 78k-1.

¹⁸ 17 CFR 242.608.

NMS Plan.¹⁹ The Participants filed the Plan to comply with Rule 613 of Regulation NMS under the Exchange Act. The Plan was published for comment in the **Federal Register** on May 17, 2016,²⁰ and approved by the Commission, as modified, on November 15, 2016.²¹ The Plan is designed to create, implement and maintain a consolidated audit trail ("CAT") that would capture customer and order event information for orders in NMS Securities and OTC Equity Securities, across all markets, from the time of order inception through routing, cancellation, modification, or execution in a single consolidated data source. The Plan accomplishes this by creating CAT NMS, LLC (the "Company"), of which each Participant is a member, to operate the CAT.²² Under the CAT NMS Plan, the Operating Committee of the Company ("Operating Committee") has discretion to establish funding for the Company to operate the CAT, including establishing fees that the Participants will pay, and establishing fees for Industry Members that will be implemented by the Participants ("CAT Fees").²³ The Participants are required to file with the SEC under Section 19(b) of the Exchange Act any such CAT Fees applicable to Industry Members that the Operating Committee approves.²⁴ Accordingly, the Exchange submitted the Original Proposal to amend the Arca Fee Schedule and the Arca Options Fee Schedule to adopt the Consolidated Audit Trail Funding Fees, which would require Industry Members that are Exchange members to pay the CAT Fees determined by the Operating Committee.

The Commission published the Original Proposal for public comment in the **Federal Register** on May 22, 2017,²⁵ and received comments in response to the Original Proposal or similar fee filings by other Participants.²⁶ On June

¹⁹ See Letter from the Participants to Brent J. Fields, Secretary, Commission, dated September 30, 2014; and Letter from Participants to Brent J. Fields, Secretary, Commission, dated February 27, 2015. On December 24, 2015, the Participants submitted an amendment to the CAT NMS Plan. See Letter from Participants to Brent J. Fields, Secretary, Commission, dated December 23, 2015.

²⁰ Securities Exchange Act Rel. No. 77724 (Apr. 27, 2016), 81 FR 30614 (May 17, 2016).

²¹ Securities Exchange Act Rel. No. 79318 (Nov. 15, 2016), 81 FR 84696 (Nov. 23, 2016) ("Approval Order").

²² The Plan also serves as the limited liability company agreement for the Company.

²³ Section 11.1(b) of the CAT NMS Plan.

²⁴ *Id.*

²⁵ Securities Exchange Act Rel. No. 80698 (May 16, 2017), 82 FR 23457 (May 22, 2017) (SR-NYSEArca-2017-52).

²⁶ For a summary of comments, see generally Securities Exchange Act Rel. No. 81067 (June 30,

30, 2017, the Commission suspended, and instituted proceedings to determine whether to approve or disapprove, the Original Proposal.²⁷ The Commission received seven comment letters in response to those proceedings.²⁸

In response to the comments on the Original Proposal, the Operating Committee determined to make the following changes to the funding model: (1) Add two additional CAT Fee tiers for Equity Execution Venues; (2) discount the market share of Execution Venue ATSs exclusively trading OTC Equity Securities as well as the market share of the FINRA over-the-counter reporting facility ("ORF") by the average shares per trade ratio between NMS Stocks and OTC Equity Securities (calculated as 0.17% based on available data from the second quarter of June 2017) when calculating the market share of Execution Venue ATS exclusively trading OTC Equity Securities and FINRA; (3) discount the Options Market Maker quotes by the trade to quote ratio for options (calculated as 0.01% based on available data for June 2016 through June 2017) when calculating message traffic for Options Market Makers; (4) discount equity market maker quotes by the trade to quote ratio for equities (calculated as 5.43% based on available data for June 2016 through June 2017) when calculating message traffic for equity market makers; (5) decrease the number of tiers for Industry Members (other than the Execution Venue ATSs) from nine to seven; (6) change the allocation of CAT costs between Equity Execution Venues and Options Execution Venues from 75%/25% to 67%/33%; (7) adjust tier percentages and recovery allocations for Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSs); (8) focus

2017), 82 FR 31656 (July 7, 2017) ("Suspension Order").

²⁷ Suspension Order.

²⁸ See Letter from Stuart J. Kaswell, Executive Vice President, Managing Director and General Counsel, Managed Funds Association, to Brent J. Fields, Secretary, SEC (July 28, 2017) ("MFA Letter"); Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA, to Brent J. Fields, Secretary, SEC (July 28, 2017) ("SIFMA Letter"); Joanna Mallers, Secretary, FIA Principal Traders Group, to Brent J. Fields, Secretary, SEC (July 28, 2017) ("FIA Principal Traders Group Letter"); Letter from Kevin Coleman, General Counsel & Chief Compliance Officer, Belvedere Trading LLC, to Brent J. Fields, Secretary, SEC (July 28, 2017) ("Belvedere Letter"); Letter from W. Hardy Callcott, Sidley Austin LLP, to Brent J. Fields, Secretary, SEC (July 27, 2017) ("Sidley Letter"); Letter from John Kinahan, Chief Executive Officer, Group One Trading, L.P., to Brent J. Fields, Secretary, SEC (Aug. 10, 2017) ("Group One Letter"); and Letter from Joseph Molluso, Executive Vice President, Virtu Financial, to Brent J. Fields, Secretary, SEC (Aug. 18, 2017) ("Virtu Financial Letter").

the comparability of CAT Fees on the individual entity level, rather than primarily on the comparability of affiliated entities; (9) commence invoicing of CAT Reporters as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Participants and the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants; and (10) require the proposed fees to automatically expire two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. As discussed in detail below, the Exchange proposes to amend the Original Proposal to reflect these changes.

(1) Executive Summary

The following provides an executive summary of the CAT funding model approved by the Operating Committee, as well as Industry Members' rights and obligations related to the payment of CAT Fees calculated pursuant to the CAT funding model, as amended by this Amendment. A detailed description of the CAT funding model and the CAT Fees, as amended by this Amendment, as well as the changes made to the Original Proposal follows this executive summary.

(A) CAT Funding Model

- *CAT Costs.* The CAT funding model is designed to establish CAT-specific fees to collectively recover the costs of building and operating the CAT from all CAT Reporters, including Industry Members and Participants. The overall CAT costs for the calculation of the CAT Fees in this fee filing are comprised of Plan Processor CAT costs and non-Plan Processor CAT costs incurred, and estimated to be incurred, from November 21, 2016 through November 21, 2017. (See Section 3(a)(2)(E) below)

- *Bifurcated Funding Model.* The CAT NMS Plan requires a bifurcated funding model, where costs associated with building and operating the CAT would be borne by (1) Participants and Industry Members that are Execution Venues for Eligible Securities through fixed tier fees based on market share, and (2) Industry Members (other than alternative trading systems ("ATs")) that execute transactions in Eligible Securities ("Execution Venue ATs") through fixed tier fees based on message traffic for Eligible Securities. (See Section 3(a)(2) below)

- *Industry Member Fees.* Each Industry Member (other than Execution Venue ATs) will be placed into one of seven tiers of fixed fees, based on "message traffic" in Eligible Securities

for a defined period (as discussed below). Prior to the start of CAT reporting, "message traffic" will be comprised of historical equity and equity options orders, cancels, quotes and executions provided by each exchange and FINRA over the previous three months. After an Industry Member begins reporting to the CAT, "message traffic" will be calculated based on the Industry Member's Reportable Events reported to the CAT. Industry Members with lower levels of message traffic will pay a lower fee and Industry Members with higher levels of message traffic will pay a higher fee. To avoid disincentives to quoting behavior, Options Market Maker and equity market maker quotes will be discounted when calculating message traffic. (See Section 3(a)(2)(B) below)

- *Execution Venue Fees.* Each Equity Execution Venue will be placed in one of four tiers of fixed fees based on market share, and each Options Execution Venue will be placed in one of two tiers of fixed fees based on market share. Equity Execution Venue market share will be determined by calculating each Equity Execution Venue's proportion of the total volume of NMS Stock and OTC Equity shares reported by all Equity Execution Venues during the relevant time period. For purposes of calculating market share, the market share of Execution Venue ATs exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF will be discounted. Similarly, market share for Options Execution Venues will be determined by calculating each Options Execution Venue's proportion of the total volume of Listed Options contracts reported by all Options Execution Venues during the relevant time period. Equity Execution Venues with a larger market share will pay a larger CAT Fee than Equity Execution Venues with a smaller market share. Similarly, Options Execution Venues with a larger market share will pay a larger CAT Fee than Options Execution Venues with a smaller market share. (See Section 3(a)(2)(C) below)

- *Cost Allocation.* For the reasons discussed below, in designing the model, the Operating Committee determined that 75 percent of total costs recovered would be allocated to Industry Members (other than Execution Venue ATs) and 25 percent would be allocated to Execution Venues. In addition, the Operating Committee determined to allocate 67 percent of Execution Venue costs recovered to Equity Execution Venues and 33 percent to Options Execution Venues. (See Section 3(a)(2)(D) below)

- *Comparability of Fees.* The CAT funding model charges CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) comparable CAT Fees. (See Section 3(a)(2)(F) below)

(B) CAT Fees for Industry Members

- *Fee Schedule.* The quarterly CAT Fees for each tier for Industry Members are set forth in the two fee schedules in the Consolidated Audit Trail Funding Fees, one for Equity ATs and one for Industry Members other than Equity ATs. (See Section 3(a)(3)(B) below)

- *Quarterly Invoices.* Industry Members will be billed quarterly for CAT Fees, with the invoices payable within 30 days. The quarterly invoices will identify within which tier the Industry Member falls. (See Section 3(a)(3)(C) below)

- *Centralized Payment.* Each Industry Member will receive from the Company one invoice for its applicable CAT Fees, not separate invoices from each Participant of which it is a member. Each Industry Member will pay its CAT Fees to the Company via the centralized system for the collection of CAT Fees established by the Operating Committee. (See Section 3(a)(3)(C) below)

- *Billing Commencement.* Industry Members will begin to receive invoices for CAT Fees as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Participants and the operative date of the Plan amendment adopting CAT Fees for Participants. (See Section 3(a)(2)(G) below)

- *Sunset Provision.* The Consolidated Audit Trail Funding Fees will sunset automatically two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. (See Section 3(a)(2)(J) below)

(2) Description of the CAT Funding Model

Article XI of the CAT NMS Plan requires the Operating Committee to approve the operating budget, including projected costs of developing and operating the CAT for the upcoming year. In addition to a budget, Article XI of the CAT NMS Plan provides that the Operating Committee has discretion to establish funding for the Company, consistent with a bifurcated funding model, where costs associated with building and operating the Central Repository would be borne by (1) Participants and Industry Members that are Execution Venues through fixed tier fees based on market share, and (2) Industry Members (other than Execution

Venue ATs) through fixed tier fees based on message traffic. In its order approving the CAT NMS Plan, the Commission determined that the proposed funding model was “reasonable”²⁹ and “reflects a reasonable exercise of the Participants’ funding authority to recover the Participants’ costs related to the CAT.”³⁰

More specifically, the Commission stated in approving the CAT NMS Plan that “[t]he Commission believes that the proposed funding model is reasonably designed to allocate the costs of the CAT between the Participants and Industry Members.”³¹ The Commission further noted the following:

The Commission believes that the proposed funding model reflects a reasonable exercise of the Participants’ funding authority to recover the Participants’ costs related to the CAT. The CAT is a regulatory facility jointly owned by the Participants and . . . the Exchange Act specifically permits the Participants to charge their members fees to fund their self-regulatory obligations. The Commission further believes that the proposed funding model is designed to impose fees reasonably related to the Participants’ self-regulatory obligations because the fees would be directly associated with the costs of establishing and maintaining the CAT, and not unrelated SRO services.³²

Accordingly, the funding model approved by the Operating Committee imposes fees on both Participants and Industry Members.

As discussed in Appendix C of the CAT NMS Plan, in developing and approving the approved funding model, the Operating Committee considered the advantages and disadvantages of a variety of alternative funding and cost allocation models before selecting the proposed model.³³ After analyzing the various alternatives, the Operating Committee determined that the proposed tiered, fixed fee funding model provides a variety of advantages in comparison to the alternatives.

In particular, the fixed fee model, as opposed to a variable fee model, provides transparency, ease of calculation, ease of billing and other administrative functions, and predictability of a fixed fee. Such factors are crucial to estimating a reliable revenue stream for the Company and for

permitting CAT Reporters to reasonably predict their payment obligations for budgeting purposes. Additionally, a strictly variable or metered funding model based on message volume would be far more likely to affect market behavior and place an inappropriate burden on competition.

In addition, reviews from varying time periods of current broker-dealer order and trading data submitted under existing reporting requirements showed a wide range in activity among broker-dealers, with a number of broker-dealers submitting fewer than 1,000 orders per month and other broker-dealers submitting millions and even billions of orders in the same period. Accordingly, the CAT NMS Plan includes a tiered approach to fees. The tiered approach helps ensure that fees are equitably allocated among similarly situated CAT Reporters and furthers the goal of lessening the impact on smaller firms.³⁴ In addition, in choosing a tiered fee structure, the Operating Committee concluded that the variety of benefits offered by a tiered fee structure, discussed above, outweighed the fact that CAT Reporters in any particular tier would pay different rates per message traffic order event or per market share (e.g., an Industry Member with the largest amount of message traffic in one tier would pay a smaller amount per order event than an Industry Member in the same tier with the least amount of message traffic). Such variation is the natural result of a tiered fee structure.³⁵ The Operating Committee considered several approaches to developing a tiered model, including defining fee tiers based on such factors as size of firm, message traffic or trading dollar volume. After analyzing the alternatives, it was concluded that the tiering should be based on message traffic which will reflect the relative impact of CAT Reporters on the CAT System.

Accordingly, the CAT NMS Plan contemplates that costs will be allocated across the CAT Reporters on a tiered basis in order to allocate higher costs to those CAT Reporters that contribute more to the costs of creating, implementing and maintaining the CAT and lower costs to those that contribute less.³⁶ The fees to be assessed at each tier are calculated so as to recoup a proportion of costs appropriate to the message traffic or market share (as

applicable) from CAT Reporters in each tier. Therefore, Industry Members generating the most message traffic will be in the higher tiers, and will be charged a higher fee. Industry Members with lower levels of message traffic will be in lower tiers and will be assessed a lower fee for the CAT.³⁷

Correspondingly, Execution Venues with the highest market shares will be in the top tier, and will be charged higher fees. Execution Venues with the lowest market shares will be in the lowest tier and will be assessed lower fees for the CAT.³⁸

The CAT NMS Plan states that Industry Members (other than Execution Venue ATs) will be charged based on message traffic, and that Execution Venues will be charged based on market share.³⁹ While there are multiple factors that contribute to the cost of building, maintaining and using the CAT, processing and storage of incoming message traffic is one of the most significant cost drivers for the CAT.⁴⁰ Thus, the CAT NMS Plan provides that the fees payable by Industry Members (other than Execution Venue ATs) will be based on the message traffic generated by such Industry Member.⁴¹

In contrast to Industry Members, which determine the degree to which they produce message traffic that constitute CAT Reportable Events, the CAT Reportable Events of the Execution Venues are largely derivative of quotations and orders received from Industry Members that they are required to display. The business model for Execution Venues (other than FINRA), however, is focused on executions on their markets. As a result, the Operating Committee believes that it is more equitable to charge Execution Venues based on their market share rather than their message traffic.

Focusing on message traffic would make it more difficult to draw distinctions between large and small Execution Venues and, in particular, between large and small options exchanges. For instance, the Operating Committee analyzed the message traffic of Execution Venues and Industry Members for the period of April 2017 to June 2017 and placed all CAT Reporters into a nine-tier framework (i.e., a single tier may include both Execution Venues and Industry Members). The Operating Committee’s analysis found that the majority of exchanges (15 total) were

³⁴ Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85006.

³⁵ Moreover, as the SEC noted in approving the CAT NMS Plan, “[t]he Participants also have offered a reasonable basis for establishing a funding model based on broad tiers, in that it may be easier to implement.” Approval Order at 84796.

³⁶ Approval Order at 85005.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Section 11.3(a) and (b) of the CAT NMS Plan.

⁴⁰ Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85005.

⁴¹ Section 11.3(b) of the CAT NMS Plan.

²⁹ Approval Order at 84796.

³⁰ *Id.* at 84794.

³¹ *Id.* at 84795.

³² *Id.* at 84794.

³³ Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85006.

grouped in Tiers 1 and 2. Moreover, virtually all of the options exchanges were in Tiers 1 and 2.⁴² Given the resulting concentration of options exchanges in Tiers 1 and 2 under this approach, the analysis shows that a funding model for Execution Venues based on message traffic would make it more difficult to distinguish between large and small options exchanges, as compared to the proposed fee approach that bases fees for Execution Venues on market share.

The CAT NMS Plan's funding model also is structured to avoid a "reduction in market quality."⁴³ The tiered, fixed fee funding model is designed to limit the disincentives to providing liquidity to the market. For example, the Operating Committee expects that a firm that has a large volume of quotes would likely be categorized in one of the upper tiers, and would not be assessed a fee for this traffic directly as they would under a more directly metered model. In contrast, strictly variable or metered funding models based on message volume are far more likely to affect market behavior. In approving the CAT NMS Plan, the SEC stated that "[t]he Participants also offered a reasonable basis for establishing a funding model based on broad tiers, in that it may be . . . less likely to have an incremental deterrent effect on liquidity provision."⁴⁴

The funding model also is structured to avoid a reduction in market quality because it discounts Options Market Maker and equity market maker quotes when calculating message traffic for Options Market Makers and equity market makers, respectively. As discussed in more detail below, the Operating Committee determined to discount the Options Market Maker quotes by the trade to quote ratio for options when calculating message traffic for Options Market Makers. Similarly, to avoid disincentives to quoting behavior on the equities side as well, the Operating Committee determined to discount equity market maker quotes by the trade to quote ratio for equities when calculating message traffic for equity market makers. The proposed discounts recognize the value of the market makers' quoting activity to the market as a whole.

The CAT NMS Plan is further structured to avoid potential conflicts raised by the Operating Committee determining fees applicable to its own

members—the Participants. First, the Company will operate on a "break-even" basis, with fees imposed to cover costs and an appropriate reserve. Any surpluses will be treated as an operational reserve to offset future fees and will not be distributed to the Participants as profits.⁴⁵ To ensure that the Participants' operation of the CAT will not contribute to the funding of their other operations, Section 11.1(c) of the CAT NMS Plan specifically states that "[a]ny surplus of the Company's revenues over its expenses shall be treated as an operational reserve to offset future fees." In addition, as set forth in Article VIII of the CAT NMS Plan, the Company "intends to operate in a manner such that it qualifies as a 'business league' within the meaning of Section 501(c)(6) of the [Internal Revenue] Code." To qualify as a business league, an organization must "not [be] organized for profit and no part of the net earnings of [the organization can] inure[] to the benefit of any private shareholder or individual."⁴⁶ As the SEC stated when approving the CAT NMS Plan, "the Commission believes that the Company's application for Section 501(c)(6) business league status addresses issues raised by commenters about the Plan's proposed allocation of profit and loss by mitigating concerns that the Company's earnings could be used to benefit individual Participants."⁴⁷ The Internal Revenue Service recently has determined that the Company is exempt from federal income tax under Section 501(c)(6) of the Internal Revenue Code.

The funding model also is structured to take into account distinctions in the securities trading operations of Participants and Industry Members. For example, the Operating Committee designed the model to address the different trading characteristics in the OTC Equity Securities market. Specifically, the Operating Committee proposes to discount the market share of Execution Venue ATSS exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF by the average shares per trade ratio between NMS Stocks and OTC Equity Securities to adjust for the greater number of shares being traded in the OTC Equity Securities market, which is generally a function of a lower per share price for OTC Equity Securities when compared to NMS Stocks. In addition, the Operating Committee also proposes to discount Options Market Maker and

equity market maker message traffic in recognition of their role in the securities markets. Furthermore, the funding model creates separate tiers for Equity and Options Execution Venues due to the different trading characteristics of those markets.

Finally, by adopting a CAT-specific fee, the Operating Committee will be fully transparent regarding the costs of the CAT. Charging a general regulatory fee, which would be used to cover CAT costs as well as other regulatory costs, would be less transparent than the selected approach of charging a fee designated to cover CAT costs only.

A full description of the funding model is set forth below. This description includes the framework for the funding model as set forth in the CAT NMS Plan, as well as the details as to how the funding model will be applied in practice, including the number of fee tiers and the applicable fees for each tier. The complete funding model is described below, including those fees that are to be paid by the Participants. The proposed Consolidated Audit Trail Funding Fees, however, do not apply to the Participants; the proposed Consolidated Audit Trail Funding Fees only apply to Industry Members. The CAT Fees for Participants will be imposed separately by the Operating Committee pursuant to the CAT NMS Plan.

(A) Funding Principles

Section 11.2 of the CAT NMS Plan sets forth the principles that the Operating Committee applied in establishing the funding for the Company. The Operating Committee has considered these funding principles as well as the other funding requirements set forth in the CAT NMS Plan and in Rule 613 in developing the proposed funding model. The following are the funding principles in Section 11.2 of the CAT NMS Plan:

- To create transparent, predictable revenue streams for the Company that are aligned with the anticipated costs to build, operate and administer the CAT and other costs of the Company;
- To establish an allocation of the Company's related costs among Participants and Industry Members that is consistent with the Exchange Act, taking into account the timeline for implementation of the CAT and distinctions in the securities trading operations of Participants and Industry Members and their relative impact upon the Company's resources and operations;
- To establish a tiered fee structure in which the fees charged to: (i) CAT Reporters that are Execution Venues,

⁴² The Operating Committee notes that this analysis did not place MIAx PEARL in Tier 1 or Tier 2 since the exchange commenced trading on February 6, 2017.

⁴³ Section 11.2(e) of the CAT NMS Plan.

⁴⁴ Approval Order at 84796.

⁴⁵ *Id.* at 84792.

⁴⁶ 26 U.S.C. 501(c)(6).

⁴⁷ Approval Order at 84793.

including ATSS, are based upon the level of market share; (ii) Industry Members' non-ATS activities are based upon message traffic; (iii) the CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether Execution Venue and/or Industry Members);

- To provide for ease of billing and other administrative functions;
- To avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality; and
- To build financial stability to support the Company as a going concern.

(B) Industry Member Tiering

Under Section 11.3(b) of the CAT NMS Plan, the Operating Committee is required to establish fixed fees to be payable by Industry Members, based on message traffic generated by such Industry Member, with the Operating Committee establishing at least five and no more than nine tiers.

The CAT NMS Plan clarifies that the fixed fees payable by Industry Members pursuant to Section 11.3(b) shall, in addition to any other applicable message traffic, include message traffic generated by: (i) An ATS that does not execute orders that is sponsored by such Industry Member; and (ii) routing orders to and from any ATS sponsored by such Industry Member. In addition, the Industry Member fees will apply to Industry Members that act as routing broker-dealers for exchanges. The Industry Member fees will not be applicable, however, to an ATS that qualifies as an Execution Venue, as discussed in more detail in the section on Execution Venue tiering.

In accordance with Section 11.3(b), the Operating Committee approved a tiered fee structure for Industry Members (other than Execution Venue ATSS) as described in this section. In determining the tiers, the Operating Committee considered the funding principles set forth in Section 11.2 of the CAT NMS Plan, seeking to create funding tiers that take into account the relative impact on CAT System resources of different Industry Members, and that establish comparable fees among the CAT Reporters with the most Reportable Events. The Operating Committee has determined that establishing seven tiers results in an allocation of fees that distinguishes between Industry Members with

differing levels of message traffic. Thus, each such Industry Member will be placed into one of seven tiers of fixed fees, based on "message traffic" for a defined period (as discussed below).

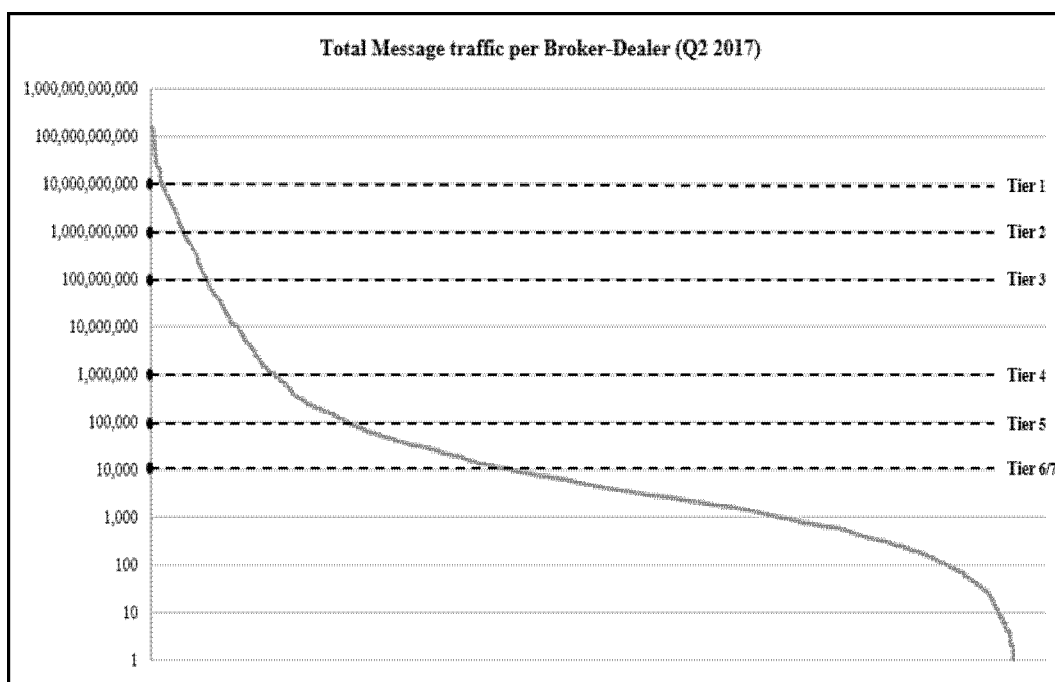
A seven tier structure was selected to provide a wide range of levels for tiering Industry Members such that Industry Members submitting significantly less message traffic to the CAT would be adequately differentiated from Industry Members submitting substantially more message traffic. The Operating Committee considered historical message traffic from multiple time periods, generated by Industry Members across all exchanges and as submitted to FINRA's Order Audit Trail System ("OATS"), and considered the distribution of firms with similar levels of message traffic, grouping together firms with similar levels of message traffic. Based on this, the Operating Committee determined that seven tiers would group firms with similar levels of message traffic, charging those firms with higher impact on the CAT more, while lowering the burden on Industry Members that have less CAT-related activity. Furthermore, the selection of seven tiers establishes comparable fees among the largest CAT Reporters.

Each Industry Member (other than Execution Venue ATSS) will be ranked by message traffic and tiered by predefined Industry Member percentages (the "Industry Member Percentages"). The Operating Committee determined to use predefined percentages rather than fixed volume thresholds to ensure that the total CAT Fees collected recover the expected CAT costs regardless of changes in the total level of message traffic. To determine the fixed percentage of Industry Members in each tier, the Operating Committee analyzed historical message traffic generated by Industry Members across all exchanges and as submitted to OATS, and considered the distribution of firms with similar levels of message traffic, grouping together firms with similar levels of message traffic. Based on this, the Operating Committee identified seven tiers that would group firms with similar levels of message traffic.

The percentage of costs recovered by each Industry Member tier will be determined by predefined percentage allocations (the "Industry Member Recovery Allocation"). In determining the fixed percentage allocation of costs recovered for each tier, the Operating Committee considered the impact of CAT Reporter message traffic on the CAT System as well as the distribution of total message volume across Industry Members while seeking to maintain

comparable fees among the largest CAT Reporters. Accordingly, following the determination of the percentage of Industry Members in each tier, the Operating Committee identified the percentage of total market volume for each tier based on the historical message traffic upon which Industry Members had been initially ranked. Taking this into account along with the resulting percentage of total recovery, the percentage allocation of costs recovered for each tier were assigned, allocating higher percentages of recovery to tiers with higher levels of message traffic while avoiding any inappropriate burden on competition. Furthermore, by using percentages of Industry Members and costs recovered per tier, the Operating Committee sought to include elasticity within the funding model, allowing the funding model to respond to changes in either the total number of Industry Members or the total level of message traffic.

The following chart illustrates the breakdown of seven Industry Member tiers across the monthly average of total equity and equity options orders, cancels, quotes and executions in the second quarter of 2017 as well as message traffic thresholds between the largest of Industry Member message traffic gaps. The Operating Committee referenced similar distribution illustrations to determine the appropriate division of Industry Member percentages in each tier by considering the grouping of firms with similar levels of message traffic and seeking to identify relative breakpoints in the message traffic between such groupings. In reviewing the chart and its corresponding table, note that while these distribution illustrations were referenced to help differentiate between Industry Member tiers, the proposed funding model is driven by fixed percentages of Industry Members across tiers to account for fluctuating levels of message traffic over time. This approach also provides financial stability for the CAT by ensuring that the funding model will recover the required amounts regardless of changes in the number of Industry Members or the amount of message traffic. Actual messages in any tier will vary based on the actual traffic in a given measurement period, as well as the number of firms included in the measurement period. The Industry Member Percentages and Industry Member Recovery Allocation for each tier will remain fixed with each Industry Member's tier to be reassigned periodically, as described below in Section 3(a)(2)(I).



Industry Member tier	Approximate message traffic per Industry Member (Q2 2017) (orders, quotes, cancels and executions)
Tier 1	>10,000,000,000
Tier 2	1,000,000,000–10,000,000,000
Tier 3	100,000,000–1,000,000,000
Tier 4	1,000,000–100,000,000
Tier 5	100,000–1,000,000
Tier 6	10,000–100,000
Tier 7	<10,000

Based on the above analysis, the Operating Committee approved the following Industry Member Percentages and Industry Member Recovery Allocations:

Industry Member tier	Percentage of Industry Members	Percentage of Industry Member recovery	Percentage of total recovery
Tier 1	0.900	12.00	9.00
Tier 2	2.150	20.50	15.38
Tier 3	2.800	18.50	13.88
Tier 4	7.750	32.00	24.00
Tier 5	8.300	10.00	7.50
Tier 6	18.800	6.00	4.50
Tier 7	59.300	1.00	0.75
Total	100	100	75

For the purposes of creating these tiers based on message traffic, the Operating Committee determined to define the term “message traffic” separately for the period before the commencement of CAT reporting and for the period after the start of CAT reporting. The different definition for message traffic is necessary as there will be no Reportable Events as defined in

the Plan, prior to the commencement of CAT reporting. Accordingly, prior to the start of CAT reporting, “message traffic” will be comprised of historical equity and equity options orders, cancels, quotes and executions provided by each exchange and FINRA over the previous three months. Prior to the start of CAT reporting, orders would be comprised of the total number of equity and equity

options orders received and originated by a member of an exchange or FINRA over the previous three-month period, including principal orders, cancel/replace orders, market maker orders originated by a member of an exchange, and reserve (iceberg) orders as well as executions originated by a member of FINRA, and excluding order rejects, system-modified orders, order routes

and implied orders.⁴⁸ In addition, prior to the start of CAT reporting, cancels would be comprised of the total number of equity and equity option cancels received and originated by a member of an exchange or FINRA over a three-month period, excluding order modifications (*e.g.*, order updates, order splits, partial cancels) and multiple cancels of a complex order. Furthermore, prior to the start of CAT reporting, quotes would be comprised of information readily available to the exchanges and FINRA, such as the total number of historical equity and equity options quotes received and originated by a member of an exchange or FINRA over the prior three-month period. Additionally, prior to the start of CAT reporting, executions would be comprised of the total number of equity and equity option executions received or originated by a member of an exchange or FINRA over a three-month period.

After an Industry Member begins reporting to the CAT, “message traffic” will be calculated based on the Industry Member’s Reportable Events reported to the CAT as will be defined in the Technical Specifications.⁴⁹

Quotes of Options Market Makers and equity market makers will be included in the calculation of total message traffic for those market makers for purposes of tiering under the CAT funding model both prior to CAT reporting and once CAT reporting commences.⁵⁰ To address potential concerns regarding burdens on competition or market quality of including quotes in the calculation of message traffic, however, the Operating Committee determined to discount the Options Market Maker quotes by the trade to quote ratio for

options when calculating message traffic for Options Market Makers. Based on available data for June 2016 through June 2017, the trade to quote ratio for options is 0.01%. Similarly, to avoid disincentives to quoting behavior on the equities side, the Operating Committee determined to discount equity market maker quotes by the trade to quote ratio for equities. Based on available data for June 2016 through June 2017, the trade to quote ratio for equities is 5.43%.⁵¹ The trade to quote ratio for options and the trade to quote ratio for equities will be calculated every three months when tiers are recalculated (as discussed below).

The Operating Committee has determined to calculate fee tiers every three months, on a calendar quarter basis, based on message traffic from the prior three months. Based on its analysis of historical data, the Operating Committee believes that calculating tiers based on three months of data will provide the best balance between reflecting changes in activity by Industry Members while still providing predictability in the tiering for Industry Members. Because fee tiers will be calculated based on message traffic from the prior three months, the Operating Committee will begin calculating message traffic based on an Industry Member’s Reportable Events reported to the CAT once the Industry Member has been reporting to the CAT for three months. Prior to that, fee tiers will be calculated as discussed above with regard to the period prior to CAT reporting.

(C) Execution Venue Tiering

Under Section 11.3(a) of the CAT NMS Plan, the Operating Committee is required to establish fixed fees payable by Execution Venues. Section 1.1 of the CAT NMS Plan defines an Execution Venue as “a Participant or an alternative trading system (“ATS”) (as defined in Rule 300 of Regulation ATS) that operates pursuant to Rule 301 of Regulation ATS (excluding any such ATS that does not execute orders).”⁵²

The Operating Committee determined that ATSs should be included within the definition of Execution Venue. The Operating Committee believes that it is appropriate to treat ATSs as Execution Venues under the proposed funding

model since ATSs have business models that are similar to those of exchanges, and ATSs also compete with exchanges.

Given the differences between Execution Venues that trade NMS Stocks and/or OTC Equity Securities and Execution Venues that trade Listed Options, Section 11.3(a) addresses Execution Venues that trade NMS Stocks and/or OTC Equity Securities separately from Execution Venues that trade Listed Options. Equity Execution Venues and Options Execution Venues are treated separately for two reasons. First, the differing quoting behavior of Equity Execution Venues and Options Execution Venues makes comparison of activity between Execution Venues difficult. Second, Execution Venue tiers are calculated based on market share of share volume, and it is therefore difficult to compare market share between asset classes (*i.e.*, equity shares versus options contracts). Discussed below is how the funding model treats the two types of Execution Venues.

(I) NMS Stocks and OTC Equity Securities

Section 11.3(a)(i) of the CAT NMS Plan states that each Execution Venue that (i) executes transactions or, (ii) in the case of a national securities association, has trades reported by its members to its trade reporting facility or facilities for reporting transactions effected otherwise than on an exchange, in NMS Stocks or OTC Equity Securities will pay a fixed fee depending on the market share of that Execution Venue in NMS Stocks and OTC Equity Securities, with the Operating Committee establishing at least two and not more than five tiers of fixed fees, based on an Execution Venue’s NMS Stocks and OTC Equity Securities market share. For these purposes, market share for Execution Venues that execute transactions will be calculated by share volume, and market share for a national securities association that has trades reported by its members to its trade reporting facility or facilities for reporting transactions effected otherwise than on an exchange in NMS Stocks or OTC Equity Securities will be calculated based on share volume of trades reported, provided, however, that the share volume reported to such national securities association by an Execution Venue shall not be included in the calculation of such national security association’s market share.

In accordance with Section 11.3(a)(i) of the CAT NMS Plan, the Operating Committee approved a tiered fee structure for Equity Execution Venues and Option Execution Venues. In determining the Equity Execution

⁴⁸ Consequently, firms that do not have “message traffic” reported to an exchange or OATS before they are reporting to the CAT would not be subject to a fee until they begin to report information to CAT.

⁴⁹ If an Industry Member (other than an Execution Venue ATS) has no orders, cancels, quotes and executions prior to the commencement of CAT Reporting, or no Reportable Events after CAT reporting commences, then the Industry Member would not have a CAT Fee obligation.

⁵⁰ The SEC approved exemptive relief permitting Options Market Maker quotes to be reported to the Central Repository by the relevant Options Exchange in lieu of requiring that such reporting be done by both the Options Exchange and the Options Market Maker, as required by Rule 613 of Regulation NMS. *See* Securities Exchange Act Rel. No. 77265 (Mar. 1, 2017, 81 FR 11856 (Mar. 7, 2016)). This exemption applies to Options Market Maker quotes for CAT reporting purposes only. Therefore, notwithstanding the reporting exemption provided for Options Market Maker quotes, Options Market Maker quotes will be included in the calculation of total message traffic for Options Market Makers for purposes of tiering under the CAT funding model both prior to CAT reporting and once CAT reporting commences.

⁵¹ The trade to quote ratios were calculated based on the inverse of the average of the monthly equity SIP and OPRA quote to trade ratios from June 2016–June 2017 that were compiled by the Financial Information Forum using data from NASDAQ and SIAC.

⁵² Although FINRA does not operate an execution venue, because it is a Participant, it is considered an “Execution Venue” under the Plan for purposes of determining fees.

Venue Tiers, the Operating Committee considered the funding principles set forth in Section 11.2 of the CAT NMS Plan, seeking to create funding tiers that take into account the relative impact on system resources of different Equity Execution Venues, and that establish comparable fees among the CAT Reporters with the most Reportable Events. Each Equity Execution Venue will be placed into one of four tiers of fixed fees, based on the Execution Venue's NMS Stocks and OTC Equity Securities market share. In choosing four tiers, the Operating Committee performed an analysis similar to that discussed above with regard to the non-Execution Venue Industry Members to determine the number of tiers for Equity Execution Venues. The Operating Committee determined to establish four tiers for Equity Execution Venues, rather than a larger number of tiers as established for non-Execution Venue Industry Members, because the four tiers were sufficient to distinguish between the smaller number of Equity Execution Venues based on market share. Furthermore, the selection of four tiers serves to help establish comparability among the largest CAT Reporters.

Each Equity Execution Venue will be ranked by market share and tiered by predefined Execution Venue percentages, (the "Equity Execution Venue Percentages"). In determining the fixed percentage of Equity Execution Venues in each tier, the Operating Committee reviewed historical market share of share volume for Execution Venues. Equity Execution Venue market shares of share volume were sourced from market statistics made publicly-available by Bats Global Markets, Inc. ("Bats"). ATS market shares of share volume was sourced from market statistics made publicly-available by FINRA. FINRA trade reporting facility ("TRF") and ORF market share of share volume was sourced from market

statistics made publicly available by FINRA. Based on data from FINRA and otcmarkets.com, ATSs accounted for 39.12% of the share volume across the TRFs and ORFs during the recent tiering period. A 39.12%/60.88% split was applied to the ATS and non-ATS breakdown of FINRA market share, with FINRA tiered based only on the non-ATS portion of its market share of share volume.

The Operating Committee determined to discount the market share of Execution Venue ATSs exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF in recognition of the different trading characteristics of the OTC Equity Securities market as compared to the market in NMS Stocks. Many OTC Equity Securities are priced at less than one dollar—and a significant number at less than one penny—per share and low-priced shares tend to trade in larger quantities. Accordingly, a disproportionately large number of shares are involved in transactions involving OTC Equity Securities versus NMS Stocks. Because the proposed fee tiers are based on market share calculated by share volume, Execution Venue ATSs exclusively trading OTC Equity Securities and FINRA would likely be subject to higher tiers than their operations may warrant. To address this potential concern, the Operating Committee determined to discount the market share of Execution Venue ATSs exclusively trading OTC Equity Securities and the market share of the FINRA ORF by multiplying such market share by the average shares per trade ratio between NMS Stocks and OTC Equity Securities in order to adjust for the greater number of shares being traded in the OTC Equity Securities market. Based on available data for the second quarter of 2017, the average shares per trade ratio between NMS Stocks and OTC Equity Securities is 0.17%.⁵³ The average shares per trade

ratio between NMS Stocks and OTC Equity Securities will be recalculated every three months when tiers are recalculated.⁵⁴

Based on this, the Operating Committee considered the distribution of Execution Venues, and grouped together Execution Venues with similar levels of market share. The percentage of costs recovered by each Equity Execution Venue tier will be determined by predefined percentage allocations (the "Equity Execution Venue Recovery Allocation"). In determining the fixed percentage allocation of costs to be recovered from each tier, the Operating Committee considered the impact of CAT Reporter market share activity on the CAT System as well as the distribution of total market volume across Equity Execution Venues while seeking to maintain comparable fees among the largest CAT Reporters. Accordingly, following the determination of the percentage of Execution Venues in each tier, the Operating Committee identified the percentage of total market volume for each tier based on the historical market share upon which Execution Venues had been initially ranked. Taking this into account along with the resulting percentage of total recovery, the percentage allocation of cost recovery for each tier were assigned, allocating higher percentages of recovery to the tier with a higher level of market share while avoiding any inappropriate burden on competition. Furthermore, by using percentages of Equity Execution Venues and cost recovery per tier, the Operating Committee sought to include elasticity within the funding model, allowing the funding model to respond to changes in either the total number of Equity Execution Venues or changes in market share.

Based on this analysis, the Operating Committee approved the following Equity Execution Venue Percentages and Recovery Allocations:

Equity Execution Venue tier	Percentage of Equity Execution Venues	Percentage of Execution Venue recovery	Percentage of total recovery
Tier 1	25.00	33.25	8.31
Tier 2	42.00	25.73	6.43
Tier 3	23.00	8.00	2.00
Tier 4	10.00	0.02	0.01
Total	100	67	16.75

⁵³The average shares per trade ratio for both NMS Stocks and OTC Equity Securities from the second quarter of 2017 was calculated using publicly available market volume data from Bats and OTC Markets Group, and the totals were divided to

determine the average number of shares per trade between NMS Stocks and OTC Equity Securities.

⁵⁴The discount is only applied to the market share of Execution Venue ATSs exclusively trading

OTC Equity Securities. Accordingly, FINRA's market share, which includes market share from the OTC Reporting Facility, is not discounted as a result of its OTC Equity Securities activity.

(II) Listed Options

Section 11.3(a)(ii) of the CAT NMS Plan states that each Execution Venue that executes transactions in Listed Options will pay a fixed fee depending on the Listed Options market share of that Execution Venue, with the Operating Committee establishing at least two and no more than five tiers of fixed fees, based on an Execution Venue's Listed Options market share. For these purposes, market share will be calculated by contract volume.

In accordance with Section 11.3(a)(ii) of the CAT NMS Plan, the Operating Committee approved a tiered fee structure for Options Execution Venues. In determining the tiers, the Operating Committee considered the funding principles set forth in Section 11.2 of the CAT NMS Plan, seeking to create funding tiers that take into account the relative impact on system resources of different Options Execution Venues, and that establish comparable fees among the CAT Reporters with the most Reportable Events. Each Options Execution Venue will be placed into one of two tiers of fixed fees, based on the Execution Venue's Listed Options market share. In choosing two tiers, the Operating Committee performed an analysis similar to that discussed above with regard to Industry Members (other than Execution Venue ATSS) to

determine the number of tiers for Options Execution Venues. The Operating Committee determined to establish two tiers for Options Execution Venues, rather than a larger number, because the two tiers were sufficient to distinguish between the smaller number of Options Execution Venues based on market share. Furthermore, due to the smaller number of Options Execution Venues, the incorporation of additional Options Execution Venue tiers would result in significantly higher fees for Tier 1 Options Execution Venues and reduce comparability between Execution Venues and Industry Members. Furthermore, the selection of two tiers served to establish comparable fees among the largest CAT Reporters.

Each Options Execution Venue will be ranked by market share and tiered by predefined Execution Venue percentages, (the "Options Execution Venue Percentages"). To determine the fixed percentage of Options Execution Venues in each tier, the Operating Committee analyzed the historical and publicly available market share of Options Execution Venues to group Options Execution Venues with similar market shares across the tiers. Options Execution Venue market share of share volume were sourced from market statistics made publicly-available by

Bats. The process for developing the Options Execution Venue Percentages was the same as discussed above with regard to Equity Execution Venues.

The percentage of costs to be recovered from each Options Execution Venue tier will be determined by predefined percentage allocations (the "Options Execution Venue Recovery Allocation"). In determining the fixed percentage allocation of cost recovery for each tier, the Operating Committee considered the impact of CAT Reporter market share activity on the CAT System as well as the distribution of total market volume across Options Execution Venues while seeking to maintain comparable fees among the largest CAT Reporters. Furthermore, by using percentages of Options Execution Venues and cost recovery per tier, the Operating Committee sought to include elasticity within the funding model, allowing the funding model to respond to changes in either the total number of Options Execution Venues or changes in market share. The process for developing the Options Execution Venue Recovery Allocation was the same as discussed above with regard to Equity Execution Venues.

Based on this analysis, the Operating Committee approved the following Options Execution Venue Percentages and Recovery Allocations:

Options Execution Venue tier	Percentage of Options Execution Venues	Percentage of Execution Venue recovery	Percentage of total recovery
Tier 1	75.00	28.25	7.06
Tier 2	25.00	4.75	1.19
Total	100	33	8.25

(III) Market Share/Tier Assignments

The Operating Committee determined that, prior to the start of CAT reporting, market share for Execution Venues would be sourced from publicly-available market data. Options and equity volumes for Participants will be sourced from market data made publicly available by Bats while Execution Venue ATS volumes will be sourced from market data made publicly available by FINRA and OTC Markets. Set forth in Exhibit 3 of the proposed rule change are two charts, one listing the current Equity Execution Venues, each with its rank and tier, and one listing the current Options Execution Venues, each with its rank and tier.

After the commencement of CAT reporting, market share for Execution Venues will be sourced from data reported to the CAT. Equity Execution

Venue market share will be determined by calculating each Equity Execution Venue's proportion of the total volume of NMS Stock and OTC Equity shares reported by all Equity Execution Venues during the relevant time period (with the discounting of market share of Execution Venue ATSS exclusively trading OTC Equity Securities, as described above). Similarly, market share for Options Execution Venues will be determined by calculating each Options Execution Venue's proportion of the total volume of Listed Options contracts reported by all Options Execution Venues during the relevant time period.

The Operating Committee has determined to calculate fee tiers for Execution Venues every three months based on market share from the prior three months. Based on its analysis of

historical data, the Operating Committee believes calculating tiers based on three months of data will provide the best balance between reflecting changes in activity by Execution Venues while still providing predictability in the tiering for Execution Venues.

(D) Allocation of Costs

In addition to the funding principles discussed above, including comparability of fees, Section 11.1(c) of the CAT NMS Plan also requires expenses to be fairly and reasonably shared among the Participants and Industry Members. Accordingly, in developing the proposed fee schedules pursuant to the funding model, the Operating Committee calculated how the CAT costs would be allocated between Industry Members and Execution Venues, and how the portion

of CAT costs allocated to Execution Venues would be allocated between Equity Execution Venues and Options Execution Venues. These determinations are described below.

(I) Allocation Between Industry Members and Execution Venues

In determining the cost allocation between Industry Members (other than Execution Venue ATSS) and Execution Venues, the Operating Committee analyzed a range of possible splits for revenue recovery from such Industry Members and Execution Venues, including 80%/20%, 75%/25%, 70%/30% and 65%/35% allocations. Based on this analysis, the Operating Committee determined that 75 percent of total costs recovered would be allocated to Industry Members (other than Execution Venue ATSS) and 25 percent would be allocated to Execution Venues. The Operating Committee determined that this 75%/25% division maintained the greatest level of comparability across the funding model. For example, the cost allocation establishes fees for the largest Industry Members (*i.e.*, those Industry Members in Tiers 1) that are comparable to the largest Equity Execution Venues and Options Execution Venues (*i.e.*, those Execution Venues in Tier 1).

Furthermore, the allocation of total CAT cost recovery recognizes the difference in the number of CAT Reporters that are Industry Members versus CAT Reporters that are Execution Venues. Specifically, the cost allocation takes into consideration that there are approximately 23 times more Industry Members expected to report to the CAT than Execution Venues (*e.g.*, an estimated 1541 Industry Members versus 67 Execution Venues as of June 2017).

(II) Allocation Between Equity Execution Venues and Options Execution Venues

The Operating Committee also analyzed how the portion of CAT costs allocated to Execution Venues would be allocated between Equity Execution

Venues and Options Execution Venues. In considering this allocation of costs, the Operating Committee analyzed a range of alternative splits for revenue recovered between Equity Execution Venues and Options Execution Venues, including a 70%/30%, 67%/33%, 65%/35%, 50%/50% and 25%/75% split. Based on this analysis, the Operating Committee determined to allocate 67 percent of Execution Venue costs recovered to Equity Execution Venues and 33 percent to Options Execution Venues. The Operating Committee determined that a 67%/33% allocation between Equity Execution Venues and Options Execution Venues maintained the greatest level of fee equitability and comparability based on the current number of Equity Execution Venues and Options Execution Venues. For example, the allocation establishes fees for the larger Equity Execution Venues that are comparable to the larger Options Execution Venues. Specifically, Tier 1 Equity Execution Venues would pay a quarterly fee of \$81,047 and Tier 1 Options Execution Venues would pay a quarterly fee of \$81,379. In addition to fee comparability between Equity Execution Venues and Options Execution Venues, the allocation also establishes equitability between larger (Tier 1) and smaller (Tier 2) Execution Venues based upon the level of market share. Furthermore, the allocation is intended to reflect the relative levels of current equity and options order events.

(E) Fee Levels

The Operating Committee determined to establish a CAT-specific fee to collectively recover the costs of building and operating the CAT. Accordingly, under the funding model, the sum of the CAT Fees is designed to recover the total cost of the CAT. The Operating Committee has determined overall CAT costs to be comprised of Plan Processor costs and non-Plan Processor costs, which are estimated to be \$50,700,000 in total for the year beginning November 21, 2016.⁵⁵

The Plan Processor costs relate to costs incurred and to be incurred through November 21, 2017 by the Plan Processor and consist of the Plan Processor's current estimates of average yearly ongoing costs, including development costs, which total \$37,500,000. This amount is based upon the fees due to the Plan Processor pursuant to the Company's agreement with the Plan Processor.

The non-Plan Processor estimated costs incurred and to be incurred by the Company through November 21, 2017 consist of three categories of costs. The first category of such costs are third party support costs, which include legal fees, consulting fees and audit fees from November 21, 2016 until the date of filing as well as estimated third party support costs for the rest of the year. These amount to an estimated \$5,200,000. The second category of non-Plan Processor costs are estimated cyber-insurance costs for the year. Based on discussions with potential cyber-insurance providers, assuming \$2–5 million cyber-insurance premium on \$100 million coverage, the Company has estimated \$3,000,000 for the annual cost. The final cost figures will be determined following receipt of final underwriter quotes. The third category of non-Plan Processor costs is the CAT operational reserve, which is comprised of three months of ongoing Plan Processor costs (\$9,375,000), third party support costs (\$1,300,000) and cyber-insurance costs (\$750,000). The Operating Committee aims to accumulate the necessary funds to establish the three-month operating reserve for the Company through the CAT Fees charged to CAT Reporters for the year. On an ongoing basis, the Operating Committee will account for any potential need to replenish the operating reserve or other changes to total cost during its annual budgeting process. The following table summarizes the Plan Processor and non-Plan Processor cost components which comprise the total estimated CAT costs of \$50,700,000 for the covered period.

Cost category	Cost component	Amount
Plan Processor	Operational Costs	\$37,500,000
Non-Plan Processor	Third Party Support Costs	5,200,000
	Operational Reserve	⁵⁶ 5,000,000
	Cyber-insurance Costs	3,000,000
Estimated Total .....	.....	\$50,700,000

⁵⁵ It is anticipated that CAT-related costs incurred prior to November 21, 2016 will be addressed via a separate filing.

Based on these estimated costs and the calculations for the funding model described above, the Operating

Committee determined to impose the following fees:⁵⁷

For Industry Members (other than Execution Venue ATs):

Tier	Percentage of Industry Members	Quarterly CAT fee
1	0.900	\$81,483
2	2.150	59,055
3	2.800	40,899
4	7.750	25,566
5	8.300	7,428
6	18.800	1,968
7	59.300	105

For Execution Venues for NMS Stocks and OTC Equity Securities:

Tier	Percentage of Equity Execution Venues	Quarterly CAT fee
1	25.00	\$81,048
2	42.00	37,062
3	23.00	21,126
4	10.00	129

For Execution Venues for Listed Options:

Tier	Percentage of Options Execution Venues	Quarterly CAT fee
1	75.00	\$81,381
2	25.00	37,629

The Operating Committee has calculated the schedule of effective fees for Industry Members (other than Execution Venue ATs) and Execution

Venues in the following manner. Note that the calculation of CAT Fees assumes 52 Equity Execution Venues, 15 Options Execution Venues and 1,541

Industry Members (other than Execution Venue ATs) as of June 2017.

CALCULATION OF ANNUAL TIER FEES FOR INDUSTRY MEMBERS ("IM")

Industry Member tier	Percentage of Industry Members	Percentage of Industry Member recovery	Percentage of total recovery
Tier 1	0.900	12.00	9.00
Tier 2	2.150	20.50	15.38
Tier 3	2.800	18.50	13.88
Tier 4	7.750	32.00	24.00
Tier 5	8.300	10.00	7.50
Tier 6	18.800	6.00	4.50
Tier 7	59.300	1.00	0.75
Total	100	100	75

⁵⁶ This \$5,000,000 represents the gradual accumulation of the funds for a target operating reserve of \$11,425,000.

⁵⁷ Note that all monthly, quarterly and annual CAT Fees have been rounded to the nearest dollar.

Industry Member tier	Estimated number of Industry members
Tier 1	14
Tier 2	33
Tier 3	43
Tier 4	119
Tier 5	128
Tier 6	290
Tier 7	914
Total	1,541

Calculation 1.1 (Calculation of a Tier 1 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 0.9\% \text{ [% of Tier 1 IMs]} = 14 \text{ [Estimated Tier 1 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 12\% \text{ [% of Tier 1 IM Recovery]}}{14 \text{ [Estimated Tier 1 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$27,161}$$

Calculation 1.2 (Calculation of a Tier 2 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 2.15\% \text{ [% of Tier 2 IMs]} = 33 \text{ [Estimated Tier 2 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 20.5\% \text{ [% of Tier 2 IM Recovery]}}{33 \text{ [Estimated Tier 2 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$19,685}$$

Calculation 1.3 (Calculation of a Tier 3 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 2.125\% \text{ [% of Tier 3 IMs]} = 43 \text{ [Estimated Tier 3 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 18.5\% \text{ [% of Tier 3 IM Recovery]}}{43 \text{ [Estimated Tier 3 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$13,633}$$

Calculation 1.4 (Calculation of a Tier 4 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 7.75\% \text{ [% of Tier 4 IMs]} = 119 \text{ [Estimated Tier 4 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 32\% \text{ [% of Tier 4 IM Recovery]}}{119 \text{ [Estimated Tier 4 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$8522}$$

Calculation 1.5 (Calculation of a Tier 5 Industry Member Annual Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 8.3\% \text{ [% of Tier 5 IMs]} = 128 \text{ [Estimated Tier 5 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 7.75\% \text{ [% of Tier 5 IM Recovery]}}{128 \text{ [Estimated Tier 5 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$2476}$$

Calculation 1.6 (Calculation of a Tier 6 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 18.8\% \text{ [% of Tier 6 IMs]} = 290 \text{ [Estimated Tier 6 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 6\% \text{ [% of Tier 6 IM Recovery]}}{290 \text{ [Estimated Tier 6 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$656}$$

Calculation 1.7 (Calculation of a Tier 7 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 59.3\% \text{ [% of Tier 7 IMs]} = 914 \text{ [Estimated Tier 7 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 1\% \text{ [% of Tier 7 IM Recovery]}}{914 \text{ [Estimated Tier 7 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$35}$$

CALCULATION OF ANNUAL TIER FEES FOR EQUITY EXECUTION VENUES ("EV")

Equity Execution Venue tier	Percentage of Equity Execution Venues	Percentage of Execution Venue recovery	Percentage of total recovery
Tier 1	25.00	33.25	8.31
Tier 2	42.00	25.73	6.43
Tier 3	23.00	8.00	2.00
Tier 4	10.00	49.00	0.01
Total	100	67	16.75

Equity Execution Venue tier	Estimated number of Equity Execution Venues
Tier 1	13
Tier 2	22
Tier 3	12
Tier 4	5
Total	52

Calculation 2.1 (Calculation of a Tier 1 Equity Execution Venue Monthly Fee)

$$52 \left[\frac{\text{Estimated Tot. Equity EVs} \times 25\% \left[\frac{\$50,700,000 \text{ [Tot. Ann.CAT Costs]} \times 33.25\% \text{ [EV \% of Tot. Ann.CAT Costs]} \times 26\% \text{ [\% of Tier 1 Equity EV Recovery]} \right]}{13 \text{ [Estimated Tier 1 Equity EVs]}} \right] \div 12 \text{ [Months per year]} = \$27,016$$

Calculation 2.2 (Calculation of a Tier 2 Equity Execution Venue Monthly Fee)

$$52 \left[\frac{\text{Estimated Tot. Equity EVs} \times 42\% \left[\frac{\$50,700,000 \text{ [Tot. Ann.CAT Costs]} \times 25\% \text{ [EV \% of Tot. Ann.CAT Costs]} \times 25.73\% \text{ [\% of Tier 2 Equity EV Recovery]} \right]}{22 \text{ [Estimated Tier 2 Equity EVs]}} \right] \div 12 \text{ [Months per year]} = \$12,353$$

Calculation 2.3 (Calculation of a Tier 3 Equity Execution Venue Monthly Fee)

$$52 \left[\frac{\text{Estimated Tot. Equity EVs} \times 23\% \left[\frac{\$50,700,000 \text{ [Tot. Ann.CAT Costs]} \times 25\% \text{ [EV \% of Tot. Ann.CAT Costs]} \times 8\% \text{ [\% of Tier 2 Equity EV Recovery]} \right]}{12 \text{ [Estimated Tier 2 Equity EVs]}} \right] \div 12 \text{ [Months per year]} = \$7,042$$

Calculation 2.4 (Calculation of a Tier 4 Equity Execution Venue Monthly Fee)

$$52 \left[\frac{\text{Estimated Tot. Equity EVs} \times 10\% \left[\frac{\$50,700,000 \text{ [Tot. Ann.CAT Costs]} \times 25\% \text{ [EV \% of Tot. Ann.CAT Costs]} \times 0.02\% \text{ [\% of Tier 2 Equity EV Recovery]} \right]}{5 \text{ [Estimated Tier 2 Equity EVs]}} \right] \div 12 \text{ [Months per year]} = \$42$$

CALCULATION OF ANNUAL TIER FEES FOR OPTIONS EXECUTION VENUES (“EV”)

Options Execution Venue tier	Percentage of Options Execution Venues	Percentage of Execution Venue recovery	Percentage of total recovery
Tier 1	75.00	28.25	7.06
Tier 2	25.00	4.75	1.19
Total	100	33	8.25

Options Execution Venue tier	Estimated number of Options Execution Venues
Tier 1	11
Tier 2	4
Total	15

Calculation 3.1 (Calculation of a Tier 1 Options Execution Venue Monthly Fee)

$$15 \left[\frac{\text{Estimated Tot. Options EVs} \times 75\% \left[\frac{\$50,700,000 \text{ [Tot. Ann.CAT Costs]} \times 25\% \text{ [EV \% of Tot. Ann.CAT Costs]} \times 28.25\% \text{ [\% of Tier 1 Options EV Recovery]} \right]}{11 \text{ [Estimated Tier 1 Options EVs]}} \right] \div 12 \text{ [Months per year]} = \$27,127$$

Calculation 3.2 (Calculation of a Tier 2 Options Execution Venue Annual Fee)

$$15 \left[\frac{\text{Estimated Tot. Options EVs} \times 25\% \left[\frac{\$50,700,000 \text{ [Tot. Ann.CAT Costs]} \times 25\% \text{ [EV \% of Tot. Ann.CAT Costs]} \times 4.75\% \text{ [\% of Tier 2 Options EV Recovery]} \right]}{4 \text{ [Estimated Tier 2 Options EVs]}} \right] \div 12 \text{ [Months per year]} = \$12,543$$

TRACEABILITY OF TOTAL CAT FEES

Type	Industry Member tier	Estimated number of members	CAT fees paid annually	Total recovery
Industry Members	Tier 1	14	\$325,932	\$4,563,048
	Tier 2	33	236,220	7,795,260
	Tier 3	43	163,596	7,034,628
	Tier 4	119	102,264	12,169,416
	Tier 5	128	29,712	3,803,136
	Tier 6	290	7,872	2,282,880
	Tier 7	914	420	383,880
Total		1,541		38,032,248
Equity Execution Venues	Tier 1	13	324,192	4,214,496
	Tier 2	22	148,248	3,261,456
	Tier 3	12	84,504	1,014,048
	Tier 4	5	516	2,580
Total		52		8,492,580
Options Execution Venues	Tier 1	11	325,524	3,580,764
	Tier 2	4	150,516	602,064

TRACEABILITY OF TOTAL CAT FEES—Continued

Type	Industry Member tier	Estimated number of members	CAT fees paid annually	Total recovery
Total	15	.....	4,182,828
Total	50,700,000
Excess ⁵⁸	7,656

(F) Comparability of Fees

The funding principles require a funding model in which the fees charged to the CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether Execution Venue and/or Industry Members). Accordingly, in creating the model, the Operating Committee sought to establish comparable fees for the top tier of Industry Members (other than Execution Venue ATSS), Equity Execution Venues and Options Execution Venues. Specifically, each Tier 1 CAT Reporter would be required to pay a quarterly fee of approximately \$81,000.

(G) Billing Onset

Under Section 11.1(c) of the CAT NMS Plan, to fund the development and implementation of the CAT, the Company shall time the imposition and collection of all fees on Participants and Industry Members in a manner reasonably related to the timing when the Company expects to incur such development and implementation costs. The Company is currently incurring such development and implementation costs and will continue to do so prior to the commencement of CAT reporting and thereafter. In accordance with the CAT NMS Plan, all CAT Reporters, including both Industry Members and Execution Venues (including Participants), will be invoiced as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Participants and the operative date of the Plan amendment adopting CAT Fees for Participants.

(H) Changes to Fee Levels and Tiers

Section 11.3(d) of the CAT NMS Plan states that “[t]he Operating Committee shall review such fee schedule on at

⁵⁸ The amount in excess of the total CAT costs will contribute to the gradual accumulation of the target operating reserve of \$11.425 million.

least an annual basis and shall make any changes to such fee schedule that it deems appropriate. The Operating Committee is authorized to review such fee schedule on a more regular basis, but shall not make any changes on more than a semi-annual basis unless, pursuant to a Supermajority Vote, the Operating Committee concludes that such change is necessary for the adequate funding of the Company.” With such reviews, the Operating Committee will review the distribution of Industry Members and Execution Venues across tiers, and make any updates to the percentage of CAT Reporters allocated to each tier as may be necessary. In addition, the reviews will evaluate the estimated ongoing CAT costs and the level of the operating reserve. To the extent that the total CAT costs decrease, the fees would be adjusted downward, and to the extent that the total CAT costs increase, the fees would be adjusted upward.⁵⁹ Furthermore, any surplus of the Company’s revenues over its expenses is to be included within the operational reserve to offset future fees. The limitations on more frequent changes to the fee, however, are intended to provide budgeting certainty for the CAT Reporters and the Company.⁶⁰ To the extent that the Operating Committee approves changes to the number of tiers in the funding model or the fees assigned to each tier, then the Exchange will file such changes with the SEC pursuant to Section 19(b) of the Exchange Act, and any such changes will become effective in accordance with the requirements of Section 19(b).

(I) Initial and Periodic Tier Reassignments

The Operating Committee has determined to calculate fee tiers every three months based on market share or

⁵⁹ The CAT Fees are designed to recover the costs associated with the CAT. Accordingly, CAT Fees would not be affected by increases or decreases in other non-CAT expenses incurred by the Participants, such as any changes in costs related to the retirement of existing regulatory systems, such as OATS.

⁶⁰ Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85006.

message traffic, as applicable, from the prior three months. For the initial tier assignments, the Company will calculate the relevant tier for each CAT Reporter using the three months of data prior to the commencement date. As with the initial tier assignment, for the tri-monthly reassignments, the Company will calculate the relevant tier using the three months of data prior to the relevant tri-monthly date. Any movement of CAT Reporters between tiers will not change the criteria for each tier or the fee amount corresponding to each tier.

In performing the tri-monthly reassignments, the assignment of CAT Reporters in each assigned tier is relative. Therefore, a CAT Reporter’s assigned tier will depend, not only on its own message traffic or market share, but also on the message traffic/market share across all CAT Reporters. For example, the percentage of Industry Members (other than Execution Venue ATSS) in each tier is relative such that such Industry Member’s assigned tier will depend on message traffic generated across all CAT Reporters as well as the total number of CAT Reporters. The Operating Committee will inform CAT Reporters of their assigned tier every three months following the periodic tiering process, as the funding model will compare an individual CAT Reporter’s activity to that of other CAT Reporters in the marketplace.

The following demonstrates a tier reassignment. In accordance with the funding model, the top 75% of Options Execution Venues in market share are categorized as Tier 1 while the bottom 25% of Options Execution Venues in market share are categorized as Tier 2. In the sample scenario below, Options Execution Venue L is initially categorized as a Tier 2 Options Execution Venue in Period A due to its market share. When market share is recalculated for Period B, the market share of Execution Venue L increases, and it is therefore subsequently reranked and reassigned to Tier 1 in Period B. Correspondingly, Options Execution Venue K, initially a Tier 1

Options Execution Venue in Period A, is reassigned to Tier 2 in Period B due to decreases in its market share.

Period A			Period B		
Options Execution Venue	Market share rank	Tier	Options Execution Venue	Market share rank	Tier
Options Execution Venue A	1	1	Options Execution Venue A	1	1
Options Execution Venue B	2	1	Options Execution Venue B	2	1
Options Execution Venue C	3	1	Options Execution Venue C	3	1
Options Execution Venue D	4	1	Options Execution Venue D	4	1
Options Execution Venue E	5	1	Options Execution Venue E	5	1
Options Execution Venue F	6	1	Options Execution Venue F	6	1
Options Execution Venue G	7	1	Options Execution Venue I	7	1
Options Execution Venue H	8	1	Options Execution Venue H	8	1
Options Execution Venue I	9	1	Options Execution Venue G	9	1
Options Execution Venue J	10	1	Options Execution Venue J	10	1
Options Execution Venue K	11	1	Options Execution Venue L	11	1
Options Execution Venue L	12	2	Options Execution Venue K	12	2
Options Execution Venue M	13	2	Options Execution Venue N	13	2
Options Execution Venue N	14	2	Options Execution Venue M	14	2
Options Execution Venue O	15	2	Options Execution Venue O	15	2

For each periodic tier reassignment, the Operating Committee will review the new tier assignments, particularly those assignments for CAT Reporters that shift from the lowest tier to a higher tier. This review is intended to evaluate whether potential changes to the market or CAT Reporters (e.g., dissolution of a large CAT Reporter) adversely affect the tier reassignments.

(J) Sunset Provision

The Operating Committee developed the proposed funding model by analyzing currently available historical data. Such historical data, however, is not as comprehensive as data that will be submitted to the CAT. Accordingly, the Operating Committee believes that it will be appropriate to revisit the funding model once CAT Reporters have actual experience with the funding model. Accordingly, the Operating Committee determined to include an automatic sunset provision for the proposed fees. Specifically, the Operating Committee determined that the CAT Fees should automatically expire two years after the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. The Operating Committee intends to monitor the operation of the funding model during this two year period and to evaluate its effectiveness during that period. Such a process will inform the Operating Committee’s approach to funding the CAT after the two year period.

(3) Proposed CAT Fee Schedule

The Exchange proposes the Consolidated Audit Trail Funding Fees to adopt the CAT Fees determined by the Operating Committee on the Exchange’s Industry Members. The

proposed fee change has four sections, covering definitions, the fee schedule for CAT Fees, the timing and manner of payments, and the automatic sunset of the CAT Fees. Each of these sections is discussed in detail below.

(A) Definitions

Paragraph (a) sets forth the definitions applicable to the proposed Consolidated Audit Trail Funding Fees. Proposed paragraph (a)(1) states that, for purposes of the Consolidated Audit Trail Funding Fees, the terms “CAT”, “CAT NMS Plan,” “Industry Member,” “NMS Stock,” “OTC Equity Security”, “Options Market Maker”, and “Participant” are defined as set forth in Rule 11.6810 (Consolidated Audit Trail—Definitions) of the CAT Compliance Rule.⁶¹

The Exchange proposes to adopt different fees for Equity ATSs and Industry Members that are not Equity ATSs. Accordingly, the Exchange proposes to define the term “Equity ATS.” First, paragraph (a)(2) defines an “ATS” to mean an alternative trading system as defined in Rule 300(a) of Regulation ATS under the Securities Exchange Act of 1934, as amended, that operates pursuant to Rule 301 of Regulation ATS. This is the same definition of an ATS as set forth in Section 1.1 of the CAT NMS Plan in the definition of an “Execution Venue.” Then, paragraph (a)(4) defines an “Equity ATS” as an ATS that executes transactions in NMS Stocks and/or OTC Equity Securities.

Paragraph (a)(3) defines the term “CAT Fee” to mean the Consolidated

Audit Trail Funding Fee(s) to be paid by Industry Members as set forth in paragraph (b) of the proposed rule change.

Finally, Paragraph (a)(6) defines an “Execution Venue” as a Participant or an ATS (excluding any such ATS that does not execute orders). This definition is the same substantive definition as set forth in Section 1.1 of the CAT NMS Plan. Paragraph (a)(5) defines an “Equity Execution Venue” as an Execution Venue that trades NMS Stocks and/or OTC Equity Securities.

(B) Fee Schedule

The Exchange proposes to adopt the CAT Fees applicable to its Industry Members through paragraph (b) of the proposed rule change. Paragraph (b)(1) of the proposed rule change sets forth the CAT Fees applicable to Industry Members other than Equity ATSs. Specifically, paragraph (b)(1) states that the Company will assign each Industry Member (other than an Equity ATS) to a fee tier once every quarter, where such tier assignment is calculated by ranking each Industry Member based on its total message traffic (with discounts for equity market maker quotes and Options Market Maker quotes based on the trade to quote ratio for equities and options, respectively) for the three months prior to the quarterly tier calculation day and assigning each Industry Member to a tier based on that ranking and predefined Industry Member percentages. The Industry Members with the highest total quarterly message traffic will be ranked in Tier 1, and the Industry Members with lowest quarterly message traffic will be ranked in Tier 7. Each quarter, each Industry Member (other than an Equity ATS) shall pay the following

⁶¹ Securities Exchange Act Rel. No. 80256 (Mar. 15, 2017), 82 FR 14526 (Mar. 21, 2017) (SR–NYSEArca–2017–03).

CAT Fee corresponding to the tier assigned by the Company for such Industry Member for that quarter:

Tier	Percentage of Industry Members	Quarterly CAT fee
1	0.900	\$81,483
2	2.150	59,055
3	2.800	40,899
4	7.750	25,566
5	8.300	7,428
6	18.800	1,968
7	59.300	105

Paragraph (b)(2) of the proposed rule change sets forth the CAT Fees applicable to Equity ATSs.⁶² These are the same fees that Participants that trade NMS Stocks and/or OTC Equity Securities will pay. Specifically, paragraph (b)(2) states that the Company will assign each Equity ATS to a fee tier once every quarter, where such tier assignment is calculated by ranking each Equity Execution Venue based on its total market share of NMS Stocks and OTC Equity Securities (with a discount for Equity ATSs exclusively trading OTC Equity Securities based on the average shares per trade ratio between NMS Stocks and OTC Equity Securities) for the three months prior to the quarterly tier calculation day and assigning each Equity ATS to a tier based on that ranking and predefined Equity Execution Venue percentages. The Equity ATSs with the highest total quarterly market share will be ranked in Tier 1, and the Equity ATSs with the lowest quarterly market share will be ranked in Tier 4. Specifically, paragraph (b)(2) states that, each quarter, each Equity ATS shall pay the following CAT Fee corresponding to the tier assigned by the Company for such Equity ATS for that quarter:

Tier	Percentage of Equity Execution Venues	Quarterly CAT fee
1	25.00	\$81,048
2	42.00	37,062
3	23.00	21,126
4	10.00	129

(C) Timing and Manner of Payment

Section 11.4 of the CAT NMS Plan states that the Operating Committee shall establish a system for the collection of fees authorized under the CAT NMS Plan. The Operating Committee may include such collection

⁶² Note that no fee schedule is provided for Execution Venue ATSs that execute transactions in Listed Options, as no such Execution Venue ATSs currently exist due to trading restrictions related to Listed Options.

responsibility as a function of the Plan Processor or another administrator. To implement the payment process to be adopted by the Operating Committee, paragraph (c)(1) of the proposed rule change states that the Company will provide each Industry Member with one invoice each quarter for its CAT Fees as determined pursuant to paragraph (b) of the proposed rule change, regardless of whether the Industry Member is a member of multiple self-regulatory organizations. Paragraph (c)(1) further states that each Industry Member will pay its CAT Fees to the Company via the centralized system for the collection of CAT Fees established by the Company in the manner prescribed by the Company. The Exchange will provide Industry Members with details regarding the manner of payment of CAT Fees by Trader Update.

All CAT fees will be billed and collected centrally through the Company via the Plan Processor. Although each Participant will adopt its own fee schedule regarding CAT Fees, no CAT Fees or portion thereof will be collected by the individual Participants. Each Industry Member will receive from the Company one invoice for its applicable CAT fees, not separate invoices from each Participant of which it is a member. The Industry Members will pay the CAT Fees to the Company via the centralized system for the collection of CAT fees established by the Company.⁶³

Section 11.4 of the CAT NMS Plan also states that Participants shall require each Industry Member to pay all applicable authorized CAT Fees within thirty days after receipt of an invoice or other notice indicating payment is due (unless a longer payment period is otherwise indicated). Section 11.4 further states that, if an Industry Member fails to pay any such fee when due, such Industry Member shall pay interest on the outstanding balance from such due date until such fee is paid at a per annum rate equal to the lesser of: (i) The Prime Rate plus 300 basis points; or (ii) the maximum rate permitted by applicable law. Therefore, in accordance with Section 11.4 of the CAT NMS Plan, the Exchange proposes to adopt paragraph (c)(2), which states that each Industry Member shall pay CAT Fees within thirty days after receipt of an invoice or other notice indicating payment is due (unless a longer payment period is otherwise indicated). If an Industry Member fails to pay any such fee when due, such Industry Member shall pay interest on the outstanding balance from such due date

⁶³ Section 11.4 of the CAT NMS Plan.

until such fee is paid at a per annum rate equal to the lesser of: (i) The Prime Rate plus 300 basis points; or (ii) the maximum rate permitted by applicable law.

(D) Sunset Provision

The Operating Committee has determined to require that the CAT Fees automatically sunset two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. Accordingly, the Exchange proposes to adopt paragraph (d) of the proposed rule change, which states that “[t]hese Consolidated Audit Trailing Funding Fees will automatically expire two years after the operative date of the amendment of the CAT NMS Plan that adopts CAT fees for the Participants.”

(4) Changes to Original Proposal

The proposed funding model set forth in this Amendment is a revised version of the Original Proposal. The Commission received a number of comment letters in response to the Original Proposal.⁶⁴ The SEC suspended the Original Proposal and instituted proceedings to determine whether to approve or disapprove it.⁶⁵ Pursuant to those proceedings, additional comment letters were submitted regarding the proposed funding model.⁶⁶ In developing this Amendment, the Operating Committee carefully considered these comments and made a number of changes to the Original Proposal to address these comments where appropriate.

This Amendment makes the following changes to the Original Proposal: (1) Adds two additional CAT Fee tiers for Equity Execution Venues; (2) discounts the market share of Execution Venue ATSs exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF by the average shares per trade ratio between NMS Stocks and OTC Equity Securities (calculated as 0.17% based on available data from the second quarter of June 2017) when calculating the market share of Execution Venue ATSs exclusively trading OTC Equity Securities and FINRA; (3) discounts the Options Market Maker quotes by the trade to quote ratio for options (calculated as 0.01% based on available data for June 2016 through June 2017) when calculating message traffic for Options Market Makers; (4) discounts equity

⁶⁴ For a description of the comments submitted in response to those Original Proposal, see Suspension Order.

⁶⁵ Suspension Order.

⁶⁶ See MFA Letter; SIFMA Letter; FIA Principal Traders Group Letter; Belvedere Letter; Sidley Letter; Group One Letter; and Virtu Financial Letter.

market maker quotes by the trade to quote ratio for equities (calculated as 5.43% based on available data for June 2016 through June 2017) when calculating message traffic for equity market makers; (5) decreases the number of tiers for Industry Members (other than the Execution Venue ATSS) from nine to seven; (6) changes the allocation of CAT costs between Equity Execution Venues and Options Execution Venues from 75%/25% to 67%/33%; (7) adjusts tier percentages and recovery allocations for Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSS); (8) focuses the comparability of CAT Fees on the individual entity level, rather than primarily on the comparability of affiliated entities; (9) commences invoicing of CAT Reporters as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Participants and the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants; and (10) requires the proposed fees to automatically expire two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for the Participants.

(A) Equity Execution Venues

(i) Small Equity Execution Venues

In the Original Proposal, the Operating Committee proposed to establish two fee tiers for Equity Execution Venues. The Commission and commenters raised the concern that, by establishing only two tiers, smaller Equity Execution Venues (*e.g.*, those Equity ATSS representing less than 1% of NMS market share) would be placed in the same fee tier as larger Equity Execution Venues, thereby imposing an undue or inappropriate burden on competition.⁶⁷ To address this concern, the Operating Committee proposes to add two additional tiers for Equity Execution Venues, a third tier for smaller Equity Execution Venues and a fourth tier for the smallest Equity Execution Venues.

Specifically, the Original Proposal had two tiers of Equity Execution Venues. Tier 1 required the largest Equity Execution Venues to pay a quarterly fee of \$63,375. Based on available data, these largest Equity Execution Venues were those that had equity market share of share volume greater than or equal to 1%.⁶⁸ Tier 2

required the remaining smaller Equity Execution Venues to pay a quarterly fee of \$38,820.

To address concerns about the potential for the \$38,820 quarterly fee to impose an undue burden on smaller Equity Execution Venues, the Operating Committee determined to move to a four tier structure for Equity Execution Venues. Tier 1 would continue to include the largest Equity Execution Venues by share volume (that is, based on currently available data, those with market share of equity share volume greater than or equal to 1%), and these Equity Execution Venues would be required to pay a quarterly fee of \$81,048. The Operating Committee determined to divide the original Tier 2 into three tiers. The new Tier 2 Equity Execution Venues, which would include the next largest Equity Execution Venues by equity share volume, would be required to pay a quarterly fee of \$37,062. The new Tier 3 Equity Execution Venues would be required to pay a quarterly fee of \$21,126. The new Tier 4 Equity Execution Venues, which would include the smallest Equity Execution Venues by share volume, would be required to pay a quarterly fee of \$129.

In developing the proposed four tier structure, the Operating Committee considered keeping the existing two tiers, as well as shifting to three, four or five Equity Execution Venue tiers (the maximum number of tiers permitted under the Plan), to address the concerns regarding small Equity Execution Venues. For each of the two, three, four and five tier alternatives, the Operating Committee considered the assignment of various percentages of Equity Execution Venues to each tier as well as various percentage of Equity Execution Venue recovery allocations for each alternative. As discussed below in more detail, each of these options was considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined that the four tier alternative addressed the spectrum of different Equity Execution Venues. The Operating Committee determined that neither a two tier structure nor a three tier structure sufficiently accounted for

differentiate between Equity Execution Venue tiers, the proposed funding model is directly driven not by market share thresholds, but rather by fixed percentages of Equity Execution Venues across tiers to account for fluctuating levels of market share across time. Actual market share in any tier will vary based on the actual market activity in a given measurement period, as well as the number of Equity Execution Venues included in the measurement period.

the range of market shares of smaller Equity Execution Venues. The Operating Committee also determined that, given the limited number of Equity Execution Venues, that a fifth tier was unnecessary to address the range of market shares of the Equity Execution Venues.

By increasing the number of tiers for Equity Execution Venues and reducing the proposed CAT Fees for the smaller Equity Execution Venues, the Exchange believes that the proposed fees for Equity Execution Venues would not impose an undue or inappropriate burden on competition under Section 6 of the Exchange Act. Moreover, the Exchange believes that the proposed fees appropriately take into account the distinctions in the securities trading operations of different Equity Execution Venues, as required under the funding principles of the CAT NMS Plan.⁶⁹ The larger number of tiers more closely tracks the variety of sizes of equity share volume of Equity Execution Venues. In addition, the reduction in the fees for the smaller Equity Execution Venues recognizes the potential burden of larger fees on smaller entities. In particular, the very small quarterly fee of \$129 for Tier 4 Equity Execution Venues reflects the fact that certain Equity Execution Venues have a very small share volume due to their typically more focused business models.

Accordingly, with this Amendment, the Exchange proposes to amend paragraph (b)(2) of the proposed rule change to add the two additional tiers for Equity Execution Venues, to establish the percentages and fees for Tiers 3 and 4 as described, and to revise the percentages and fees for Tiers 1 and 2 as described.

(ii) Execution Venues for OTC Equity Securities

In the Original Proposal, the Execution Venues for OTC Equity Securities and Execution Venues for NMS Stocks were grouped in the same tier structure. The Commission and commenters raised concerns as to whether this determination to place Execution Venues for OTC Equity Securities in the same tier structure as Execution Venues for NMS Stocks would result in an undue or inappropriate burden on competition, recognizing that the application of share volume may lead to different outcomes as applied to OTC Equity Securities and NMS Stocks.⁷⁰ To address this concern, the Operating Committee proposes to discount the market share of Execution

⁶⁷ See Suspension Order at 31664; SIFMA Letter at 3.

⁶⁸ Note that while these equity market share thresholds were referenced as data points to help

⁶⁹ Section 11.2(b) of the CAT NMS Plan.

⁷⁰ See Suspension Order at 31664–5.

Venue ATSS exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF by the average shares per trade ratio between NMS Stocks and OTC Equity Securities (0.17% for the second quarter of 2017) in order to adjust for the greater number of shares being traded in the OTC Equity Securities market, which is generally a function of a lower per share price for OTC Equity Securities when compared to NMS Stocks.

As commenters noted, many OTC Equity Securities are priced at less than one dollar—and a significant number at less than one penny—and low-priced shares tend to trade in larger quantities. Accordingly, a disproportionately large number of shares are involved in transactions involving OTC Equity Securities versus NMS Stocks, which has the effect of overstating an Execution Venue's true market share when the Execution Venue is involved in the trading of OTC Equity Securities. Because the proposed fee tiers are based on market share calculated by share volume, Execution Venue ATSS trading OTC Equity Securities and FINRA may be subject to higher tiers than their operations may warrant.⁷¹ The Operating Committee proposes to address this concern in two ways. First, the Operating Committee proposes to increase the number of Equity Execution Venue tiers, as discussed above. Second, the Operating Committee determined to discount the market share of Execution Venue ATSS exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF when calculating their tier placement. Because the disparity in share volume between Execution Venues trading in OTC Equity Securities and NMS Stocks is based on the different number of shares per trade for OTC Equity Securities and NMS Stocks, the Operating Committee believes that discounting the share volume of such Execution Venue ATSS as well as the market share of the FINRA ORF would address the difference in shares per trade for OTC Equity Securities and NMS Stocks. Specifically, the Operating Committee proposes to impose a discount based on the objective measure of the average shares per trade ratio between NMS Stocks and OTC Equity Securities. Based on available data from the second quarter of 2017, the average shares per trade ratio between NMS Stocks and OTC Equity Securities is 0.17%.

The practical effect of applying such a discount for trading in OTC Equity Securities is to shift Execution Venue ATSS exclusively trading OTC Equity

Securities to tiers for smaller Execution Venues and with lower fees. For example, under the Original Proposal, one Execution Venue ATSS exclusively trading OTC Equity Securities was placed in the first CAT Fee tier, which had a quarterly fee of \$63,375. With the imposition of the proposed tier changes and the discount, this ATSS would be ranked in Tier 3 and would be subject to a quarterly fee of \$21,126.

In developing the proposed discount for Equity Execution Venue ATSS exclusively trading OTC Equity Securities and FINRA, the Operating Committee evaluated different alternatives to address the concerns related to OTC Equity Securities, including creating a separate tier structure for Execution Venues trading OTC Equity Securities (like the separate tier for Options Execution Venues) as well as the proposed discounting method for Execution Venue ATSS exclusively trading OTC Equity Securities and FINRA. For these alternatives, the Operating Committee considered how each alternative would affect the recovery allocations. In addition, each of these options was considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee did not adopt a separate tier structure for Equity Execution Venues trading OTC Equity Securities as they determined that the proposed discount approach appropriately addresses the concern. The Operating Committee determined to adopt the proposed discount because it directly relates to the concern regarding the trading patterns and operations in the OTC Equity Securities markets, and is an objective discounting method.

By increasing the number of tiers for Equity Execution Venues and imposing a discount on the market share of share volume calculation for trading in OTC Equity Securities, the Exchange believes that the proposed fees for Equity Execution Venues would not impose an undue or inappropriate burden on competition under Section 6 of the Exchange Act. Moreover, the Exchange believes that the proposed fees appropriately take into account the distinctions in the securities trading operations of different Equity Execution Venues, as required under the funding principles of the CAT NMS Plan.⁷² As discussed above, the larger number of tiers more closely tracks the variety of sizes of equity share volume of Equity Execution Venues. In addition, the

proposed discount recognizes the different types of trading operations at Equity Execution Venues trading OTC Equity Securities versus those trading NMS Stocks, thereby more closely matching the relative revenue generation by Equity Execution Venues trading OTC Equity Securities to their CAT Fees.

Accordingly, with this Amendment, the Exchange proposes to amend paragraph (b)(2) of the proposed rule change to indicate that the market share for Equity ATSS exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF would be discounted. In addition, as discussed above, to address concerns related to smaller ATSS, including those that exclusively trade OTC Equity Securities, the Exchange proposes to amend paragraph (b)(2) of the proposed rule change to add two additional tiers for Equity Execution Venues, to establish the percentages and fees for Tiers 3 and 4 as described, and to revise the percentages and fees for Tiers 1 and 2 as described.

(B) Market Makers

In the Original Proposal, the proposed funding model included both Options Market Maker quotes and equities market maker quotes in the calculation of total message traffic for such market makers for purposes of tiering for Industry Members (other than Execution Venue ATSS). The Commission and commenters raised questions as to whether the proposed treatment of Options Market Maker quotes may result in an undue or inappropriate burden on competition or may lead to a reduction in market quality.⁷³ To address this concern, the Operating Committee determined to discount the Options Market Maker quotes by the trade to quote ratio for options when calculating message traffic for Options Market Makers. Similarly, to avoid disincentives to quoting behavior on the equities side as well, the Operating Committee determined to discount equity market maker quotes by the trade to quote ratio for equities when calculating message traffic for equities market makers.

In the Original Proposal, market maker quotes were treated the same as other message traffic for purposes of tiering for Industry Members (other than Execution Venue ATSS). Commenters noted, however, that charging Industry Members on the basis of message traffic

⁷¹ Suspension Order at 31664–5.

⁷² Section 11.2(b) of the CAT NMS Plan.

⁷³ See Suspension Order at 31663–4; SIFMA Letter at 4–5; FIA Principal Traders Group Letter at 3; Sidley Letter at 2–6; Group One Letter at 2–5; and Belvedere Letter at 2.

will impact market makers disproportionately because of their continuous quoting obligations. Moreover, in the context of options market makers, message traffic would include bids and offers for every listed options strikes and series, which are not an issue for equities.⁷⁴ The Operating Committee proposes to address this concern in two ways. First, the Operating Committee proposes to discount Options Market Maker quotes when calculating the Options Market Makers' tier placement. Specifically, the Operating Committee proposes to impose a discount based on the objective measure of the trade to quote ratio for options. Based on available data from June 2016 through June 2017, the trade to quote ratio for options is 0.01%. Second, the Operating Committee proposes to discount equities market maker quotes when calculating the equities market makers' tier placement. Specifically, the Operating Committee proposes to impose a discount based on the objective measure of the trade to quote ratio for equities. Based on available data for June 2016 through June 2017, this trade to quote ratio for equities is 5.43%.

The practical effect of applying such discounts for quoting activity is to shift market makers' calculated message traffic lower, leading to the potential shift to tiers for lower message traffic and reduced fees. Such an approach would move sixteen Industry Member CAT Reporters that are market makers to a lower tier than in the Original Proposal. For example, under the Original Proposal, Broker-Dealer Firm ABC was placed in the first CAT Fee tier, which had a quarterly fee of \$101,004. With the imposition of the proposed tier changes and the discount, Broker-Dealer Firm ABC, an options market maker, would be ranked in Tier 3 and would be subject to a quarterly fee of \$40,899.

In developing the proposed market maker discounts, the Operating Committee considered various discounts for Options Market Makers and equity market makers, including discounts of 50%, 25%, 0.0002%, as well as the 5.43% for option market makers and 0.01% for equity market makers. Each of these options were considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined to adopt the proposed discount because it

directly relates to the concern regarding the quoting requirement, is an objective discounting method, and has the desired potential to shift market makers to lower fee tiers.

By imposing a discount on Options Market Makers and equities market makers' quoting traffic for the calculation of message traffic, the Exchange believes that the proposed fees for market makers would not impose an undue or inappropriate burden on competition under Section 6 of the Exchange Act. Moreover, the Exchange believes that the proposed fees appropriately take into account the distinctions in the securities trading operations of different Industry Members, and avoid disincentives, such as a reduction in market quality, as required under the funding principles of the CAT NMS Plan.⁷⁵ The proposed discounts recognize the different types of trading operations presented by Options Market Makers and equities market makers, as well as the value of the market makers' quoting activity to the market as a whole. Accordingly, the Exchange believes that the proposed discounts will not impact the ability of small Options Market Makers or equities market makers to provide liquidity.

Accordingly, with this Amendment, the Exchange proposes to amend paragraph (b)(1) of the proposed rule change to indicate that the message traffic related to equity market maker quotes and Options Market Maker quotes would be discounted. In addition, the Exchange proposes to define the term "Options Market Maker" in paragraph (a)(1) of the proposed rule change.

(C) Comparability/Allocation of Costs

Under the Original Proposal, 75% of CAT costs were allocated to Industry Members (other than Execution Venue ATSS) and 25% of CAT costs were allocated to Execution Venues. This cost allocation sought to maintain the greatest level of comparability across the funding model, where comparability considered affiliations among or between CAT Reporters. The Commission and commenters expressed concerns regarding whether the proposed 75%/25% allocation of CAT costs is consistent with the Plan's funding principles and the Exchange Act, including whether the allocation places a burden on competition or reduces market quality. The Commission and commenters also questioned whether the approach of accounting for affiliations among CAT Reporters in setting CAT Fees

disadvantages non-affiliated CAT Reporters or otherwise burdens competition in the market for trading services.⁷⁶

In response to these concerns, the Operating Committee determined to revise the proposed funding model to focus the comparability of CAT Fees at the individual entity level, rather than primarily on the comparability of affiliated entities. In light of the interconnected nature of the various aspects of the funding model, the Operating Committee determined to revise various aspects of the model to enhance comparability at the individual entity level. Specifically, to achieve such comparability, the Operating Committee determined to (1) decrease the number of tiers for Industry Members (other than Execution Venue ATSS) from nine to seven; (2) change the allocation of CAT costs between Equity Execution Venues and Options Execution Venues from 75%/25% to 67%/33%; and (3) adjust tier percentages and recovery allocations for Equity Execution Venues, Options Execution Venues and Industry Member Members (other than Execution Venue ATSS). With these changes, the proposed funding model provides fee comparability for the largest individual entities, with the largest Industry Members (other than Execution Venue ATSS), Equity Execution Venues and Options Execution Venues each paying a CAT Fee of approximately \$81,000 each quarter.

(i) Number of Industry Member Tiers

In the Original Proposal, the proposed funding model had nine tiers for Industry Members (other than Execution Venue ATSS). The Operating Committee determined that reducing the number of tiers from nine tiers to seven tiers (and adjusting the predefined Industry Member Percentages as well) continues to provide a fair allocation of fees among Industry Members and appropriately distinguishes between Industry Members with differing levels of message traffic. In reaching this conclusion, the Operating Committee considered historical message traffic generated by Industry Members across all exchanges and as submitted to FINRA's OATS, and considered the distribution of firms with similar levels of message traffic, grouping together firms with similar levels of message traffic. Based on this, the Operating Committee determined that seven tiers would group firms with similar levels of

⁷⁴ Suspension Order at 31664.

⁷⁵ Section 11.2(b) of the CAT NMS Plan.

⁷⁶ See Suspension Order at 31662-3; SIFMA Letter at 3; Sidley Letter at 6-7; Group One Letter at 2; and Belvedere Letter at 2.

message traffic, while also achieving greater comparability in the model for the individual CAT Reporters with the greatest market share or message traffic.

In developing the proposed seven tier structure, the Operating Committee considered remaining at nine tiers, as well as reducing the number of tiers down to seven when considering how to address the concerns raised regarding comparability. For each of the alternatives, the Operating Committee considered the assignment of various percentages of Industry Members to each tier as well as various percentages of Industry Member recovery allocations for each alternative. Each of these options was considered in the context of its effects on the full funding model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined that the seven tier alternative provided the most fee comparability at the individual entity level for the largest CAT Reporters, while both providing logical breaks in tiering for Industry Members with different levels of message traffic and a sufficient number of tiers to provide for the full spectrum of different levels of message traffic for all Industry Members.

(ii) Allocation of CAT Costs Between Equity and Options Execution Venues

The Operating Committee also determined to adjust the allocation of CAT costs between Equity Execution Venues and Options Execution Venues to enhance comparability at the individual entity level. In the Original Proposal, 75% of Execution Venue CAT costs were allocated to Equity Execution Venues, and 25% of Execution Venue CAT costs were allocated to Options Execution Venues. To achieve the goal of increased comparability at the individual entity level, the Operating Committee analyzed a range of alternative splits for revenue recovery between Equity Execution Venues and Options Execution Venues, along with other changes in the proposed funding model. Based on this analysis, the Operating Committee determined to allocate 67 percent of Execution Venue costs recovered to Equity Execution Venues and 33 percent to Options Execution Venues. The Operating Committee determined that a 67%/33% allocation between Equity Execution Venues and Options Execution Venues enhances the level of fee comparability for the largest CAT Reporters. Specifically, the largest Equity Execution Venues and Options

Execution Venues would pay a quarterly CAT Fee of approximately \$81,000.

In developing the proposed allocation of CAT costs between Equity Execution Venues and Options Execution Venues, the Operating Committee considered various different options for such allocation, including keeping the original 75%/25% allocation, as well as shifting to a 70%/30%, 67%/33%, or 57.75%/42.25% allocation. For each of the alternatives, the Operating Committee considered the effect each allocation would have on the assignment of various percentages of Equity Execution Venues to each tier as well as various percentages of Equity Execution Venue recovery allocations for each alternative. Moreover, each of these options was considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined that the 67%/33% allocation between Equity Execution Venues and Options Execution Venues provided the greatest level of fee comparability at the individual entity level for the largest CAT Reporters, while still providing for appropriate fee levels across all tiers for all CAT Reporters.

(iii) Allocation of Costs Between Execution Venues and Industry Members

The Operating Committee determined to allocate 25% of CAT costs to Execution Venues and 75% to Industry Members (other than Execution Venue ATSSs), as it had in the Original Proposal. The Operating Committee determined that this 75%/25% allocation, along with the other changes proposed above, led to the most comparable fees for the largest Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSSs). The largest Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSSs) would each pay a quarterly CAT Fee of approximately \$81,000.

As a preliminary matter, the Operating Committee determined that it is appropriate to allocate most of the costs to create, implement and maintain the CAT to Industry Members for several reasons. First, there are many more Industry Members expected to report to the CAT than Participants (*i.e.*, 1,541 broker-dealer CAT Reporters versus 22 Participants). Second, since most of the costs to process CAT reportable data is generated by Industry Members, Industry Members could be

expected to contribute toward such costs. Finally, as noted by the SEC, the CAT “substantially enhance[s] the ability of the SROs and the Commission to oversee today’s securities markets,”⁷⁷ thereby benefitting all market participants. After making this determination, the Operating Committee analyzed several different cost allocations, as discussed further below, and determined that an allocation where 75% of the CAT costs should be borne by the Industry Members (other than Execution Venue ATSSs) and 25% should be paid by Execution Venues was most appropriate and led to the greatest comparability of CAT Fees for the largest CAT Reporters.

In developing the proposed allocation of CAT costs between Execution Venues and Industry Members (other than Execution Venue ATSSs), the Operating Committee considered various different options for such allocation, including keeping the original 75%/25% allocation, as well as shifting to an 80%/20%, 70%/30%, or 65%/35% allocation. Each of these options was considered in the context of the full model, including the effect on each of the changes discussed above, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. In particular, for each of the alternatives, the Operating Committee considered the effect each allocation had on the assignment of various percentages of Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSSs) to each relevant tier as well as various percentages of recovery allocations for each tier. The Operating Committee determined that the 75%/25% allocation between Execution Venues and Industry Members (other than Execution Venue ATSSs) provided the greatest level of fee comparability at the individual entity level for the largest CAT Reporters, while still providing for appropriate fee levels across all tiers for all CAT Reporters.

(iv) Affiliations

The funding principles set forth in Section 11.2 of the Plan require that the fees charged to CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether

⁷⁷ Securities Exchange Act Rel. No. 67457 (Jul 18, 2012), 77 FR 45722, 45726 (Aug. 1, 2012) (“Rule 613 Adopting Release”).

Execution Venue and/or Industry Members). The proposed funding model satisfies this requirement. As discussed above, under the proposed funding model, the largest Equity Execution Venues, Options Execution Venues, and Industry Members (other than Execution Venue ATSS) pay approximately the same fee. Moreover, the Operating Committee believes that the proposed funding model takes into consideration affiliations between or among CAT Reporters as complexes with multiple CAT Reporters will pay the appropriate fee based on the proposed rule change for each of the CAT Reporters in the complex. For example, a complex with a Tier 1 Equity Execution Venue and Tier 2 Industry Member will pay the same as another complex with a Tier 1 Equity Execution Venue and Tier 2 Industry Member.

(v) Fee Schedule Changes

Accordingly, with this Amendment, the Exchange proposes to amend paragraphs (b)(1) and (2) of the proposed rule change to reflect the changes discussed in this section. Specifically, the Exchange proposes to amend paragraph (b)(1) and (2) to update the number of tiers, and the fees and percentages assigned to each tier to reflect the described changes.

(D) Market Share/Message Traffic

In the Original Proposal, the Operating Committee proposed to charge Execution Venues based on market share and Industry Members (other than Execution Venue ATSS) based on message traffic. Commenters questioned the use of the two different metrics for calculating CAT Fees.⁷⁸ The Operating Committee continues to believe that the proposed use of market share and message traffic satisfies the requirements of the Exchange Act and the funding principles set forth in the CAT NMS Plan. Accordingly, the proposed funding model continues to charge Execution Venues based on market share and Industry Members (other than Execution Venue ATSS) based on message traffic.

In drafting the Plan and the Original Proposal, the Operating Committee expressed the view that the correlation between message traffic and size does not apply to Execution Venues, which they described as producing similar amounts of message traffic regardless of size. The Operating Committee believed that charging Execution Venues based on message traffic would result in both large and small Execution Venues

paying comparable fees, which would be inequitable, so the Operating Committee determined that it would be more appropriate to treat Execution Venues differently from Industry Members in the funding model. Upon a more detailed analysis of available data, however, the Operating Committee noted that Execution Venues have varying levels of message traffic. Nevertheless, the Operating Committee continues to believe that a bifurcated funding model—where Industry Members (other than Execution Venue ATSS) are charged fees based on message traffic and Execution Venues are charged based on market share—complies with the Plan and meets the standards of the Exchange Act for the reasons set forth below.

Charging Industry Members based on message traffic is the most equitable means for establishing fees for Industry Members (other than Execution Venue ATSS). This approach will assess fees to Industry Members that create larger volumes of message traffic that are relatively higher than those fees charged to Industry Members that create smaller volumes of message traffic. Since message traffic, along with fixed costs of the Plan Processor, is a key component of the costs of operating the CAT, message traffic is an appropriate criterion for placing Industry Members in a particular fee tier.

The Operating Committee also believes that it is appropriate to charge Execution Venues CAT Fees based on their market share. In contrast to Industry Members (other than Execution Venue ATSS), which determine the degree to which they produce the message traffic that constitutes CAT Reportable Events, the CAT Reportable Events of Execution Venues are largely derivative of quotations and orders received from Industry Members that the Execution Venues are required to display. The business model for Execution Venues, however, is focused on executions on their markets. As a result, the Operating Committee believes that it is more equitable to charge Execution Venues based on their market share rather than their message traffic.

Similarly, focusing on message traffic would make it more difficult to draw distinctions between large and small exchanges, including options exchanges in particular. For instance, the Operating Committee analyzed the message traffic of Execution Venues and Industry Members for the period of April 2017 to June 2017 and placed all CAT Reporters into a nine-tier framework (*i.e.*, a single tier may include both Execution Venues and

Industry Members). The Operating Committee's analysis found that the majority of exchanges (15 total) were grouped in Tiers 1 and 2. Moreover, virtually all of the options exchanges were in Tiers 1 and 2.⁷⁹ Given the concentration of options exchanges in Tiers 1 and 2, the Operating Committee believes that using a funding model based purely on message traffic would make it more difficult to distinguish between large and small options exchanges, as compared to the proposed bifurcated fee approach.

In addition, the Operating Committee also believes that it is appropriate to treat ATSS as Execution Venues under the proposed funding model since ATSS have business models that are similar to those of exchanges, and ATSS also compete with exchanges. For these reasons, the Operating Committee believes that charging Execution Venues based on market share is more appropriate and equitable than charging Execution Venues based on message traffic.

(E) Time Limit

In the Original Proposal, the Operating Committee did not impose any time limit on the application of the proposed CAT Fees. As discussed above, the Operating Committee developed the proposed funding model by analyzing currently available historical data. Such historical data, however, is not as comprehensive as data that will be submitted to the CAT. Accordingly, the Operating Committee believes that it will be appropriate to revisit the funding model once CAT Reporters have actual experience with the funding model. Accordingly, the Operating Committee proposes to include a sunset provision in the proposed fee model. The proposed CAT Fees will sunset two years after the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. Specifically, the Exchange proposes to add paragraph (d) to the proposed rule change to include this sunset provision. Such a provision will provide the Operating Committee and other market participants with the opportunity to reevaluate the performance of the proposed funding model.

(F) Tier Structure/Decreasing Cost per Unit

In the Original Proposal, the Operating Committee determined to use a tiered fee structure. The Commission

⁷⁸ Suspension Order at 31663; FIA Principal Traders Group Letter at 2.

⁷⁹ The Participants note that this analysis did not place MIAx PEARL in Tier 1 or Tier 2 since the exchange commenced trading on February 6, 2017.

and commenters questioned whether the decreasing cost per additional unit (of message traffic in the case of Industry Members, or of share volume in the case of Execution Venues) burdens competition by disadvantaging small Industry Members and Execution Venues and/or by creating barriers to entry in the market for trading services and/or the market for broker-dealer services.⁸⁰

The Operating Committee does not believe that decreasing cost per additional unit places an unfair competitive burden on Small Industry Members and Execution Venues. While the cost per unit of message traffic or share volume necessarily will decrease as volume increases in any tiered fee model using fixed fee percentages and, as a result, Small Industry Members and small Execution Venues may pay a larger fee per message or share, this comment fails to take account of the substantial differences in the absolute fees paid by Small Industry Members and small Execution Venues as opposed to large Industry Members and large Execution Venues. For example, under the revised funding model, Tier 7 Industry Members would pay a quarterly fee of \$105, while Tier 1 Industry Members would pay a quarterly fee of \$81,483. Similarly, a Tier 4 Equity Execution Venue would pay a quarterly fee of \$129, while a Tier 1 Equity Execution Venue would pay a quarterly fee of \$81,048. Thus, Small Industry Members and small Execution Venues are not disadvantaged in terms of the total fees that they actually pay. In contrast to a tiered model using fixed fee percentages, the Operating Committee believes that strictly variable or metered funding models based on message traffic or share volume would be more likely to affect market behavior and may present administrative challenges (e.g., the costs to calculate and monitor fees may exceed the fees charged to the smallest CAT Reporters).

(G) Other Alternatives Considered

In addition to the various funding model alternatives discussed above regarding discounts, number of tiers and allocation percentages, the Operating Committee also discussed other possible funding models. For example, the Operating Committee considered allocating the total CAT costs equally among each of the Participants, and then permitting each Participant to charge its own members as it deems appropriate.⁸¹ The Operating Committee

determined that such an approach raised a variety of issues, including the likely inconsistency of the ensuing charges, potential for lack of transparency, and the impracticality of multiple SROs submitting invoices for CAT charges. The Operating Committee therefore determined that the proposed funding model was preferable to this alternative.

(H) Industry Member Input

Commenters expressed concern regarding the level of Industry Member input into the development of the proposed funding model, and certain commenters have recommended a greater role in the governance of the CAT.⁸² The Participants previously addressed this concern in its letters responding to comments on the Plan and the CAT Fees.⁸³ As discussed in those letters, the Participants discussed the funding model with the Development Advisory Group (“DAG”), the advisory group formed to assist in the development of the Plan, during its original development.⁸⁴ Moreover, Industry Members currently have representation on the Operating Committee and operation of the CAT generally through the Advisory Committee established pursuant to Rule 613(b)(7) and Section 4.13 of the Plan. The Advisory Committee attends all meetings of the Operating Committee, as well as meetings of various subcommittees and working groups, and provides valuable and critical input for the Participants’ and Operating Committee’s consideration. The Operating Committee continues to believe that Industry Members have an appropriate voice regarding the funding of the Company.

(I) Conflicts of Interest

Commenters also raised concerns regarding Participant conflicts of interest in setting the CAT Fees.⁸⁵ The Participants previously responded to this concern in both the Plan Response Letter and the Fee Rule Response Letter.⁸⁶ As discussed in those letters, the Plan, as approved by the SEC, adopts various measures to protect against the potential conflicts issues

raised by the Participants’ fee-setting authority. Such measures include the operation of the Company as a not for profit business league and on a break-even basis, and the requirement that the Participants file all CAT Fees under Section 19(b) of the Exchange Act. The Operating Committee continues to believe that these measures adequately protect against concerns regarding conflicts of interest in setting fees, and that additional measures, such as an independent third party to evaluate an appropriate CAT Fee, are unnecessary.

(J) Fee Transparency

Commenters also argued that they could not adequately assess whether the CAT Fees were fair and equitable because the Operating Committee has not provided details as to what the Participants are receiving in return for the CAT Fees.⁸⁷ The Operating Committee provided a detailed discussion of the proposed funding model in the Plan, including the expenses to be covered by the CAT Fees. In addition, the agreement between the Company and the Plan Processor sets forth a comprehensive set of services to be provided to the Company with regard to the CAT. Such services include, without limitation: User support services (e.g., a help desk); tools to allow each CAT Reporter to monitor and correct their submissions; a comprehensive compliance program to monitor CAT Reporters’ adherence to Rule 613; publication of detailed Technical Specifications for Industry Members and Participants; performing data linkage functions; creating comprehensive data security and confidentiality safeguards; creating query functionality for regulatory users (i.e., the Participants, and the SEC and SEC staff); and performing billing and collection functions. The Operating Committee further notes that the services provided by the Plan Processor and the costs related thereto were subject to a bidding process.

(K) Funding Authority

Commenters also questioned the authority of the Operating Committee to impose CAT Fees on Industry Members.⁸⁸ The Participants previously responded to this same comment in the Plan Response Letter and the Fee Rule Response Letter.⁸⁹ As the Participants previously noted, SEC Rule 613 specifically contemplates broker-dealers

⁸² See Suspension Order at 31662; MFA Letter at 1–3.

⁸³ Letter from Participants to Brent J. Fields, Secretary, SEC (Sept. 23, 2016) (“Plan Response Letter”); Letter from CAT NMS Plan Participants to Brent J. Fields, Secretary, SEC (June 29, 2017) (“Fee Rule Response Letter”).

⁸⁴ Fee Rule Response Letter at 2; Plan Response Letter at 18.

⁸⁵ See Suspension Order at 31662; FIA Principal Traders Group at 3.

⁸⁶ See Plan Response Letter at 16, 18; Fee Rule Response Letter at 11–12.

⁸⁷ See FIA Principal Traders Group at 3; SIFMA Letter at 3.

⁸⁸ See Suspension Order at 31661–2; SIFMA Letter at 2.

⁸⁹ See Plan Response Letter at 9; Fee Rule Response Letter at 3–4.

⁸⁰ Suspension Order at 31667.

⁸¹ See FIA Principal Traders Group Letter at 2; Belvedere Letter at 4.

contributing to the funding of the CAT. In addition, as noted by the SEC, the CAT “substantially enhance[s] the ability of the SROs and the Commission to oversee today’s securities markets,”⁹⁰ thereby benefitting all market participants. Therefore, the Operating Committee continues to believe that it is equitable for both Participants and Industry Members to contribute to funding the cost of the CAT.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6(b)(4) of the Act,⁹¹ because it provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using its facilities. The Exchange believes the proposed rule change is also consistent with Section 6(b)(5) of the Act,⁹² which requires, among other things, that the Exchange’s 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, and not designed to permit unfair discrimination between customers, issuers, brokers and dealers. As discussed above, the SEC approved the bifurcated, tiered, fixed fee funding model in the CAT NMS Plan, finding it was reasonable and that it equitably allocated fees among Participants and Industry Members. The Exchange believes that the proposed tiered fees adopted pursuant to the funding model approved by the SEC in the CAT NMS Plan are reasonable, equitably allocated and not unfairly discriminatory.

The Exchange believes that this proposal is consistent with the Act because it implements, interprets or clarifies the provisions of the Plan, and is designed to assist the Exchange and its Industry Members in meeting regulatory obligations pursuant to the Plan. In approving the Plan, the SEC noted that the Plan “is necessary and appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanism of a national market system, or is otherwise in furtherance of the purposes of the Act.”⁹³ To the extent that this proposal implements, interprets or clarifies the Plan and applies specific requirements to Industry Members, the Exchange believes that this proposal furthers the

objectives of the Plan, as identified by the SEC, and is therefore consistent with the Act.

The Exchange believes that the proposed tiered fees are reasonable. First, the total CAT Fees to be collected would be directly associated with the costs of establishing and maintaining the CAT, where such costs include Plan Processor costs and costs related to insurance, third party services and the operational reserve. The CAT Fees would not cover Participant services unrelated to the CAT. In addition, any surplus CAT Fees cannot be distributed to the individual Participants; such surpluses must be used as a reserve to offset future fees. Given the direct relationship between the fees and the CAT costs, the Exchange believes that the total level of the CAT Fees is reasonable.

In addition, the Exchange believes that the proposed CAT Fees are reasonably designed to allocate the total costs of the CAT equitably between and among the Participants and Industry Members, and are therefore not unfairly discriminatory. As discussed in detail above, the proposed tiered fees impose comparable fees on similarly situated CAT Reporters. For example, those with a larger impact on the CAT (measured via message traffic or market share) pay higher fees, whereas CAT Reporters with a smaller impact pay lower fees. Correspondingly, the tiered structure lessens the impact on smaller CAT Reporters by imposing smaller fees on those CAT Reporters with less market share or message traffic. In addition, the fee structure takes into consideration distinctions in securities trading operations of CAT Reporters, including ATSS trading OTC Equity Securities, and equity and options market makers.

Moreover, the Exchange believes that the division of the total CAT costs between Industry Members and Execution Venues, and the division of the Execution Venue portion of total costs between Equity and Options Execution Venues, is reasonably designed to allocate CAT costs among CAT Reporters. The 75%/25% division between Industry Members (other than Execution Venue ATSSs) and Execution Venues maintains the greatest level of comparability across the funding model. For example, the cost allocation establishes fees for the largest Industry Members (*i.e.*, those Industry Members in Tier 1) that are comparable to the largest Equity Execution Venues and Options Execution Venues (*i.e.*, those Execution Venues in Tier 1). Furthermore, the allocation of total CAT cost recovery recognizes the difference in the number of CAT Reporters that are

Industry Members (other than Execution Venue ATSSs) versus CAT Reporters that are Execution Venues. Similarly, the 67%/33% division between Equity Execution Venues and Options Execution Venues also helps to provide fee comparability for the largest CAT Reporters.

Finally, the Exchange believes that the proposed fees are reasonable because they would provide ease of calculation, ease of billing and other administrative functions, and predictability of a fixed fee. Such factors are crucial to estimating a reliable revenue stream for the Company and for permitting CAT Reporters to reasonably predict their payment obligations for budgeting purposes.

For the foregoing reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization’s Statement on Burden on Competition

Section 6(b)(8) of the Act⁹⁴ require that the Exchange’s rules not impose any burden on competition that is not necessary or appropriate. The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange notes that the proposed rule change implements provisions of the CAT NMS Plan approved by the Commission, and is designed to assist the Exchange in meeting its regulatory obligations pursuant to the Plan. Similarly, all national securities exchanges and FINRA are proposing a similar proposed fee change to implement the requirements of the CAT NMS Plan. Therefore, this is not a competitive fee filing and, therefore, it does not raise competition issues between and among the exchanges and FINRA.

Moreover, as previously described, the Exchange believes that the proposed rule change fairly and equitably allocates costs among CAT Reporters. In particular, the proposed fee schedule is structured to impose comparable fees on similarly situated CAT Reporters, and lessen the impact on smaller CAT Reporters. CAT Reporters with similar levels of CAT activity will pay similar fees. For example, Industry Members (other than Execution Venue ATSSs) with higher levels of message traffic will pay higher fees, and those with lower levels of message traffic will pay lower fees. Similarly, Execution Venue ATSSs and other Execution Venues with larger market share will pay higher fees, and those with lower levels of market share

⁹⁰ Rule 613 Adopting Release at 45726.

⁹¹ 15 U.S.C. 78f(b)(4).

⁹² 15 U.S.C. 78f(b)(6).

⁹³ Approval Order at 84697.

⁹⁴ 15 U.S.C. 78f(b)(8).

will pay lower fees. Therefore, given that there is generally a relationship between message traffic and market share to the CAT Reporter's size, smaller CAT Reporters generally pay less than larger CAT Reporters. Accordingly, the Exchange does not believe that the CAT Fees would have a disproportionate effect on smaller or larger CAT Reporters. In addition, ATSS and exchanges will pay the same fees based on market share. Therefore, the Exchange does not believe that the fees will impose any burden on the competition between ATSS and exchanges. Accordingly, the Exchange believes that the proposed fees will minimize the potential for adverse effects on competition between CAT Reporters in the market.

Furthermore, the tiered, fixed fee funding model limits the disincentives to providing liquidity to the market. Therefore, the proposed fees are structured to limit burdens on competitive quoting and other liquidity provision in the market.

In addition, the Exchange believes that the proposed changes to the Original Proposal, as discussed above in detail, address certain competitive concerns raised by commenters, including concerns related to, among other things, smaller ATSS, ATSS trading OTC Equity Securities, market making quoting and fee comparability. As discussed above, the Exchange believes that this Amendment addresses the competitive concerns raised by commenters.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Solicitation of Comments on Amendment No. 1

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment No. 1 is consistent with the Act. In particular, the Commission seeks comment on the following:

Allocation of Costs

(1) Commenters' views as to whether the allocation of CAT costs is consistent with the funding principle expressed in the CAT NMS Plan that requires the Operating Committee to "avoid any disincentives such as placing an

inappropriate burden on competition and a reduction in market quality."⁹⁵

(2) Commenters' views as to whether the allocation of 25% of CAT costs to the Execution Venues (including all the Participants) and 75% to Industry Members, will incentivize or disincentivize the Participants to effectively and efficiently manage the CAT costs incurred by the Participants since they will only bear 25% of such costs.

(3) Commenters' views on the determination to allocate 75% of all costs incurred by the Participants from November 21, 2016 to November 21, 2017 to Industry Members (other than Execution Venue ATSS), when such costs are development and build costs and when Industry Member reporting is scheduled to commence a year later, including views on whether such "fees, costs and expenses . . . [are] fairly and reasonably shared among the Participants and Industry Members" in accordance with the CAT NMS Plan.⁹⁶

(4) Commenters' views on whether an analysis of the ratio of the expected Industry Member-reported CAT messages to the expected SRO-reported CAT messages should be the basis for determining the allocation of costs between Industry Members and Execution Venues.⁹⁷

(5) Any additional data analysis on the allocation of CAT costs, including any existing supporting evidence.

Comparability

(6) Commenters' views on the shift in the standard used to assess the comparability of CAT Fees, with the emphasis now on comparability of individual entities instead of affiliated entities, including views as to whether this shift is consistent with the funding principle expressed in the CAT NMS Plan that requires the Operating Committee to establish a fee structure in which the fees charged to "CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether Execution Venues and/or Industry Members)."⁹⁸

⁹⁵ Section 11.2(e) of the CAT NMS Plan.

⁹⁶ Section 11.1(c) of the CAT NMS Plan.

⁹⁷ The Notice for the CAT NMS Plan did not provide a comprehensive count of audit trail message traffic from different regulatory data sources, but the Commission did estimate the ratio of all SRO audit trail messages to OATS audit trail messages to be 1.9431. See Securities Exchange Act Release No. 77724 (April 27, 2016), 81 FR 30613, 30721 n.919 and accompanying text (May 17, 2016).

⁹⁸ Section 11.2(c) of the CAT NMS Plan.

(7) Commenters' views as to whether the reduction in the number of tiers for Industry Members (other than Execution Venue ATSS) from nine to seven, the revised allocation of CAT costs between Equity Execution Venues and Options Execution Venues from a 75%/25% split to a 67%/33% split, and the adjustment of all tier percentages and recovery allocations achieves comparability across individual entities, and whether these changes should have resulted in a change to the allocation of 75% of total CAT costs to Industry Members (other than Execution Venue ATSS) and 25% of such costs to Execution Venues.

Discounts

(8) Commenters' views as to whether the discounts for options market-makers, equities market-makers, and Equity ATSS trading OTC Equity Securities are clear, reasonable, and consistent with the funding principle expressed in the CAT NMS Plan that requires the Operating Committee to "avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality,"⁹⁹ including views as to whether the discounts for market-makers limit any potential disincentives to act as a market-maker and/or to provide liquidity due to CAT fees.

Calculation of Costs and Imposition of CAT Fees

(9) Commenters' views as to whether the amendment provides sufficient information regarding the amount of costs incurred from November 21, 2016 to November 21, 2017, particularly, how those costs were calculated, how those costs relate to the proposed CAT Fees, and how costs incurred after November 21, 2017 will be assessed upon Industry Members and Execution Venues;

(10) Commenters' views as to whether the timing of the imposition and collection of CAT Fees on Execution Venues and Industry Members is reasonably related to the timing of when the Company expects to incur such development and implementation costs.¹⁰⁰

(11) Commenters' views on dividing CAT costs equally among each of the Participants, and then each Participant charging its own members as it deems appropriate, taking into consideration the possibility of inconsistency in charges, the potential for lack of transparency, and the impracticality of multiple SROs submitting invoices for CAT charges.

⁹⁹ Section 11.2(e) of the CAT NMS Plan.

¹⁰⁰ Section 11.1(c) of the CAT NMS Plan.

Burden on Competition and Barriers to Entry

(12) Commenters' views as to whether the allocation of 75% of CAT costs to Industry Members (other than Execution Venue ATs) imposes any burdens on competition to Industry Members, including views on what baseline competitive landscape the Commission should consider when analyzing the proposed allocation of CAT costs.

(13) Commenters' views on the burdens on competition, including the relevant markets and services and the impact of such burdens on the baseline competitive landscape in those relevant markets and services.

(14) Commenters' views on any potential burdens imposed by the fees on competition between and among CAT Reporters, including views on which baseline markets and services the fees could have competitive effects on and whether the fees are designed to minimize such effects.

(15) Commenters' general views on the impact of the proposed fees on economies of scale and barriers to entry.

(16) Commenters' views on the baseline economies of scale and barriers to entry for Industry Members and Execution Venues and the relevant markets and services over which these economies of scale and barriers to entry exist.

(17) Commenters' views as to whether a tiered fee structure necessarily results in less active tiers paying more per unit than those in more active tiers, thus creating economies of scale, with supporting information if possible.

(18) Commenters' views as to how the level of the fees for the least active tiers would or would not affect barriers to entry.

(19) Commenters' views on whether the difference between the cost per unit (messages or market share) in less active tiers compared to the cost per unit in more active tiers creates regulatory economies of scale that favor larger competitors and, if so:

(a) How those economies of scale compare to operational economies of scale; and

(b) Whether those economies of scale reduce or increase the current advantages enjoyed by larger competitors or otherwise alter the competitive landscape.

(20) Commenters' views on whether the fees could affect competition between and among national securities exchanges and FINRA, in light of the fact that implementation of the fees does not require the unanimous consent of all such entities, and, specifically:

(a) Whether any of the national securities exchanges or FINRA are disadvantaged by the fees; and

(b) If so, whether any such disadvantages would be of a magnitude that would alter the competitive landscape.

(21) Commenters' views on any potential burden imposed by the fees on competitive quoting and other liquidity provision in the market, including, specifically:

(a) Commenters' views on the kinds of disincentives that discourage liquidity provision and/or disincentives that the Commission should consider in its analysis;

(b) Commenters' views as to whether the fees could disincentive the provision of liquidity; and

(c) Commenters' views as to whether the fees limit any disincentives to provide liquidity.

(22) Commenters' views as to whether the amendment adequately responds to and/or addresses comments received on related filings.

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-NYSEARCA-2017-52 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEARCA-2017-52. 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 website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the

filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEARCA-2017-52 and should be submitted on or before January 4, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁰¹

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2017-27024 Filed 12-13-17; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-82240; File No. SR-CboeEDGX-2017-003]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Related to Transaction Fees for Exchange's Equity Trading Platform

December 8, 2017.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on November 30, 2017, Cboe EDGX Exchange, Inc. ("EDGX" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as one establishing or changing a member due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act³ and Rule 19b-4(f)(2) thereunder,⁴ which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

¹⁰¹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(ii).

⁴ 17 CFR 240.19b-4(f)(2).

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange filed a proposal to amend the fee schedule applicable to Members⁵ and non-Members of the Exchange pursuant to EDGX Rules 15.1(a) and (c).

The text of the proposed rule change is available at the Exchange's website at www.markets.cboe.com, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fee schedule to: (i) Reduce the rebate applicable to fee code ZA; and (ii) provide the enhanced rebate offered by the Investor Depth Tier under footnote 1 of the fee schedule to orders that yield fee code ZA where the Member satisfies the tier's required criteria.

Currently, the Exchange determines the liquidity adding rebate that it will provide to Members using the Exchange's fee code and tiered pricing structure. Fee code ZA is appended to Retail Orders⁶ that add liquidity on the Exchange. Retail Orders which yield fee code ZA currently receive a rebate of \$0.0034 per share in securities priced at or above \$1.00 and a rebate of \$0.0003 per share in securities priced below \$1.00. The Exchange now proposes to

⁵ The term "Member" is defined as "any registered broker or dealer that has been admitted to membership in the Exchange." See Exchange Rule 1.5(n).

⁶ "Retail Orders" are defined as "an agency or riskless principal order that meets the criteria of FINRA Rule 5320.03 that originates from a natural person and is submitted to the Exchange by a Retail Member Organization, provided that no change is made to the terms of the order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology." See Exchange Rule 11.21(a)(2).

reduce the rebate provided by fee code ZA from \$0.0034 per share to \$0.0032 per share for securities priced at or above \$1.00. The Exchange does not propose to amend the rebate provided by fee code ZA for securities priced below \$1.00.

The Exchange offers additional rebates depending on the volume tiers for which such Member qualifies. As is the case with any rebate on the fee schedule, to the extent that a Member qualifies for higher rebates than those provided under a volume tier, the higher rebate shall apply. Footnote 1 offers volume tiered rebates ranging from \$0.0025 to \$0.0033 per share to orders yielding fee codes B,⁷ V,⁸ Y,⁹ 3¹⁰ and 4.¹¹ Under footnote 1's Investor Depth Tier, a Member will receive a rebate of \$0.0033 per share where they: (i) add an ADV $\geq 0.12\%$ of the TCV; (ii) have an "added liquidity" as a percentage of "added plus removed liquidity" $\geq 85\%$; and (iii) adds an ADV $\geq 400,000$ shares as non-displayed orders that yield fee code HA,¹² HI,¹³ and/or MM.¹⁴ The Exchange now proposes to also provide the rebate offered by the Investor Depth Tier to orders that yield fee code ZA where the Member satisfies the tier's required criteria. As such, Member's Retail Orders that yield fee code ZA would receive an enhanced rebate of \$0.0033 per share where that Member satisfies the tier's required criteria.

Implementation Date

The Exchange proposes to implement these amendments to its fee schedule as of December 1, 2017.

⁷ Fee code B is appended to displayed orders that add liquidity in Tape B securities and are provided a rebate of \$0.0020 per share. See the Exchange's fee schedule available at http://markets.cboe.com/us/equities/membership/fee_schedule/edgx/.

⁸ Fee code V is appended to displayed orders that add liquidity in Tape A securities and are provided a rebate of \$0.0020 per share. *Id.*

⁹ Fee code Y is appended to displayed orders that add liquidity in Tape C securities and are provided a rebate of \$0.0020 per share. *Id.*

¹⁰ Fee code 3 is appended to displayed orders that add liquidity in Tape A or C securities during the post-market or pre-market sessions and are provided a rebate of \$0.0020 per share. *Id.*

¹¹ Fee code 4 is appended to displayed orders that add liquidity in Tape B securities during the post-market or pre-market sessions and are provided a rebate of \$0.0020 per share. *Id.*

¹² Fee code HA is appended to non-displayed orders that add liquidity and are provided a rebate of \$0.0015 per share. See the Exchange's fee schedule available at http://markets.cboe.com/us/equities/membership/fee_schedule/edgx/.

¹³ Fee code HI is appended to non-displayed orders that add liquidity and receive price improvement and are executed free of charge. *Id.*

¹⁴ Fee code MM is appended to non-displayed orders that add liquidity using the Mid-Point Peg order type. *Id.*

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,¹⁵ in general, and furthers the objectives of Section 6(b)(4),¹⁶ in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities. The Exchange also notes that it operates in a highly-competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. The proposed rule change reflects a competitive pricing structure designed to incent market participants to direct their order flow to the Exchange. The Exchange believes the rates remain competitive with those charged by other venues and, therefore, reasonable and equitably allocated to Members. The Exchange further believes that the proposed amendments are non-discriminatory because they apply uniformly to all Members.

The Exchange believes it is equitable and reasonable to lower the rebate for Retail Orders that yield fee code ZA from \$0.0034 to \$0.0032 per share as the level of rebate is either equal to or greater than the rebate offered on another exchange.¹⁷ The Exchange further believes the proposed fee change is equitable and reasonable because it continues to enable Retail Orders that add liquidity to receive an enhanced rebate by qualifying for the Investor Depth Tier under footnote 1. Doing so should encourage market participants to direct more order flow to the Exchange in attempt to qualify for the Investor Depth tier and receive an enhanced rebate for their Retail Orders. Volume-based rebates and fees such as proposed herein have been widely adopted by equities and options exchanges and are equitable because they are open to all Members on an equal basis and provide additional benefits or discounts that are reasonably related to the value to an exchange's market quality associated with higher levels of market activity, such as higher levels of liquidity provision and/or growth patterns, and introduction of higher volumes of orders

¹⁵ 15 U.S.C. 78f.

¹⁶ 15 U.S.C. 78f(b)(4).

¹⁷ NYSE Arca, Inc. ("NYSE Arca") provides a standard rebate of \$0.0030 per share for retail orders that add liquidity. See the NYSE Arca fee schedule available at https://www.nyse.com/publicdocs/nyse/markets/nyse-arca/NYSE_Arca_Marketplace_Fees.pdf. Cboe BZX Exchange, Inc. ("BZX") provides a rebate of \$0.0032 per share to retail orders that add liquidity. See the BZX fee schedule available at http://markets.cboe.com/us/equities/membership/fee_schedule/bzx/.

into the price and volume discovery processes.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Similarly, the Exchange does not believe that the proposed change to the Exchange's tiered pricing structure burdens competition, but instead, enhances competition by modifying pricing incentives to attract order flow and incentivize participants to increase their participation on the Exchange. The Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee structures to be unreasonable or excessive. The Exchange does not believe the proposed amendments would burden intramarket competition as they would be available to all Members uniformly.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from Members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act¹⁸ and paragraph (f) of Rule 19b-4 thereunder.¹⁹ At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-CboeEDGX-2017-003 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-CboeEDGX-2017-003. 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 website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-CboeEDGX-2017-003 and should be submitted on or before January 4, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁰

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2017-26911 Filed 12-13-17; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-82248; File No. SR-CFE-2017-003]

Self-Regulatory Organizations; Cboe Futures Exchange, LLC; Notice of Filing of Proposed Rule Change Regarding CFE's New Trading System

December 8, 2017.

Pursuant to Section 19(b)(7) of the Securities Exchange Act of 1934 ("Act"),¹ notice is hereby given that on November 29, 2017 Cboe Futures Exchange, LLC ("CFE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change described in Items I and II below, which Items have been prepared by CFE. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons. CFE also has filed this proposed rule change with the Commodity Futures Trading Commission ("CFTC"). CFE filed a written certification with the CFTC under Section 5c(c) of the Commodity Exchange Act ("CEA")² on November 29, 2017.

I. Self-Regulatory Organization's Description of the Proposed Rule Change

The Exchange proposes to amend its rules in connection with the implementation of a new CFE trading system. The scope of this filing is limited solely to the application of the rule amendments to security futures traded on CFE. The only security futures that have been offered for trading on CFE were traded under Chapter 16 of CFE's Rulebook, which is applicable to Individual Stock Based and Exchange-Traded Fund Based Volatility Index security futures. CFE does not currently list any security futures for trading. The text of the proposed rule change is attached as Exhibit 4 to the filing but is not attached to the publication of this notice.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, CFE included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. CFE has prepared

¹⁸ 15 U.S.C. 78s(b)(3)(A).

¹⁹ 17 CFR 240.19b-4(f).

²⁰ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(7).

² 7 U.S.C. 7a-2(c).

summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Cboe Global Markets, Inc. (formerly known as CBOE Holdings, Inc.) ("Cboe Global Markets") is the parent company of CFE. On February 28, 2017, Cboe Global Markets completed the acquisition of Bats Global Markets, Inc. ("Bats"). In connection with this acquisition, all of the exchanges owned by Cboe Global Markets, including CFE, are migrating their trading platforms to trading systems based on Bats technology. CFE's new trading system will be referred to in CFE rules as the "CFE System".

The Exchange is proposing to amend the following rule provisions as a result of changes for the CFE System: CFE Rule Chapter 1; CFE Rules 303A, 403, 414, 415, 603, 620, 714, 1602, 1802, and 1902; and CFE Policy and Procedure XVIII. These provisions set forth rules related to Authorized Reporters, Order Entry Operator IDs, Order Entry and Maintenance of Front-End Audit Trail Information, Exchange of Contract for Related Position ("ECRP") transactions, Block Trades, Market Manipulation, Disruptive Trading Practices, Imposition of Fines for Minor Rule Violations, Reportable Trading Volume, and Contract Specifications. With one exception, the rule amendments included as part of this rule change are to apply to all products traded on CFE, including both non-security futures and security futures. CFE is making these rule amendments in conjunction with other rule amendments being made by CFE in connection with the implementation of the CFE System that are not required to be submitted to the Commission pursuant to Section 19(b)(7) of the Act³ and thus are not included as part of this rule change.

Authorized Reporter

CFE Rule Chapter 1 includes definitions for terms used in CFE's rules. CFE is proposing to include in Chapter 1 a definition for the term "Authorized Reporter" which includes cross-references to proposed CFE Rules 414(i) and 415(f) in which the term "Authorized Reporter" is defined. Specifically, the proposed definition of an Authorized Reporter in proposed Rules 414(i) and 415(f) is an individual

that is either a CFE Trading Privilege Holder ("TPH") or a Related Party of a TPH and is pre-authorized by a CFE Clearing Member to report Exchange of Contract for Related Position transactions and Block Trades on behalf of the TPH.

Order Entry Operator IDs

CFE Rule 303A (Order Entry Operator IDs) sets forth that each TPH shall include an Order Entry Operator ID with every Order and the requirements applicable to Order Entry Operator IDs. CFE is proposing three changes to Rule 303A.

First, CFE is proposing to amend Rule 303A(a) to provide that an Order Entry Operator ID must be included on every Cancel Order and Cancel Replace/Modify Order and to provide that any Order that does not contain an Order Entry Operator ID will be rejected or canceled back to the sender by CFE's trading system.

Second, CFE is proposing to amend Rule 303A to remove references to quotes. A quote is a two-sided order that includes both a bid and an offer whereas an order only includes a bid or an offer. Most TPHs submit orders instead of quotes, and CFE will no longer accept quotes with the implementation of the CFE System.

Third, CFE is proposing to replace the term "CBOE System" (which is the term in CFE's current rules for CFE's trading system) with the term "CFE System".

Order Entry and Maintenance of Front-End Audit Trail Information

CFE Rule 403 (Order Entry) sets forth details regarding, among other things, how Orders must be entered into CFE's trading system, the information each Order must contain, and front-end audit trail information that must be maintained.

CFE is proposing to revise Rule 403(a) to describe how TPHs will connect to the CFE System by deleting current language which describes how TPHs sign onto the CBOE System by inputting the user identification assigned for such purpose and replacing that language with language that describes how TPHs will connect to the CFE System in a form and manner prescribed by the Exchange.

CFE is also updating Rule 403(a) to revise and reorder the list of items of information that must be included with every Order. Currently, Rule 403(a) provides that each Order must contain the following information: (i) Whether the Order is a buy or sell Order; (ii) Order type; (iii) commodity; (iv) contract expiration; (v) price; (vi) quantity; (vii) account type; (viii)

account designation; (ix) in the case of Orders for Options, strike price, type of option (put or call), and expiration month; and (x) such additional information as may be prescribed from time to time by the Exchange. CFE is proposing to amend Rule 403(a) to provide that each Order must contain the following information: (i) Whether the Order is a buy or sell Order; (ii) Order type; (iii) price or premium (if the Order is not a Market Order); (iv) quantity; (v) Contract identifier or product and contract expiration(s); (vi) Client Order ID; (vii) Executing Firm ID ("EFID"); (viii) Order Entry Operator ID; (ix) Clearing Corporation origin code (C for Customer or F for Firm); (x) Customer Type Indicator code; (xi) manual Order indicator; (xii) account designation; (xiii) in the case of Orders for Options, either Contract identifier or each of strike price, type of option (put or call), and expiration; and (xiv) such additional information as may be prescribed from time to time by the Exchange.

Additionally, CFE is proposing to amend Rule 403(a) to provide that any Order that does not contain required information in a form and manner prescribed by the Exchange will be rejected or canceled back to the sender by the CFE System.

CFE is proposing to revise Rule 403(c) to reference that the CFE System identifies the Clearing Member for the execution of an Order by the EFID used in the Order submission. CFE is also proposing to replace the reference in Rule 403(c) to CBOE Market Interface ("CMi") order structure with a reference to Binary Order Entry ("BOE") Order message information since the BOE protocol will be replacing the CMi protocol. CFE is retaining the reference in Rule 403(c) to the Financial Information Exchange ("FIX") protocol since TPHs will be able to interface with the CFE System either through the BOE protocol or the FIX protocol.

CFE is also proposing to amend Rule 403 to remove references to quotes, to replace the term "CBOE System" with the term "CFE System", and to replace the term "CBOE Workstation" with the term "CFE Workstation" (which is any computer connected directly to the CFE System, including by means of an Exchange defined protocol, for the purpose of trading Contracts on the Exchange).

Exchange of Contract for Related Position Transactions

CFE Rule 414 (Exchange of Contract for Related Position) sets forth details regarding ECRP transactions. The proposed changes to Rule 414 included

³ 15 U.S.C. 78s(b)(7).

as part of this rule change filing and which are described below are those amendments to Rule 414 that are related to recordkeeping or reporting.

First, CFE is proposing to set forth in proposed Rule 414(e) the Reporting Deadline and Permissible Reporting Period for ECRP transactions that will apply with the CFE System. CFE is proposing that the Reporting Deadline for an ECRP transaction be that an ECRP transaction must be fully reported to the Exchange without delay and by no later than thirty minutes after the transaction is agreed upon, unless otherwise specified in the rules governing the relevant Contract. The Reporting Deadline would be measured from the time the transaction is agreed upon to the time that the full report of the transaction is received by the CFE System matching engine. CFE is proposing that the Permissible Reporting Period for an ECRP transaction be that the ECRP transaction must be fully reported to the Exchange during Trading Hours, or a queuing period, for the Contract that comprises the Contract leg of the transaction, when that Contract is not suspended. A queuing period is a time frame in which the CFE System accepts Orders but they are not executable. Proposed Rule 414(e) also addresses when it is permissible to agree to an ECRP transaction (referred to as a Permissible Agreement Period). Accordingly, in order to satisfy the requirements of proposed Rule 414(e), the time periods in which an ECRP transaction may occur would be limited to those time periods in which the transaction is agreed to within a Permissible Agreement Period and the transaction is able to be fully reported to the Exchange within a Permissible Reporting Period by no later than the Reporting Deadline. Under CFE's current rules, the reporting deadline is the same as is proposed by this rule change but the permissible reporting periods are specified time frames that apply to all Contracts instead of having a permissible reporting period for each Contract based on its respective Trading Hours and queuing periods as is proposed.

Second, CFE is proposing to amend in proposed Rule 414(g) the list of items of information currently set forth in Rule 414(f) that must be recorded on an order ticket for an ECRP by a TPH that acts as agent for an ECRP. In particular, CFE is proposing to add to the items of information that must be recorded the arrangement time, if any, for the ECRP transaction (which is the time at which the parties agreed to enter into the transaction at a later time). CFE is also proposing to clarify and provide that the

following information must be recorded for the Related Position: The identity, quantity, and price or premium of the Related Position (including the expiration, strike price, type of option (put or call), and delta in the case of an option).

Third, CFE is proposing to revise a provision in proposed Rule 414(h) to make clear that references to ECRP are to an ECRP transaction. This provision is in current Rule 414(g) and requires a TPH to maintain records evidencing compliance with the criteria in Rule 414 or be able to obtain those records from the TPH's Customer.

Fourth, CFE is proposing to amend provisions in proposed Rule 414(i) that are currently in Rule 414(h) to provide that an Authorized Reporter for an ECRP transaction must be an individual (and not an entity) and that a Clearing Member may only authorize an Authorized Reporter to report both ECRP transactions and Block Trades (and not one or the other).

Fifth, CFE is proposing to amend provisions in proposed Rule 414(j) that are currently in Rule 414(i) to no longer allow for notification of ECRP transactions to the Exchange to be made by email and to provide that the Contract legs of all ECRP transactions will be submitted for clearing on the Business Day during which the applicable transaction is fully reported to the Exchange. Current Rule 414(i) allows Authorized Reporters to designate either the calendar day of an ECRP transaction or the next Business Day as the Business Day for which the Contract leg of the transaction is submitted for clearing if an ECRP transaction is reported to the Exchange from 3:15 p.m. to 4:00 p.m. Chicago time Monday through Thursday. This will no longer be the case once ECRP transactions are reported directly to the CFE System (instead of by email) pursuant to proposed Rule 414(l) as described below.

Sixth, CFE is proposing to update provisions in proposed Rule 414(k) that are currently in Rule 414(j) to revise and reorder the list of items of information that must be included in the notification to the Exchange of an ECRP transaction. Currently, the notification of an ECRP transaction must include the following information: The identity, contract expiration, price or premium, quantity, and time of execution of the relevant Contract leg (*i.e.*, the time the parties agreed to the Exchange of Contract for Related Position transaction), (ii) the counterparty Clearing Member, (iii) the identity, quantity, and price of the Related Position, and (iv) any other information required by the Exchange.

CFE is proposing to provide in proposed Rule 414(k) that the notification of an ECRP transaction must include the following information: (i) Whether the component of the transaction in the Contract listed on the Exchange is a single leg transaction, a transaction in a spread, or transaction in a strip; (ii) the Contract identifier (or product and contract expiration for a future or product, expiration, strike price, and type of option (put or call) in the case of an option), price (or premium for an option) and quantity of the relevant Contract leg of the transaction, and whether the relevant Contract leg is buy or sell; (iii) the time of execution (*i.e.*, the time at which the parties agreed to the transaction); (iv) the arrangement time, if any (*i.e.*, the time at which the parties agreed to enter into the transaction at a later time); (v) Operator ID; (vi) EFID; (vii) account; (viii) Clearing Corporation origin code; (ix) Customer Type Indicator code; (x) the identity, quantity, and price or premium of the Related Position (including the expiration, strike price, type of option (put or call), and delta in the case of an option); and (xi) any other information required by the Exchange.

Seventh, CFE is also proposing to delete a provision from current Rule 414(k) which allows the Authorized Reporters and parties to an ECRP transaction thirty minutes from the time the CFE Help Desk transmits a transaction summary to the Authorized Reporters to notify the Help Desk of any inaccuracies in the content of the transaction summary. The Help Desk (which will be referred to as the Trade Desk with the implementation of the CFE System) will no longer transmit transaction summaries to Authorized Reporters since Authorized Reporters will be entering the information regarding ECRP transactions directly into the CFE System pursuant to proposed Rule 414(l) as described below and will no longer be relying on the Help Desk to manually enter into CFE's trading system the information included in the email notifications that the Help Desk currently receives from Authorized Reporters regarding an ECRP transaction. Accordingly, the notification provision which permits Authorized Reporters and parties to the transaction to notify the Help Desk of any inaccuracies in the transaction summary from the Help Desk would no longer have applicability.

Eighth, CFE proposes to provide in proposed Rule 414(l) that Authorized Reporters shall provide notification to the Exchange of ECRP transactions by reporting them to the CFE System in a form and manner prescribed by the

Exchange. Proposed Rule 414(l) also describes how the CFE System includes a mechanism, in a form and manner provided by the Exchange, for the Authorized Reporter that is the initiator of a notification of an ECRP transaction to enter information regarding the transaction and for the Authorized Reporter for the contra side of the transaction to accept the notification to the Exchange of the transaction as entered by the initiating Authorized Reporter and enter contra side information for the transaction.

Ninth, CFE proposes to provide in proposed Rule 414(m) how CFE will measure adherence to Permissible Reporting Periods and the Reporting Deadline for ECRP transactions for timing purposes. Specifically, an ECRP transaction would be deemed to have been fully reported to the Exchange when the full report of the transaction has been received by the CFE System matching engine following notification to the CFE System of required information relating to the transaction by the initiating Authorized Reporter and acceptance and notification to the CFE System of required information relating to the transaction by the contra side Authorized Reporter.

Tenth, CFE proposes to provide in proposed Rule 414(n) that CFE may modify the timing requirements for and permissible manner of notification to CFE for ECRP transactions in the event of unusual circumstances. For example, this provision could be invoked if the CFE System is not accepting notifications of ECRP transactions due to a system malfunction.

Block Trades

CFE Rule 415 (Block Trading) (to be renamed Block Trades) sets forth details regarding Block Trades. CFE is proposing to make corollary changes to Rule 415 in relation to recordkeeping and reporting that are substantially equivalent to the changes being made to Rule 414. Those proposed changes are described below.

First, CFE is proposing to set forth in Rule 415(c) the Reporting Deadline and Permissible Reporting Period for Block Trades that will apply with the CFE System. CFE is proposing that the Reporting Deadline for a Block Trade be that a Block Trade must be fully reported to the Exchange without delay and by no later than ten minutes after the transaction is agreed upon, unless otherwise specified in the rules governing the relevant Contract. The Reporting Deadline would be measured from the time the transaction is agreed upon to the time that the full report of the transaction is received by the CFE

System matching engine. CFE is proposing that the Permissible Reporting Period for a Block Trade in a Contract be that the Block Trade must be fully reported to the Exchange during Trading Hours, or a queuing period, for the Contract, when that Contract is not suspended. Proposed Rule 415(c) also addresses when it is permissible to agree to a Block Trade (referred to as a Permissible Agreement Period). Accordingly, in order to satisfy the requirements of proposed Rule 415(c), the time periods in which a Block Trade may occur would be limited to those time periods in which the transaction is agreed to within a Permissible Agreement Period and the transaction is able to be fully reported to the Exchange within a Permissible Reporting Period by no later than the Reporting Deadline. Under CFE's current rules, the reporting deadline is the same as is proposed by this rule change but the permissible reporting periods are specified time frames that apply to all Contracts instead of having a permissible reporting period for each Contract based on its respective Trading Hours and queuing periods as is proposed.

Second, CFE is proposing to amend in Rule 415(e) the list of items of information that must be recorded by a TPH on an order ticket for a Block Trade. In particular, CFE is proposing to add to the items of information that must be recorded the arrangement time, if any, for the Block Trade. CFE is also proposing to clarify and provide that the expiration, strike price, and type of option (put or call) must be recorded for the Block Trade if it involves an option.

Third, CFE is proposing to amend provisions in Rule 415(f) to provide that an Authorized Reporter for a Block Trade must be an individual (and not an entity) and that a Clearing Member may only authorize an Authorized Reporter to report both ECRP transactions and Block Trades (and not one or the other). Additionally, CFE is adding a provision to Rule 415(f) which is currently included in current Rule 414(h) in relation to ECRP transactions to make clear that both the parties to and Authorized Reporters for a Block Trade are obligated to comply with the requirements set forth in Rule 415, and any of these parties or Authorized Reporters may be held responsible by the Exchange for noncompliance with those requirements.

Fifth, CFE is proposing to amend provisions in proposed Rule 415(g) to no longer allow for notification of Block Trades to the Exchange to be made by email and to provide that Block Trades will be submitted for clearing on the Business Day during which the

applicable transaction is fully reported to the Exchange. Current Rule 415(g) allows Authorized Reporters to designate either the calendar day of a Block Trade or the next Business Day as the Business Day for which the Block Trade is submitted for clearing if a Block Trade is reported to the Exchange from 3:15 p.m. to 4:00 p.m. Chicago time Monday through Thursday. This will no longer be the case once Block Trades are reported directly to the CFE System (instead of by email) pursuant to proposed Rule 415(i) as described below.

Sixth, CFE is proposing to update provisions in Rule 415(h) to revise and reorder the list of items of information that must be included in the notification to the Exchange of a Block Trade. Currently, the notification of a Block Trade must include the following information: relevant Contract, contract expiration, price or premium, quantity, time of execution (*i.e.*, the time the parties agreed to the Block Trade), counterparty Clearing Member and, if applicable, the underlying commodity, whether the transaction involved a put or a call and the strike price, and any other information that is required by the Exchange. CFE is proposing to provide in proposed Rule 415(h) that the notification of a Block Trade must include the following information: (i) Whether the Block Trade is a single leg transaction, a transaction in a spread, or a transaction in a strip; (ii) the Contract identifier (or product and contract expiration for a future or product, expiration, strike price, and type of option (put or call) in the case of an option), price (or premium for an option) and quantity of the Block Trade and whether the Block Trade is buy or sell; (iii) the time of execution (*i.e.*, the time at which the parties agreed to the transaction); (iv) the arrangement time, if any (*i.e.*, the time at which the parties agreed to enter into the transaction at a later time); (v) Operator ID; (vi) EFID; (vii) account; (viii) Clearing Corporation origin code; (ix) Customer Type Indicator code; and (x) any other information required by the Exchange.

Seventh, CFE is proposing to delete a provision from current Rule 415(i) which allows the Authorized Reporters and parties to a Block Trade thirty minutes from the time the CFE Help Desk transmits a transaction summary to the Authorized Reporters to notify the Help Desk of any inaccuracies in the content of the transaction summary. The Help Desk (which will be referred to as the Trade Desk with the implementation of the CFE System) will no longer transmit transaction summaries to Authorized Reporters since Authorized

Reporters will be entering the information regarding Block Trades directly into the CFE System pursuant to proposed Rule 415(i) as described below and will no longer be relying on the Help Desk to manually enter into CFE's trading system the information included in the email notifications that the Help Desk currently receives from Authorized Reporters regarding a Block Trade. Accordingly, the notification provision which permits Authorized Reporters and parties to the transaction to notify the Help Desk of any inaccuracies in the transaction summary from the Help Desk would no longer have applicability.

Eighth, CFE proposes to provide in proposed Rule 415(i) that Authorized Reporters shall provide notification to the Exchange of Block Trades by reporting them to the CFE System in a form and manner prescribed by the Exchange. Proposed Rule 415(i) also describes how the CFE System includes a mechanism, in a form and manner provided by the Exchange, for the Authorized Reporter that is the initiator of a notification of a Block Trade to enter information regarding the transaction and for the Authorized Reporter for the contra side of the transaction to accept the notification to the Exchange of the transaction as entered by the initiating Authorized Reporter and enter contra side information for the transaction.

Ninth, CFE proposes to provide in proposed Rule 415(j) how CFE will measure adherence to Permissible Reporting Periods and the Reporting Deadline for Block Trades for timing purposes. Specifically, a Block Trade would be deemed to have been fully reported to the Exchange when the full report of the transaction has been received by the CFE System matching engine following notification to the CFE System of required information relating to the transaction by the initiating Authorized Reporter and acceptance and notification to the CFE System of required information relating to the transaction by the contra side Authorized Reporter.

Tenth, CFE proposes to provide in proposed Rule 415(k) that CFE may modify the timing requirements for and permissible manner of notification to CFE for Block Trades in the event of unusual circumstances. For example, this provision could be invoked if the CFE System is not accepting notifications of Block Trades due to a system malfunction.

Market Manipulation

CFE Rule 603 (Market Manipulation) prohibits manipulation of the market in

any Contract traded on CFE. CFE is proposing to amend Rule 603 replace the term "CBOE System" with the term "CFE System".

Disruptive Practices

CFE Rule 620 (Disruptive Practices) sets forth prohibited disruptive trading practices, and Policy and Procedure XVIII (Disruptive Trading Practices (Rule 620) sets forth guidance regarding the factors the Exchange may use in assessing whether conduct violates Rule 620.

Since CFE will no longer accept quotes with the implementation of the CFE System, CFE is proposing to revise Rule 620 and Policy and Procedure XVIII to eliminate references to quotes and to replace references to the CBOE System with references to the CFE System.

CFE is proposing to revise Policy and Procedure XVIII(A) to eliminate reference to a category of other prices (such as an Expected Opening Price or EOP) since this concept does not exist with the CFE System.

CFE is proposing to amend Policy and Procedure XVIII(J) to revise the definition of actionable messages in relation to the CFE System to be messages that can be accepted by another party or lead to the execution of a trade or cancellation of an Order and to change a reference to an example of a non-actionable message from a request for quote (which will no longer exist with the elimination of quotes) to a heartbeat message transmitted to the CFE System.

CFE is proposing to amend Policy and Procedure XVIII(Q) and (U) to replace references to self-trade prevention functionality with references to match trade functionality (which is the name for this functionality with the CFE System).

CFE is proposing to revise Policy and Procedure XVIII(R) to eliminate reference to opening rotation periods since this concept does not exist with the CFE System, to replace reference to an EOP with reference to an expected opening price (since although an EOP is not a price that is disseminated by the CFE System, the concept of what market participants expect an opening price to be would still exist), and to revise the restriction regarding the submission of Trade at Settlement ("TAS") Orders between Business Days for a product in which TAS Orders may be submitted. CFE is amending the restriction on the submission of TAS Orders to provide that the first pre-opening notice for a TAS Contract in a product establishes the time at which TAS Orders may be submitted for all TAS Contracts in that

product. Currently, this restriction applies individually to each TAS Contract based on when the pre-opening notice for that particular TAS Contract is disseminated. A pre-opening notice is a notice disseminated by CFE of the commencement of a queuing state in a Contract during which Orders may be submitted to the CFE System prior to the commencement of trading hours for that Contract.

Additionally, the Exchange is proposing to amend Policy and Procedure XVIII(T) to eliminate a reference to user defined spreads and to change the title of the provision to better reflect the remaining portion of the provision which is not being deleted by this change. Although TPHs are currently not permitted to create user defined spreads, this prohibition is currently not systematically enforced by CFE's trading system. CFE is proposing to remove the rule text prohibiting user defined spreads since the CFE System will be able to systematically prevent TPHs from creating user defined spreads.

Imposition of Fines for Minor Rule Violations

Rule 714 (Imposition of Fines for Minor Rule Violations) sets forth fine schedules for various violation types. The proposed changes to Rule 714 included as part of this rule change filing and which are described below are those amendments to Rule 714 that are related to recordkeeping or reporting.

Specifically, CFE is proposing (i) to modify the fine schedule in Rule 714(f)(i) regarding failure to include an Order Entry Operator ID with an Order submission to eliminate reference to quotes and to change a reference from CBOE System to CFE System; (ii) to modify the fine schedule in Rule 714(f)(ii) regarding failure to identify the correct account type in an Order submission to be more specific to reference failure to identify the correct Customer Type Indicator Code in the Order submission; and (iii) to modify the fine schedules in Rule 714(f)(iii), (iv), (viii), (ix), (x), and (xiv) to either renumber the rule cross-references in those fine schedules without changing their substance to reflect the new rule numbers for the cross-referenced provisions or to change references from CBOE System to CFE System.

Reportable Trading Volume

Rule 1602(n)(ii) sets forth the reportable trading volume that triggers the requirement to report a volume threshold account to the CFTC for Individual Stock Based and Exchange

Traded Fund Based Security Futures (referred to in Chapter 16 of CFE's rules as Volatility Index futures). CFE does not currently list any Volatility Index futures for trading but did so previously and may do so in the future.

CFE is proposing to amend Rule 1602(n)(ii) to provide that the reportable trading volume that triggers the requirement to report a volume threshold account is 50 or more futures contracts in a Volatility Index futures contract during a single trading day or such other reportable trading volume threshold as may be designated by the CFTC. This proposed change is consistent with the comparable reportable trading volume rule language this is applicable in relation to other CFE products. CFE is proposing to add the additional phrase that the level may be "such other reportable trading volume threshold as may be designated by the CFTC". Although the level currently designated in Rule 1602(n)(ii) is consistent with CFTC regulations, the CFTC has issued no-action letters with a different designated level and may do so in the future. The proposed additional language allows for reporting consistent with these CFTC designations when and if they are in effect.

Contract Specifications

CFE Rule 1802 sets forth contract specifications for Single Stock Futures, and CFE Rule 1902 sets forth contract specifications for Narrow-Based Stock Index Futures. CFE is proposing to amend Rules 1802 and 1902 to capitalize the term "Spread Order", to replace the term "Help Desk" with the term "Trade Desk", and to replace the term "CBOE System" with the term "CFE System".

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,⁴ in general, and furthers the objectives of Sections 6(b)(5)⁵ and 6(b)(7)⁶ in particular in that it is designed:

- To prevent fraudulent and manipulative acts and practices;
- to foster cooperation and coordination with persons engaged in facilitating transactions in securities; and
- to remove impediments to and perfect the mechanism of a free and open market and a national market system, and in general, to protect investors and the public interest.

The proposed rule change is consistent with these provisions in that it revises CFE's rules, including CFE's recordkeeping and reporting requirements as they may relate to security futures, to conform to the functionality of the CFE System. In particular, the proposed amendments will align the changes resulting from the implementation of the CFE System with the rule provisions contained in CFE's rules.

B. Self-Regulatory Organization's Statement on Burden on Competition

CFE does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act in that the proposed rule changes to Chapter 1 of CFE's rules to include a definition for Authorized Reporter, to Rule 303A requiring the inclusion of an Order Entry Operator ID on every Cancel Order and Cancel Replace/Modify Order, to Rule 403 regarding the information that must be included with Order submissions and front-end audit trail information that must be maintained, to Rule 414 and 415 regarding ECRP transaction and Block Trade recordkeeping and reporting requirements, to Rule 603 to update terminology, to Rule 620 and Policy and Procedure XVIII to update guidance regarding disruptive trading conduct to conform to the way the CFE System will function, to Rule 714 to update the fine schedules for minor rule violations to conform to other CFE rule revisions, to Rule 1602(n) to update the reportable trading volume threshold requirements for Volatility Index futures, and to Rules 1802 and 1902 to update terminology will enhance CFE's ability to carry out its responsibilities as a self-regulatory organization. Additionally, CFE believes that the proposed amendments are equitable and not unfairly discriminatory because the changes will apply equally to all market participants.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change will become operative on December 13, 2017. At any time within 60 days of the date of effectiveness of the proposed rule change, the Commission, after

consultation with the CFTC, may summarily abrogate the proposed rule change and require that the proposed rule change be refiled in accordance with the provisions of Section 19(b)(1) of the Act.⁷

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-CFE-2017-003 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-CFE-2017-003. 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 website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File

⁷ 15 U.S.C. 78s(b)(1).

⁴ 15 U.S.C. 78f(b).

⁵ 15 U.S.C. 78f(b)(5).

⁶ 15 U.S.C. 78f(b)(7).

Number SR-CFE-2017-003, and should be submitted on or before January 4, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁸

Eduardo A. Aleman,
Assistant Secretary.

[FR Doc. 2017-26914 Filed 12-13-17; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-82256; File No. SR-MIAX-2017-18]

Self-Regulatory Organizations; Miami International Securities Exchange, LLC; Notice of Filing of Amendment No. 1 to a Proposed Rule Change to Amend the Fee Schedule

December 11, 2017.

On May 1, 2017, Miami International Securities Exchange LLC (“MIAX Options” 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 adopt a fee schedule to establish the fees for Industry Members related to the National Market System Plan Governing the Consolidated Audit Trail (“CAT NMS Plan”). The proposed rule change was published in the **Federal Register** for comment on May 19, 2017.³ The Commission received seven comment letters on the proposed rule change,⁴

and a response to comments from the Participants.⁵ On June 30, 2017, the Commission temporarily suspended and initiated proceedings to determine whether to approve or disapprove the proposed rule change.⁶ The Commission thereafter received seven comment letters,⁷ and a response to comments from the Participants.⁸ On November 7, 2017, the Exchange filed Amendment No. 1 to the proposed rule change, as

Group, to Brent J. Fields, Secretary, Commission (dated June 22, 2017), available at: <https://www.sec.gov/comments/sr-cboe-2017-040/cboe2017040-1819670-154195.pdf>; Letter from Stuart J. Kaswell, Executive Vice President and Managing Director, General Counsel, Managed Funds Association, to Brent J. Fields, Secretary, Commission (dated June 23, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-1822454-154283.pdf>; and Letter from Suzanne H. Shatto, Investor, to Commission (dated June 27, 2017), available at: <https://www.sec.gov/comments/sr-batsedgx-2017-22/batsedgx201722-154443.pdf>. The Commission also received a comment letter which is not pertinent to these proposed rule changes. See Letter from Christina Crouch, Smart Ltd., to Brent J. Fields, Secretary, Commission (dated June 5, 2017), available at: <https://www.sec.gov/comments/sr-batsbzx-2017-38/batsbzx201738-1785545-153152.htm>.

⁵ See Letter from CAT NMS Plan Participants to Brent J. Fields, Secretary, Commission (dated June 29, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-1832632-154584.pdf>.

⁶ See Securities Exchange Act Release No. 81067 (June 30, 2017), 82 FR 31656 (July 7, 2017).

⁷ See Letter from W. Hardy Callcott, Partner, Sidley Austin LLP, to Brent J. Fields, Secretary, Commission (dated July 27, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2148338-157737.pdf>; Letter from Kevin Coleman, General Counsel and Chief Compliance Officer, Belvedere Trading LLC, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2148360-157740.pdf>; Letter from Joanna Mallers, Secretary, FIA Principal Traders Group, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2150977-157744.pdf>; Letter from Stuart J. Kaswell, Executive Vice President and Managing Director, General Counsel, Managed Funds Association, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2150818-157743.pdf>; Letter from John Kinahan, Chief Executive Officer, Group One Trading, L.P., to Brent J. Fields, Secretary, Commission (dated August 10, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-2214568-160619.pdf>; Letter from Joseph Molluso, Executive Vice President and CFO, Virtu Financial, to Brent J. Fields, Commission (dated August 18, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-2238648-160830.pdf>.

⁸ See Letter from Michael Simon, Chair, CAT NMS Plan Operating Committee, to Brent J. Fields, Commission, Secretary (dated November 2, 2017), available at <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2674608-161412.pdf>.

described in Items I and II below, which Items have been prepared by the Exchange.⁹ On November 9, 2017, the Commission extended the time period within which to approve the proposed rule change or disapprove the proposed rule change to January 14, 2018.¹⁰ The Commission is publishing this notice to solicit comments from interested persons on Amendment No. 1.¹¹

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

On May 1, 2017 Miami International Securities Exchange, LLC (“MIAX Options” or “Exchange”), filed with the Securities and Exchange Commission (“Commission” or “SEC”) a proposed rule change SR-MIAX-2017-18 (the “Original Proposal”),¹² to amend the MIAX Options Fee Schedule (the “Fee Schedule”) to adopt a fee schedule to establish the fees for Industry Members related to the National Market System Plan Governing the Consolidated Audit Trail (the “CAT NMS Plan” or “Plan”).¹³ MIAX Options files this proposed rule change (the “Amendment”) to amend the Original Proposal. This Amendment replaces the Original Proposal in its entirety, and also describes the changes from the Original Proposal.

The text of the proposed rule change is available on the Exchange's website at <http://www.miaxoptions.com/rule-filings>, at MIAX's principal office, and at the Commission's Public Reference Room.

⁹ Amendment No. 1 to the proposed rule change replaces and supersedes the Original Proposal in its entirety.

¹⁰ See Securities Exchange Act Release No. 82049 (November 9, 2017), 82 FR 53549 (November 16, 2017).

¹¹ The Commission notes that on December 1, 2017, the Exchange filed Amendment No. 2 to the proposed rule change. Amendment No. 2 is a partial amendment to the proposed rule change, as amended by Amendment No. 1. Amendment No. 2 proposes to change the parenthetical regarding the OTC Equity Securities discount in paragraph (b)(2) of the proposed fee schedule from “with a discount for Equity ATSS exclusively trading OTC Equity Securities based on the average shares per trade ratio between NMS Stocks and OTC Equity Securities” to “with a discount for OTC Equity Securities market share of Equity ATSS trading OTC Equity Securities based on the average shares per trade ratio between NMS Stocks and OTC Equity Securities.” See Securities Exchange Act Release No. 82257 (December 11, 2017).

¹² See Securities Exchange Act Release No. 80675 (May 15, 2017), 82 FR 23100 (May 19, 2017)(SR-MIAX-2017-18).

¹³ Unless otherwise specified, capitalized terms used in this fee filing are defined as set forth herein, in the CAT Compliance Rule Series, the CAT NMS Plan, or the Original Proposal.

⁸ 17 CFR 200.30-3(a)(73).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 80675 (May 15, 2017), 82 FR 23100 (May 19, 2017) (“Original Proposal”).

⁴ Since the CAT NMS Plan Participants' proposed rule changes to adopt fees to be charged to Industry Members to fund the consolidated audit trail are substantively identical, the Commission is considering all comments received on the proposed rule changes regardless of the comment file to which they were submitted. See text accompanying notes 14-17 *infra*, for a list of the CAT NMS Plan Participants. See Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, to Brent J. Fields, Secretary, Commission (dated June 6, 2017), available at: <https://www.sec.gov/comments/sr-batsbzx-2017-38/batsbzx201738-1788188-153228.pdf>; Letter from Patricia L. Cerny and Steven O'Malley, Compliance Consultants, to Brent J. Fields, Secretary, Commission (dated June 12, 2017), available at: <https://www.sec.gov/comments/sr-cboe-2017-040/cboe2017040-1799253-153675.pdf>; Letter from Daniel Zinn, General Counsel, OTC Markets Group Inc., to Eduardo A. Aleman, Assistant Secretary, Commission (dated June 13, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-1801717-153703.pdf>; Letter from Joanna Mallers, Secretary, FIA Principal Traders

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

BOX Options Exchange LLC, Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe C2 Exchange, Inc., Cboe Exchange, Inc.,¹⁴ Chicago Stock Exchange, Inc., Financial Industry Regulatory Authority, Inc. ("FINRA"), Investors' Exchange LLC, Miami International Securities Exchange, LLC, MIAx PEARL, LLC, NASDAQ BX, Inc., Nasdaq GEMX, LLC, Nasdaq ISE, LLC, Nasdaq MRX, LLC,¹⁵ NASDAQ PHLX LLC, The NASDAQ Stock Market LLC, New York Stock Exchange LLC, NYSE American LLC,¹⁶ NYSE Arca, Inc. and NYSE National, Inc.¹⁷ (collectively, the "Participants") filed with the Commission, pursuant to Section 11A of the Exchange Act¹⁸ and Rule 608 of Regulation NMS thereunder,¹⁹ the CAT

¹⁴ Note that Bats BYX Exchange, Inc., Bats BZX Exchange, Inc., Bats EDGA Exchange, Inc., Bats EDGX Exchange, Inc., C2 Options Exchange, Incorporated and Chicago Board Options Exchange, Incorporated, have been renamed Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe C2 Exchange, Inc. and Cboe Exchange, Inc., respectively.

¹⁵ ISE Gemini, LLC, ISE Mercury, LLC and International Securities Exchange, LLC have been renamed Nasdaq GEMX, LLC, Nasdaq MRX, LLC, and Nasdaq ISE, LLC, respectively. See Securities Exchange Act Rel. No. 80248 (Mar. 15, 2017), 82 FR 14547 (Mar. 21, 2017); Securities Exchange Act Rel. No. 80326 (Mar. 29, 2017), 82 FR 16460 (Apr. 4, 2017); and Securities Exchange Act Rel. No. 80325 (Mar. 29, 2017), 82 FR 16445 (Apr. 4, 2017).

¹⁶ NYSE MKT LLC has been renamed NYSE American LLC. See Securities Exchange Act Rel. No. 80283 (Mar. 21, 2017), 82 FR 15244 (Mar. 27, 2017).

¹⁷ National Stock Exchange, Inc. has been renamed NYSE National, Inc. See Securities Exchange Act Rel. No. 79902 (Jan. 30, 2017), 82 FR 9258 (Feb. 3, 2017).

¹⁸ 15 U.S.C. 78k-1.

¹⁹ 17 CFR 242.608.

NMS Plan.²⁰ The Participants filed the Plan to comply with Rule 613 of Regulation NMS under the Exchange Act. The Plan was published for comment in the **Federal Register** on May 17, 2016,²¹ and approved by the Commission, as modified, on November 15, 2016.²² The Plan is designed to create, implement and maintain a consolidated audit trail ("CAT") that would capture customer and order event information for orders in NMS Securities and OTC Equity Securities, across all markets, from the time of order inception through routing, cancellation, modification, or execution in a single consolidated data source. The Plan accomplishes this by creating CAT NMS, LLC (the "Company"), of which each Participant is a member, to operate the CAT.²³ Under the CAT NMS Plan, the Operating Committee of the Company ("Operating Committee") has discretion to establish funding for the Company to operate the CAT, including establishing fees that the Participants will pay, and establishing fees for Industry Members that will be implemented by the Participants ("CAT Fees").²⁴ The Participants are required to file with the SEC under Section 19(b) of the Exchange Act any such CAT Fees applicable to Industry Members that the Operating Committee approves.²⁵ Accordingly, the Exchange submitted the Original Proposal to propose the Consolidated Audit Trail Funding Fees, which would require Industry Members that are Exchange members to pay the CAT Fees determined by the Operating Committee.

The Commission published the Original Proposal for public comment in the **Federal Register** on May 19, 2017,²⁶ and received comments in response to the Original Proposal or similar fee filings by other Participants.²⁷ On June 30, 2017, the Commission suspended, and instituted proceedings to determine

²⁰ See Letter from the Participants to Brent J. Fields, Secretary, Commission, dated September 30, 2014; and Letter from Participants to Brent J. Fields, Secretary, Commission, dated February 27, 2015. On December 24, 2015, the Participants submitted an amendment to the CAT NMS Plan. See Letter from Participants to Brent J. Fields, Secretary, Commission, dated December 23, 2015.

²¹ See Securities Exchange Act Rel. No. 77724 (Apr. 27, 2016), 81 FR 30614 (May 17, 2016).

²² See Securities Exchange Act Rel. No. 79318 (Nov. 15, 2016), 81 FR 84696 (Nov. 23, 2016) ("Approval Order").

²³ The Plan also serves as the limited liability company agreement for the Company.

²⁴ Section 11.1(b) of the CAT NMS Plan.

²⁵ *Id.*

²⁶ *Supra* note 3.

²⁷ For a summary of comments, see generally Securities Exchange Act Rel. No. 81067 (June 30, 2017), 82 FR 31656 (July 7, 2017) ("Suspension Order").

whether to approve or disapprove, the Original Proposal.²⁸ The Commission received seven comment letters in response to those proceedings.²⁹

In response to the comments on the Original Proposal, the Operating Committee determined to make the following changes to the funding model: (1) Add two additional CAT Fee tiers for Equity Execution Venues; (2) discount the market share of Execution Venue ATSS exclusively trading OTC Equity Securities as well as the market share of the FINRA over-the-counter reporting facility ("ORF") by the average shares per trade ratio between NMS Stocks and OTC Equity Securities (calculated as 0.17% based on available data from the second quarter of 2017) when calculating the market share of Execution Venue ATS exclusively trading OTC Equity Securities and FINRA; (3) discount the Options Market Maker quotes by the trade to quote ratio for options (calculated as 0.01% based on available data for June 2016 through June 2017) when calculating message traffic for Options Market Makers; (4) discount equity market maker quotes by the trade to quote ratio for equities (calculated as 5.43% based on available data for June 2016 through June 2017) when calculating message traffic for equity market makers; (5) decrease the number of tiers for Industry Members (other than the Execution Venue ATSS) from nine to seven; (6) change the allocation of CAT costs between Equity Execution Venues and Options Execution Venues from 75%/25% to 67%/33%; (7) adjust tier percentages and recovery allocations for Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSS); (8) focus the comparability of CAT Fees on the individual entity level, rather than primarily on the comparability of

²⁸ Suspension Order.

²⁹ See Letter from Stuart J. Kaswell, Executive Vice President, Managing Director and General Counsel, Managed Funds Association, to Brent J. Fields, Secretary, SEC (July 28, 2017) ("MFA Letter"); Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA, to Brent J. Fields, Secretary, SEC (July 28, 2017) ("SIFMA Letter"); Joanna Mallers, Secretary, FIA Principal Traders Group, to Brent J. Fields, Secretary, SEC (July 28, 2017) ("FIA Principal Traders Group Letter"); Letter from Kevin Coleman, General Counsel & Chief Compliance Officer, Belvedere Trading LLC, to Brent J. Fields, Secretary, SEC (July 28, 2017) ("Belvedere Letter"); Letter from W. Hardy Callcott, Sidley Austin LLP, to Brent J. Fields, Secretary, SEC (July 27, 2017) ("Sidley Letter"); Letter from John Kinahan, Chief Executive Officer, Group One Trading, L.P., to Brent J. Fields, Secretary, SEC (Aug. 10, 2017) ("Group One Letter"); and Letter from Joseph Molluso, Executive Vice President, Virtu Financial, to Brent J. Fields, Secretary, SEC (Aug. 18, 2017) ("Virtu Financial Letter").

affiliated entities; (9) commence invoicing CAT Reporters as promptly as possible following the latest operative date of the respective Consolidated Audit Trail Funding Fees filed or to be filed by each of the Participants and the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants; and (10) require the proposed fees to automatically expire two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. As discussed in detail below, the Exchange proposes to amend the Original Proposal to reflect these changes.

(1) Executive Summary

The following provides an executive summary of the CAT funding model approved by the Operating Committee, as well as Industry Members' rights and obligations related to the payment of CAT Fees calculated pursuant to the CAT funding model, as amended by this Amendment. A detailed description of the CAT funding model and the CAT Fees, as amended by this Amendment, as well as the changes made to the Original Proposal follows this executive summary.

(A) CAT Funding Model

- *CAT Costs.* The CAT funding model is designed to establish CAT-specific fees to collectively recover the costs of building and operating the CAT from all CAT Reporters, including Industry Members and Participants. The overall CAT costs used in calculating the CAT Fees in this fee filing are comprised of Plan Processor CAT costs and non-Plan Processor CAT costs incurred, and estimated to be incurred, from November 21, 2016 through November 21, 2017. Although the CAT costs from November 21, 2016 through November 21, 2017 were used in calculating the CAT Fees, the CAT Fees set forth in this fee filing would be in effect until the automatic sunset date, as discussed below. (See Section 3(a)(2)(E) below)

- *Bifurcated Funding Model.* The CAT NMS Plan requires a bifurcated funding model, where costs associated with building and operating the CAT would be borne by (1) Participants and Industry Members that are Execution Venues for Eligible Securities through fixed tier fees based on market share, and (2) Industry Members (other than alternative trading systems ("ATs")) that execute transactions in Eligible Securities ("Execution Venue ATs") through fixed tier fees based on message traffic for Eligible Securities. (See Section 3(a)(2) below)

- *Industry Member Fees.* Each Industry Member (other than Execution

Venue ATs) will be placed into one of seven tiers of fixed fees, based on "message traffic" in Eligible Securities for a defined period (as discussed below). Prior to the start of CAT reporting, "message traffic" will be comprised of historical equity and equity options orders, cancels, quotes and executions provided by each exchange and FINRA over the previous three months. After an Industry Member begins reporting to the CAT, "message traffic" will be calculated based on the Industry Member's Reportable Events reported to the CAT. Industry Members with lower levels of message traffic will pay a lower fee and Industry Members with higher levels of message traffic will pay a higher fee. To avoid disincentives to quoting behavior, Options Market Maker and equity market maker quotes will be discounted when calculating message traffic. (See Section 3(a)(2)(B) below)

- *Execution Venue Fees.* Each Equity Execution Venue will be placed in one of four tiers of fixed fees based on market share, and each Options Execution Venue will be placed in one of two tiers of fixed fees based on market share. Equity Execution Venue market share will be determined by calculating each Equity Execution Venue's proportion of the total volume of NMS Stock and OTC Equity shares reported by all Equity Execution Venues during the relevant time period. For purposes of calculating market share, the market share of Execution Venue ATs exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF will be discounted. Similarly, market share for Options Execution Venues will be determined by calculating each Options Execution Venue's proportion of the total volume of Listed Options contracts reported by all Options Execution Venues during the relevant time period. Equity Execution Venues with a larger market share will pay a larger CAT Fee than Equity Execution Venues with a smaller market share. Similarly, Options Execution Venues with a larger market share will pay a larger CAT Fee than Options Execution Venues with a smaller market share. (See Section 3(a)(2)(C) below)

- *Cost Allocation.* For the reasons discussed below, in designing the model, the Operating Committee determined that 75 percent of total costs recovered would be allocated to Industry Members (other than Execution Venue ATs) and 25 percent would be allocated to Execution Venues. In addition, the Operating Committee determined to allocate 67 percent of Execution Venue costs recovered to

Equity Execution Venues and 33 percent to Options Execution Venues. (See Section 3(a)(2)(D) below)

- *Comparability of Fees.* The CAT funding model charges CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) comparable CAT Fees. (See Section 3(a)(2)(F) below)

(B) CAT Fees for Industry Members

- *Fee Schedule.* The quarterly CAT Fees for each tier for Industry Members are set forth in the two fee schedules in the Consolidated Audit Trail Funding Fees, one for Equity ATs and one for Industry Members other than Equity ATs. (See Section 3(a)(3)(B) below)

- *Quarterly Invoices.* Industry Members will be billed quarterly for CAT Fees, with the invoices payable within 30 days. The quarterly invoices will identify within which tier the Industry Member falls. (See Section 3(a)(3)(C) below)

- *Centralized Payment.* Each Industry Member will receive from the Company one invoice for its applicable CAT Fees, not separate invoices from each Participant of which it is a member. Each Industry Member will pay its CAT Fees to the Company via the centralized system for the collection of CAT Fees established by the Operating Committee. (See Section 3(a)(3)(C) below)

- *Billing Commencement.* Industry Members will begin to receive invoices for CAT Fees as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Participants and the operative date of the Plan amendment adopting CAT Fees for Participants. (See Section 3(a)(2)(G) below)

- *Sunset Provision.* The Consolidated Audit Trail Funding Fees will sunset automatically two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. (See Section 3(a)(2)(J) below)

(2) Description of the CAT Funding Model

Article XI of the CAT NMS Plan requires the Operating Committee to approve the operating budget, including projected costs of developing and operating the CAT for the upcoming year. In addition to a budget, Article XI of the CAT NMS Plan provides that the Operating Committee has discretion to establish funding for the Company, consistent with a bifurcated funding model, where costs associated with building and operating the Central Repository would be borne by (1) Participants and Industry Members that

are Execution Venues through fixed tier fees based on market share, and (2) Industry Members (other than Execution Venue ATs) through fixed tier fees based on message traffic. In its order approving the CAT NMS Plan, the Commission determined that the proposed funding model was “reasonable”³⁰ and “reflects a reasonable exercise of the Participants’ funding authority to recover the Participants’ costs related to the CAT.”³¹

More specifically, the Commission stated in approving the CAT NMS Plan that “[t]he Commission believes that the proposed funding model is reasonably designed to allocate the costs of the CAT between the Participants and Industry Members.”³² The Commission further noted the following:

The Commission believes that the proposed funding model reflects a reasonable exercise of the Participants’ funding authority to recover the Participants’ costs related to the CAT. The CAT is a regulatory facility jointly owned by the Participants and . . . the Exchange Act specifically permits the Participants to charge their members fees to fund their self-regulatory obligations. The Commission further believes that the proposed funding model is designed to impose fees reasonably related to the Participants’ self-regulatory obligations because the fees would be directly associated with the costs of establishing and maintaining the CAT, and not unrelated SRO services.³³

Accordingly, the funding model approved by the Operating Committee imposes fees on both Participants and Industry Members.

As discussed in Appendix C of the CAT NMS Plan, in developing and approving the approved funding model, the Operating Committee considered the advantages and disadvantages of a variety of alternative funding and cost allocation models before selecting the proposed model.³⁴ After analyzing the various alternatives, the Operating Committee determined that the proposed tiered, fixed fee funding model provides a variety of advantages in comparison to the alternatives.

In particular, the fixed fee model, as opposed to a variable fee model, provides transparency, ease of calculation, ease of billing and other administrative functions, and predictability of a fixed fee. Such factors are crucial to estimating a reliable revenue stream for the Company and for

permitting CAT Reporters to reasonably predict their payment obligations for budgeting purposes. Additionally, a strictly variable or metered funding model based on message volume would be far more likely to affect market behavior and place an inappropriate burden on competition.

Reviews from varying time periods of current broker-dealer order and trading data submitted under existing reporting requirements showed a wide range in activity among broker-dealers, with a number of broker-dealers submitting fewer than 1,000 orders per month and other broker-dealers submitting millions and even billions of orders in the same period. Accordingly, the CAT NMS Plan includes a tiered approach to fees. The tiered approach helps ensure that fees are equitably allocated among similarly situated CAT Reporters and furthers the goal of lessening the impact on smaller firms.³⁵ In addition, in choosing a tiered fee structure, the Operating Committee concluded that the variety of benefits offered by a tiered fee structure, discussed above, outweighed the fact that CAT Reporters in any particular tier would pay different rates per message traffic order event or per market share (e.g., an Industry Member with the largest amount of message traffic in one tier would pay a smaller amount per order event than an Industry Member in the same tier with the least amount of message traffic). Such variation is the natural result of a tiered fee structure.³⁶ The Operating Committee considered several approaches to developing a tiered model, including defining fee tiers based on such factors as size of firm, message traffic or trading dollar volume. After analyzing the alternatives, it concluded that the tiering should be based on message traffic which will reflect the relative impact of CAT Reporters on the CAT System.

Accordingly, the CAT NMS Plan contemplates that costs will be allocated across the CAT Reporters on a tiered basis in order to allocate higher costs to those CAT Reporters that contribute more to the costs of creating, implementing and maintaining the CAT and lower costs to those that contribute less.³⁷ The fees to be assessed at each tier are calculated so as to recoup a proportion of costs appropriate to the message traffic or market share (as applicable) from CAT Reporters in each tier. Therefore, Industry Members

generating the most message traffic will be in the higher tiers, and will be charged a higher fee. Industry Members with lower levels of message traffic will be in lower tiers and will be assessed a smaller fee for the CAT.³⁸

Correspondingly, Execution Venues with the highest market shares will be in the top tier, and will be charged higher fees. Execution Venues with the lowest market shares will be in the lowest tier and will be assessed smaller fees for the CAT.³⁹

The CAT NMS Plan states that Industry Members (other than Execution Venue ATs) will be charged based on message traffic, and that Execution Venues will be charged based on market share.⁴⁰ While there are multiple factors that contribute to the cost of building, maintaining and using the CAT, processing and storage of incoming message traffic is one of the most significant cost drivers for the CAT.⁴¹ Thus, the CAT NMS Plan provides that the fees payable by Industry Members (other than Execution Venue ATs) will be based on the message traffic generated by such Industry Member.⁴²

In contrast to Industry Members, which determine the degree to which they produce message traffic that constitutes CAT Reportable Events, the CAT Reportable Events of the Execution Venues are largely derivative of quotations and orders received from Industry Members that they are required to display. The business model for Execution Venues (other than FINRA), however, is focused on executions in their markets. As a result, the Operating Committee believes that it is more equitable to charge Execution Venues based on their market share rather than their message traffic.

Focusing on message traffic would make it more difficult to draw distinctions between large and small Execution Venues and, in particular, between large and small options exchanges. For instance, the Operating Committee analyzed the message traffic of Execution Venues and Industry Members for the period of April 2017 to June 2017 and placed all CAT Reporters into a nine-tier framework (i.e., a single tier may include both Execution Venues and Industry Members). The Operating Committee’s analysis found that the majority of exchanges (15 total) were grouped in Tiers 1 and 2. Moreover, virtually all of the options exchanges

³⁰ Approval Order at 84796.

³¹ *Id.* at 84794.

³² *Id.* at 84795.

³³ *Id.* at 84794.

³⁴ Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85006.

³⁵ *Id.*

³⁶ Moreover, as the SEC noted in approving the CAT NMS Plan, “[t]he Participants also have offered a reasonable basis for establishing a funding model based on broad tiers, in that it may be easier to implement.” Approval Order at 84796.

³⁷ Approval Order at 85005.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Section 11.3(a) and (b) of the CAT NMS Plan.

⁴¹ Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85005.

⁴² Section 11.3(b) of the CAT NMS Plan.

were in Tiers 1 and 2.⁴³ Given the resulting concentration of options exchanges in Tiers 1 and 2 under this approach, the analysis shows that a funding model for Execution Venues based on message traffic would make it more difficult to distinguish between large and small options exchanges, as compared to the proposed fee approach that bases fees for Execution Venues on market share.

The CAT NMS Plan's funding model also is structured to avoid a "reduction in market quality."⁴⁴ The tiered, fixed fee funding model is designed to limit the disincentives to providing liquidity to the market. For example, the Operating Committee expects that a firm that has a large volume of quotes would likely be categorized in one of the upper tiers, and would not be assessed a fee for this traffic directly as they would under a more directly metered model. In contrast, strictly variable or metered funding models based on message volume are far more likely to affect market behavior. In approving the CAT NMS Plan, the SEC stated that "[t]he Participants also offered a reasonable basis for establishing a funding model based on broad tiers, in that it may be less likely to have an incremental deterrent effect on liquidity provision."⁴⁵

The funding model also is structured to avoid a reduction market quality because it discounts Options Market Maker and equity market maker quotes when calculating message traffic for Options Market Makers and equity market makers, respectively. As discussed in more detail below, the Operating Committee determined to discount the Options Market Maker quotes by the trade to quote ratio for options when calculating message traffic for Options Market Makers. Similarly, to avoid disincentives to quoting behavior on the equities side as well, the Operating Committee determined to discount equity market maker quotes by the trade to quote ratio for equities when calculating message traffic for equity market makers. The proposed discounts recognize the value of the market makers' quoting activity to the market as a whole.

The CAT NMS Plan is further structured to avoid potential conflicts raised by the Operating Committee determining fees applicable to its own members—the Participants. First, the Company will operate on a "break-

even" basis, with fees imposed to cover costs and an appropriate reserve. Any surpluses will be treated as an operational reserve to offset future fees and will not be distributed to the Participants as profits.⁴⁶ To ensure that the Participants' operation of the CAT will not contribute to the funding of their other operations, Section 11.1(c) of the CAT NMS Plan specifically states that "[a]ny surplus of the Company's revenues over its expenses shall be treated as an operational reserve to offset future fees." In addition, as set forth in Article VIII of the CAT NMS Plan, the Company "intends to operate in a manner such that it qualifies as a 'business league' within the meaning of Section 501(c)(6) of the [Internal Revenue] Code." To qualify as a business league, an organization must "not [be] organized for profit and no part of the net earnings of [the organization can] inure[] to the benefit of any private shareholder or individual."⁴⁷ As the SEC stated when approving the CAT NMS Plan, "the Commission believes that the Company's application for Section 501(c)(6) business league status addresses issues raised by commenters about the Plan's proposed allocation of profit and loss by mitigating concerns that the Company's earnings could be used to benefit individual Participants."⁴⁸ The Internal Revenue Service recently has determined that the Company is exempt from federal income tax under Section 501(c)(6) of the Internal Revenue Code.

The funding model also is structured to take into account distinctions in the securities trading operations of Participants and Industry Members. For example, the Operating Committee designed the model to address the different trading characteristics in the OTC Equity Securities market. Specifically, the Operating Committee proposes to discount the market share of Execution Venue ATSS exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF by the average shares per trade ratio between NMS Stocks and OTC Equity Securities to adjust for the greater number of shares being traded in the OTC Equity Securities market, which is generally a function of a lower per share price for OTC Equity Securities when compared to NMS Stocks. In addition, the Operating Committee also proposes to discount Options Market Maker and equity market maker message traffic in recognition of their role in the securities

markets. Furthermore, the funding model creates separate tiers for Equity and Options Execution Venues due to the different trading characteristics of those markets.

Finally, by adopting a CAT-specific fee, the Operating Committee will be fully transparent regarding the costs of the CAT. Charging a general regulatory fee, which would be used to cover CAT costs as well as other regulatory costs, would be less transparent than the selected approach of charging a fee designated to cover CAT costs only.

A full description of the funding model is set forth below. This description includes the framework for the funding model as set forth in the CAT NMS Plan, as well as the details as to how the funding model will be applied in practice, including the number of fee tiers and the applicable fees for each tier. The complete funding model is described below, including those fees that are to be paid by the Participants. The proposed Consolidated Audit Trail Funding Fees, however, do not apply to the Participants; the proposed Consolidated Audit Trail Funding Fees only apply to Industry Members. The CAT Fees for Participants will be imposed separately by the Operating Committee pursuant to the CAT NMS Plan.

(A) Funding Principles

Section 11.2 of the CAT NMS Plan sets forth the principles that the Operating Committee applied in establishing the funding for the Company. The Operating Committee has considered these funding principles as well as the other funding requirements set forth in the CAT NMS Plan and in Rule 613 in developing the proposed funding model. The following are the funding principles in Section 11.2 of the CAT NMS Plan:

- To create transparent, predictable revenue streams for the Company that are aligned with the anticipated costs to build, operate and administer the CAT and other costs of the Company;
- To establish an allocation of the Company's related costs among Participants and Industry Members that is consistent with the Exchange Act, taking into account the timeline for implementation of the CAT and distinctions in the securities trading operations of Participants and Industry Members and their relative impact upon the Company's resources and operations;
- To establish a tiered fee structure in which the fees charged to: (i) CAT Reporters that are Execution Venues, including ATSS, are based upon the level of market share; (ii) Industry

⁴³ The Operating Committee notes that this analysis did not place MIAx PEARL in Tier 1 or Tier 2 since the exchange commenced trading on February 6, 2017.

⁴⁴ Section 11.2(e) of the CAT NMS Plan.

⁴⁵ Approval Order at 84796.

⁴⁶ *Id.* at 84792.

⁴⁷ 26 U.S.C. 501(c)(6).

⁴⁸ Approval Order at 84793.

Members' non-ATS activities are based upon message traffic; (iii) the CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether Execution Venue and/or Industry Members);

- To provide for ease of billing and other administrative functions;
- To avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality; and
- To build financial stability to support the Company as a going concern.

(B) Industry Member Tiering

Under Section 11.3(b) of the CAT NMS Plan, the Operating Committee is required to establish fixed fees to be payable by Industry Members, based on message traffic generated by such Industry Member, with the Operating Committee establishing at least five and no more than nine tiers.

The CAT NMS Plan clarifies that the fixed fees payable by Industry Members pursuant to Section 11.3(b) shall, in addition to any other applicable message traffic, include message traffic generated by: (i) An ATS that does not execute orders that is sponsored by such Industry Member; and (ii) routing orders to and from any ATS sponsored by such Industry Member. In addition, the Industry Member fees will apply to Industry Members that act as routing broker-dealers for exchanges. The Industry Member fees will not be applicable, however, to an ATS that qualifies as an Execution Venue, as discussed in more detail in the section on Execution Venue tiering.

In accordance with Section 11.3(b), the Operating Committee approved a tiered fee structure for Industry Members (other than Execution Venue ATSs) as described in this section. In determining the tiers, the Operating Committee considered the funding principles set forth in Section 11.2 of the CAT NMS Plan, seeking to create funding tiers that take into account the relative impact on CAT System resources of different Industry Members, and that establish comparable fees among the CAT Reporters with the most Reportable Events. The Operating Committee has determined that establishing seven tiers results in an allocation of fees that distinguishes between Industry Members with differing levels of message traffic. Thus,

each such Industry Member will be placed into one of seven tiers of fixed fees, based on "message traffic" for a defined period (as discussed below).

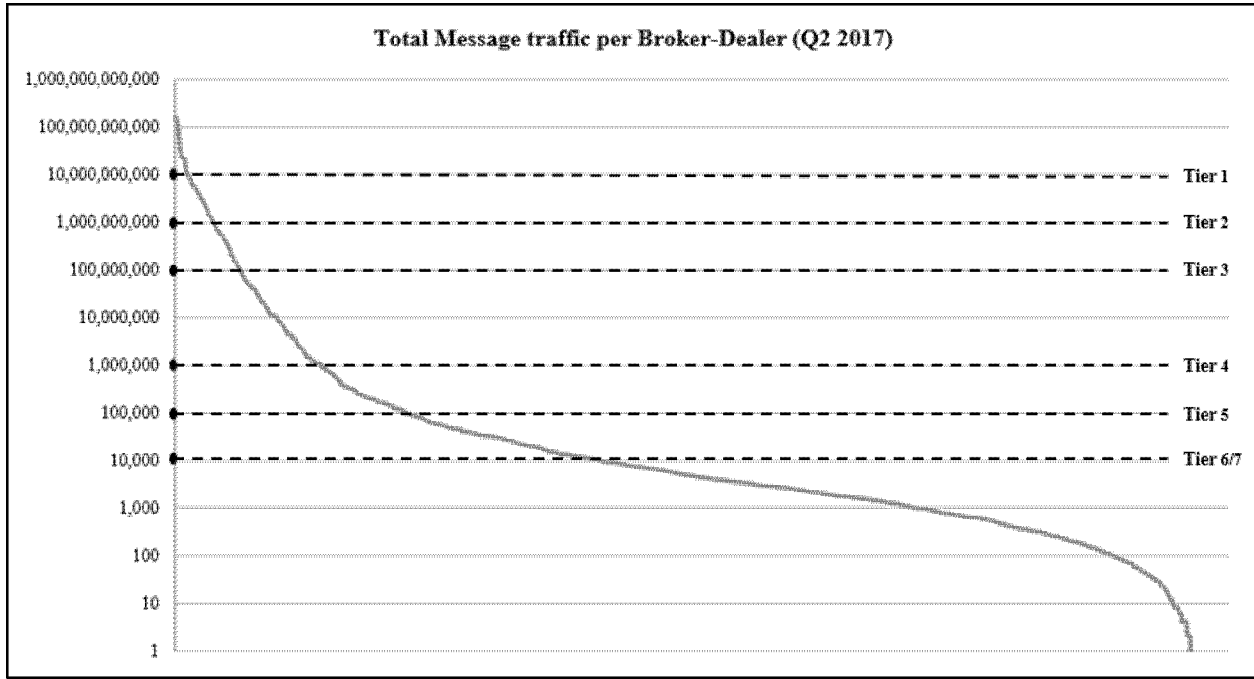
A seven tier structure was selected to provide a wide range of levels for tiering Industry Members such that Industry Members submitting significantly less message traffic to the CAT would be adequately differentiated from Industry Members submitting substantially more message traffic. The Operating Committee considered historical message traffic from multiple time periods, generated by Industry Members across all exchanges and as submitted to FINRA's Order Audit Trail System ("OATS"), and considered the distribution of firms with similar levels of message traffic, grouping together firms with similar levels of message traffic. Based on this, the Operating Committee determined that seven tiers would group firms with similar levels of message traffic, charging those firms with higher impact on the CAT more, while lowering the burden on Industry Members that have less CAT-related activity. Furthermore, the selection of seven tiers establishes comparable fees among the largest CAT Reporters.

Each Industry Member (other than Execution Venue ATSs) will be ranked by message traffic and tiered by predefined Industry Member percentages (the "Industry Member Percentages"). The Operating Committee determined to use predefined percentages rather than fixed volume thresholds to ensure that the total CAT Fees collected recover the expected CAT costs regardless of changes in the total level of message traffic. To determine the fixed percentage of Industry Members in each tier, the Operating Committee analyzed historical message traffic generated by Industry Members across all exchanges and as submitted to OATS, and considered the distribution of firms with similar levels of message traffic, grouping together firms with similar levels of message traffic. Based on this, the Operating Committee identified seven tiers that would group firms with similar levels of message traffic.

The percentage of costs recovered by each Industry Member tier will be determined by predefined percentage allocations (the "Industry Member Recovery Allocation"). In determining the fixed percentage allocation of costs recovered for each tier, the Operating Committee considered the impact of CAT Reporter message traffic on the CAT System as well as the distribution of total message volume across Industry Members while seeking to maintain

comparable fees among the largest CAT Reporters. Accordingly, following the determination of the percentage of Industry Members in each tier, the Operating Committee identified the percentage of total market volume for each tier based on the historical message traffic upon which Industry Members had been initially ranked. Taking this into account along with the resulting percentage of total recovery, the percentage allocation of costs recovered for each tier were assigned, allocating higher percentages of recovery to tiers with higher levels of message traffic while avoiding any inappropriate burden on competition. Furthermore, by using percentages of Industry Members and costs recovered per tier, the Operating Committee sought to include elasticity within the funding model, allowing the funding model to respond to changes in either the total number of Industry Members or the total level of message traffic.

The following chart illustrates the breakdown of seven Industry Member tiers across the monthly average of total equity and equity options orders, cancels, quotes and executions in the second quarter of 2017 as well as message traffic thresholds between the largest of Industry Member message traffic gaps. The Operating Committee referenced similar distribution illustrations to determine the appropriate division of Industry Member percentages in each tier by considering the grouping of firms with similar levels of message traffic and seeking to identify relative breakpoints in the message traffic between such groupings. In reviewing the chart and its corresponding table, note that while these distribution illustrations were referenced to help differentiate between Industry Member tiers, the proposed funding model is driven by fixed percentages of Industry Members across tiers to account for fluctuating levels of message traffic over time. This approach also provides financial stability for the CAT by ensuring that the funding model will recover the required amounts regardless of changes in the number of Industry Members or the amount of message traffic. Actual messages in any tier will vary based on the actual traffic in a given measurement period, as well as the number of firms included in the measurement period. The Industry Member Percentages and Industry Member Recovery Allocation for each tier will remain fixed with each Industry Member's tier to be reassigned periodically, as described below in Section 3(a)(2)(I).



Industry Member tier	Approximate message traffic per Industry Member (Q2 2017) (orders, quotes, cancels and executions)
Tier 1	>10,000,000,000
Tier 2	1,000,000,000–10,000,000,000
Tier 3	100,000,000–1,000,000,000
Tier 4	1,000,000–100,000,000
Tier 5	100,000–1,000,000
Tier 6	10,000–100,000
Tier 7	<10,000

Based on the above analysis, the Operating Committee approved the following Industry Member Percentages and Industry Member Recovery Allocations:

Industry Member tier	Percentage of Industry Members	Percentage of Industry Member Recovery	Percentage of total recovery
Tier 1	0.900	12.00	9.00
Tier 2	2.150	20.50	15.38
Tier 3	2.800	18.50	13.88
Tier 4	7.750	32.00	24.00
Tier 5	8.300	10.00	7.50
Tier 6	18.800	6.00	4.50
Tier 7	59.300	1.00	0.75
Total	100	100	75

For the purposes of creating these tiers based on message traffic, the Operating Committee determined to define the term “message traffic” separately for the period before the commencement of CAT reporting and for the period after the start of CAT reporting. The different definition for message traffic is necessary as there will

be no Reportable Events as defined in the Plan, prior to the commencement of CAT reporting. Accordingly, prior to the start of CAT reporting, “message traffic” will be comprised of historical equity and equity options orders, cancels, quotes and executions provided by each exchange and FINRA over the previous three months. Prior to the start of CAT

reporting, orders would be comprised of the total number of equity and equity options orders received and originated by a member of an exchange or FINRA over the previous three-month period, including principal orders, cancel/replace orders, market maker orders originated by a member of an exchange, and reserve (iceberg) orders as well as

executions originated by a member of FINRA, and excluding order rejects, system-modified orders, order routes and implied orders.⁴⁹ In addition, prior to the start of CAT reporting, cancels would be comprised of the total number of equity and equity option cancels received and originated by a member of an exchange or FINRA over a three-month period, excluding order modifications (e.g., order updates, order splits, partial cancels) and multiple cancels of a complex order. Furthermore, prior to the start of CAT reporting, quotes would be comprised of information readily available to the exchanges and FINRA, such as the total number of historical equity and equity options quotes received and originated by a member of an exchange or FINRA over the prior three-month period. Additionally, prior to the start of CAT reporting, executions would be comprised of the total number of equity and equity option executions received or originated by a member of an exchange or FINRA over a three-month period.

After an Industry Member begins reporting to the CAT, “message traffic” will be calculated based on the Industry Member’s Reportable Events reported to the CAT as will be defined in the Technical Specifications.⁵⁰

Quotes of Options Market Makers and equity market makers will be included in the calculation of total message traffic for those market makers for purposes of tiering under the CAT funding model both prior to CAT reporting and once CAT reporting commences.⁵¹ To address potential concerns regarding burdens on competition or market quality of including quotes in the calculation of message traffic, however,

the Operating Committee determined to discount the Options Market Maker quotes by the trade to quote ratio for options when calculating message traffic for Options Market Makers. Based on available data for June 2016 through June 2017, the trade to quote ratio for options is 0.01%. Similarly, to avoid disincentives to quoting behavior on the equities side, the Operating Committee determined to discount equity market maker quotes by the trade to quote ratio for equities. Based on available data for June 2016 through June 2017, the trade to quote ratio for equities is 5.43%.⁵² The trade to quote ratio for options and the trade to quote ratio for equities will be calculated every three months when tiers are recalculated (as discussed below).

The Operating Committee has determined to calculate fee tiers every three months, on a calendar quarter basis, based on message traffic from the prior three months. Based on its analysis of historical data, the Operating Committee believes that calculating tiers based on three months of data will provide the best balance between reflecting changes in activity by Industry Members while still providing predictability in the tiering for Industry Members. Because fee tiers will be calculated based on message traffic from the prior three months, the Operating Committee will begin calculating message traffic based on an Industry Member’s Reportable Events reported to the CAT once the Industry Member has been reporting to the CAT for three months. Prior to that, fee tiers will be calculated as discussed above with regard to the period prior to CAT reporting.

(C) Execution Venue Tiering

Under Section 11.3(a) of the CAT NMS Plan, the Operating Committee is required to establish fixed fees payable by Execution Venues. Section 1.1 of the CAT NMS Plan defines an Execution Venue as “a Participant or an alternative trading system (“ATS”) (as defined in Rule 300 of Regulation ATS) that operates pursuant to Rule 301 of Regulation ATS (excluding any such ATS that does not execute orders).”⁵³

The Operating Committee determined that ATSs should be included within the definition of Execution Venue. The

Operating Committee believes that it is appropriate to treat ATSs as Execution Venues under the proposed funding model since ATSs have business models that are similar to those of exchanges, and ATSs also compete with exchanges.

Given the differences between Execution Venues that trade NMS Stocks and/or OTC Equity Securities and Execution Venues that trade Listed Options, Section 11.3(a) addresses Execution Venues that trade NMS Stocks and/or OTC Equity Securities separately from Execution Venues that trade Listed Options. Equity and Options Execution Venues are treated separately for two reasons. First, the differing quoting behavior of Equity and Options Execution Venues makes comparison of activity between such Execution Venues difficult. Second, Execution Venue tiers are calculated based on market share of share volume, and it is therefore difficult to compare market share between asset classes (i.e., equity shares versus options contracts). Discussed below is how the funding model treats the two types of Execution Venues.

(I) NMS Stocks and OTC Equity Securities

Section 11.3(a)(i) of the CAT NMS Plan states that each Execution Venue that (i) executes transactions or, (ii) in the case of a national securities association, has trades reported by its members to its trade reporting facility or facilities for reporting transactions effected otherwise than on an exchange, in NMS Stocks or OTC Equity Securities will pay a fixed fee depending on the market share of that Execution Venue in NMS Stocks and OTC Equity Securities, with the Operating Committee establishing at least two and not more than five tiers of fixed fees, based on an Execution Venue’s NMS Stocks and OTC Equity Securities market share. For these purposes, market share for Execution Venues that execute transactions will be calculated by share volume, and market share for a national securities association that has trades reported by its members to its trade reporting facility or facilities for reporting transactions effected otherwise than on an exchange in NMS Stocks or OTC Equity Securities will be calculated based on share volume of trades reported, provided, however, that the share volume reported to such national securities association by an Execution Venue shall not be included in the calculation of such national securities association’s market share.

In accordance with Section 11.3(a)(i) of the CAT NMS Plan, the Operating Committee approved a tiered fee

⁴⁹ Consequently, firms that do not have “message traffic” reported to an exchange or OATS before they are reporting to the CAT would not be subject to a fee until they begin to report information to CAT.

⁵⁰ If an Industry Member (other than an Execution Venue ATS) has no orders, cancels, quotes and executions prior to the commencement of CAT Reporting, or no Reportable Events after CAT reporting commences, then the Industry Member would not have a CAT Fee obligation.

⁵¹ The SEC approved exemptive relief permitting Options Market Maker quotes to be reported to the Central Repository by the relevant Options Exchange in lieu of requiring that such reporting be done by both the Options Exchange and the Options Market Maker, as required by Rule 613 of Regulation NMS. See Securities Exchange Act Rel. No. 77265 (Mar. 1, 2017, 81 FR 11856 (Mar. 7, 2016)). This exemption applies to Options Market Maker quotes for CAT reporting purposes only. Therefore, notwithstanding the reporting exemption provided for Options Market Maker quotes, Options Market Maker quotes will be included in the calculation of total message traffic for Options Market Makers for purposes of tiering under the CAT funding model both prior to CAT reporting and once CAT reporting commences.

⁵² The trade to quote ratios were calculated based on the inverse of the average of the monthly equity SIP and OPRA quote to trade ratios from June 2016–June 2017 that were compiled by the Financial Information Forum using data from NASDAQ and SIAC.

⁵³ Although FINRA does not operate an execution venue, because it is a Participant, it is considered an “Execution Venue” under the Plan for purposes of determining fees.

structure for Equity Execution Venues and Option Execution Venues. In determining the Equity Execution Venue Tiers, the Operating Committee considered the funding principles set forth in Section 11.2 of the CAT NMS Plan, seeking to create funding tiers that take into account the relative impact on system resources of different Equity Execution Venues, and that establish comparable fees among the CAT Reporters with the most Reportable Events. Each Equity Execution Venue will be placed into one of four tiers of fixed fees, based on the Execution Venue's NMS Stocks and OTC Equity Securities market share. In choosing four tiers, the Operating Committee performed an analysis similar to that discussed above with regard to the non-Execution Venue Industry Members to determine the number of tiers for Equity Execution Venues. The Operating Committee determined to establish four tiers for Equity Execution Venues, rather than a larger number of tiers as established for non-Execution Venue Industry Members, because the four tiers were sufficient to distinguish between the smaller number of Equity Execution Venues based on market share. Furthermore, the selection of four tiers serves to help establish comparability among the largest CAT Reporters.

Each Equity Execution Venue will be ranked by market share and tiered by predefined Execution Venue percentages (the "Equity Execution Venue Percentages"). In determining the fixed percentage of Equity Execution Venues in each tier, the Operating Committee reviewed historical market share of share volume for Execution Venues. Equity Execution Venue market shares of share volume were sourced from market statistics made publicly-available by Bats Global Markets, Inc. ("Bats"). ATS market shares of share volume was sourced from market statistics made publicly-available by FINRA. FINRA trade reporting facility

("TRF") and ORF market share of share volume was sourced from market statistics made publicly available by FINRA. Based on data from FINRA and the otcmarkets.com, ATSS accounted for 39.12% of the share volume across the TRFs and ORFs during the recent tiering period. A 39.12/60.88 split was applied to the ATS and non-ATS breakdown of FINRA market share, with FINRA tiered based only on the non-ATS portion of its market share of share volume.

The Operating Committee determined to discount the market share of Execution Venue ATSS exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF in recognition of the different trading characteristics of the OTC Equity Securities market as compared to the market in NMS Stocks. Many OTC Equity Securities are priced at less than one dollar—and a significant number at less than one penny—per share and low-priced shares tend to trade in larger quantities. Accordingly, a disproportionately large number of shares are involved in transactions involving OTC Equity Securities versus NMS Stocks. Because the proposed fee tiers are based on market share calculated by share volume, Execution Venue ATSS exclusively trading OTC Equity Securities and FINRA would likely be subject to higher tiers than their operations may warrant. To address this potential concern, the Operating Committee determined to discount the market share of Execution Venue ATSS exclusively trading OTC Equity Securities and the market share of the FINRA ORF by multiplying such market share by the average shares per trade ratio between NMS Stocks and OTC Equity Securities in order to adjust for the greater number of shares being traded in the OTC Equity Securities market. Based on available data for the second quarter of 2017, the average shares per trade ratio between NMS Stocks and OTC Equity Securities is 0.17%.⁵⁴ The average shares per trade

ratio between NMS Stocks and OTC Equity Securities will be recalculated every three months when tiers are recalculated.

Based on this, the Operating Committee considered the distribution of Execution Venues, and grouped together Execution Venues with similar levels of market share. The percentage of costs recovered by each Equity Execution Venue tier will be determined by predefined percentage allocations (the "Equity Execution Venue Recovery Allocation"). In determining the fixed percentage allocation of costs to be recovered from each tier, the Operating Committee considered the impact of CAT Reporter market share activity on the CAT System as well as the distribution of total market volume across Equity Execution Venues while seeking to maintain comparable fees among the largest CAT Reporters. Accordingly, following the determination of the percentage of Execution Venues in each tier, the Operating Committee identified the percentage of total market volume for each tier based on the historical market share upon which Execution Venues had been initially ranked. Taking this into account along with the resulting percentage of total recovery, the percentage allocation of cost recovery for each tier were assigned, allocating higher percentages of recovery to the tier with a higher level of market share while avoiding any inappropriate burden on competition. Furthermore, by using percentages of Equity Execution Venues and cost recovery per tier, the Operating Committee sought to include elasticity within the funding model, allowing the funding model to respond to changes in either the total number of Equity Execution Venues or changes in market share.

Based on this analysis, the Operating Committee approved the following Equity Execution Venue Percentages and Recovery Allocations:

Equity Execution Venue tier	Percentage of Equity Execution Venues	Percentage of Execution Venue Recovery	Percentage of total recovery
Tier 1	25.00	33.25	8.31
Tier 2	42.00	25.73	6.43
Tier 3	23.00	8.00	2.00
Tier 4	10.00	0.02	0.01
Total	100	67	16.75

⁵⁴ The average shares per trade ratio for both NMS Stocks and OTC Equity Securities from the second quarter of 2017 was calculated using publicly

available market volume data from Bats and OTC Markets Group, and the totals were divided to

determine the average number of shares per trade between NMS Stocks and OTC Equity Securities.

(II) Listed Options

Section 11.3(a)(ii) of the CAT NMS Plan states that each Execution Venue that executes transactions in Listed Options will pay a fixed fee depending on the Listed Options market share of that Execution Venue, with the Operating Committee establishing at least two and no more than five tiers of fixed fees, based on an Execution Venue's Listed Options market share. For these purposes, market share will be calculated by contract volume.

In accordance with Section 11.3(a)(ii) of the CAT NMS Plan, the Operating Committee approved a tiered fee structure for Options Execution Venues. In determining the tiers, the Operating Committee considered the funding principles set forth in Section 11.2 of the CAT NMS Plan, seeking to create funding tiers that take into account the relative impact on system resources of different Options Execution Venues, and that establish comparable fees among the CAT Reporters with the most Reportable Events. Each Options Execution Venue will be placed into one of two tiers of fixed fees, based on the Execution Venue's Listed Options market share. In choosing two tiers, the Operating Committee performed an analysis similar to that discussed above with regard to Industry Members (other than Execution Venue ATSS) to

determine the number of tiers for Options Execution Venues. The Operating Committee determined to establish two tiers for Options Execution Venues, rather than a larger number, because the two tiers were sufficient to distinguish between the smaller number of Options Execution Venues based on market share. Furthermore, due to the smaller number of Options Execution Venues, the incorporation of additional Options Execution Venue tiers would result in significantly higher fees for Tier 1 Options Execution Venues and reduce comparability between Execution Venues and Industry Members. Furthermore, the selection of two tiers served to establish comparable fees among the largest CAT Reporters.

Each Options Execution Venue will be ranked by market share and tiered by predefined Execution Venue percentages (the "Options Execution Venue Percentages"). To determine the fixed percentage of Options Execution Venues in each tier, the Operating Committee analyzed the historical and publicly available market share of Options Execution Venues to group Options Execution Venues with similar market shares across the tiers. Options Execution Venue market share of share volume were sourced from market statistics made publicly-available by

Bats. The process for developing the Options Execution Venue Percentages was the same as discussed above with regard to Equity Execution Venues.

The percentage of costs to be recovered from each Options Execution Venue tier will be determined by predefined percentage allocations (the "Options Execution Venue Recovery Allocation"). In determining the fixed percentage allocation of cost recovery for each tier, the Operating Committee considered the impact of CAT Reporter market share activity on the CAT System as well as the distribution of total market volume across Options Execution Venues while seeking to maintain comparable fees among the largest CAT Reporters. Furthermore, by using percentages of Options Execution Venues and cost recovery per tier, the Operating Committee sought to include elasticity within the funding model, allowing the funding model to respond to changes in either the total number of Options Execution Venues or changes in market share. The process for developing the Options Execution Venue Recovery Allocation was the same as discussed above with regard to Equity Execution Venues.

Based on this analysis, the Operating Committee approved the following Options Execution Venue Percentages and Recovery Allocations:

Options Execution Venue tier	Percentage of Options Execution Venues	Percentage of Execution Venue Recovery	Percentage of total recovery
Tier 1	75.00	28.25	7.06
Tier 2	25.00	4.75	1.19
Total	100	33	8.25

(III) Market Share/Tier Assignments

The Operating Committee determined that, prior to the start of CAT reporting, market share for Execution Venues would be sourced from publicly-available market data. Options and equity volumes for Participants will be sourced from market data made publicly available by Bats while Execution Venue ATS volumes will be sourced from market data made publicly available by FINRA and OTC Markets. Set forth in the Appendix are two charts, one listing the current Equity Execution Venues, each with its rank and tier, and one listing the current Options Execution Venues, each with its rank and tier.

After the commencement of CAT reporting, market share for Execution Venues will be sourced from data reported to the CAT. Equity Execution

Venue market share will be determined by calculating each Equity Execution Venue's proportion of the total volume of NMS Stock and OTC Equity shares reported by all Equity Execution Venues during the relevant time period (with the discounting of market share of Execution Venue ATSS exclusively trading OTC Equity Securities, as described above). Similarly, market share for Options Execution Venues will be determined by calculating each Options Execution Venue's proportion of the total volume of Listed Options contracts reported by all Options Execution Venues during the relevant time period.

The Operating Committee has determined to calculate fee tiers for Execution Venues every three months based on market share from the prior three months. Based on its analysis of

historical data, the Operating Committee believes calculating tiers based on three months of data will provide the best balance between reflecting changes in activity by Execution Venues while still providing predictability in the tiering for Execution Venues.

(D) Allocation of Costs

In addition to the funding principles discussed above, including comparability of fees, Section 11.1(c) of the CAT NMS Plan also requires expenses to be fairly and reasonably shared among the Participants and Industry Members. Accordingly, in developing the proposed fee schedules pursuant to the funding model, the Operating Committee calculated how the CAT costs would be allocated between Industry Members and Execution Venues, and how the portion

of CAT costs allocated to Execution Venues would be allocated between Equity Execution Venues and Options Execution Venues. These determinations are described below.

(I) Allocation Between Industry Members and Execution Venues

In determining the cost allocation between Industry Members (other than Execution Venue ATSS) and Execution Venues, the Operating Committee analyzed a range of possible splits for revenue recovery from such Industry Members and Execution Venues, including 80%/20%, 75%/25%, 70%/30% and 65%/35% allocations. Based on this analysis, the Operating Committee determined that 75 percent of total costs recovered would be allocated to Industry Members (other than Execution Venue ATSS) and 25 percent would be allocated to Execution Venues. The Operating Committee determined that this 75%/25% division maintained the greatest level of comparability across the funding model. For example, the cost allocation establishes fees for the largest Industry Members (*i.e.*, those Industry Members in Tiers 1) that are comparable to the largest Equity Execution Venues and Options Execution Venues (*i.e.*, those Execution Venues in Tier 1).

Furthermore, the allocation of total CAT cost recovery recognizes the difference in the number of CAT Reporters that are Industry Members versus CAT Reporters that are Execution Venues. Specifically, the cost allocation takes into consideration that there are approximately 23 times more Industry Members expected to report to the CAT than Execution Venues (*e.g.*, an estimated 1,541 Industry Members versus 67 Execution Venues as of June 2017).

(II) Allocation Between Equity Execution Venues and Options Execution Venues

The Operating Committee also analyzed how the portion of CAT costs allocated to Execution Venues would be allocated between Equity Execution

Venues and Options Execution Venues. In considering this allocation of costs, the Operating Committee analyzed a range of alternative splits for revenue recovered between Equity and Options Execution Venues, including a 70%/30%, 67%/33%, 65%/35%, 50%/50% and 25%/75% split. Based on this analysis, the Operating Committee determined to allocate 67 percent of Execution Venue costs recovered to Equity Execution Venues and 33 percent to Options Execution Venues. The Operating Committee determined that a 67%/33% allocation between Equity and Options Execution Venues maintained the greatest level of fee equitability and comparability based on the current number of Equity and Options Execution Venues. For example, the allocation establishes fees for the larger Equity Execution Venues that are comparable to the larger Options Execution Venues. Specifically, Tier 1 Equity Execution Venues would pay a quarterly fee of \$81,047 and Tier 1 Options Execution Venues would pay a quarterly fee of \$81,379. In addition to fee comparability between Equity Execution Venues and Options Execution Venues, the allocation also establishes equitability between larger (Tier 1) and smaller (Tier 2) Execution Venues based upon the level of market share. Furthermore, the allocation is intended to reflect the relative levels of current equity and options order events.

(E) Fee Levels

The Operating Committee determined to establish a CAT-specific fee to collectively recover the costs of building and operating the CAT. Accordingly, under the funding model, the sum of the CAT Fees is designed to recover the total cost of the CAT. The Operating Committee has determined overall CAT costs to be comprised of Plan Processor costs and non-Plan Processor costs, which are estimated to be \$50,700,000 in total for the year beginning November 21, 2016.⁵⁵

The Plan Processor costs relate to costs incurred and to be incurred

through November 21, 2017 by the Plan Processor and consist of the Plan Processor's current estimates of average yearly ongoing costs, including development costs, which total \$37,500,000. This amount is based upon the fees due to the Plan Processor pursuant to the Company's agreement with the Plan Processor.

The non-Plan Processor estimated costs incurred and to be incurred by the Company through November 21, 2017 consist of three categories of costs. The first category of such costs are third party support costs, which include legal fees, consulting fees and audit fees from November 21, 2016 until the date of filing as well as estimated third party support costs for the rest of the year. These amount to an estimated \$5,200,000. The second category of non-Plan Processor costs are estimated cyber-insurance costs for the year. Based on discussions with potential cyber-insurance providers, assuming \$2–5 million cyber-insurance premium on \$100 million coverage, the Company has estimated \$3,000,000 for the annual cost. The final cost figures will be determined following receipt of final underwriter quotes. The third category of non-Plan Processor costs is the CAT operational reserve, which is comprised of three months of ongoing Plan Processor costs (\$9,375,000), third party support costs (\$1,300,000) and cyber-insurance costs (\$750,000). The Operating Committee aims to accumulate the necessary funds to establish the three-month operating reserve for the Company through the CAT Fees charged to CAT Reporters for the year. On an ongoing basis, the Operating Committee will account for any potential need to replenish the operating reserve or other changes to total cost during its annual budgeting process. The following table summarizes the Plan Processor and non-Plan Processor cost components which comprise the total estimated CAT costs of \$50,700,000 for the covered period.

Cost category	Cost component	Amount
Plan Processor	Operational Costs	\$37,500,000
Non-Plan Processor	Third Party Support Costs	5,200,000
	Operational Reserve	⁵⁶ 5,000,000
	Cyber-insurance Costs	3,000,000
Estimated Total		50,700,000

⁵⁵ It is anticipated that CAT-related costs incurred prior to November 21, 2016 will be addressed via a separate filing.

Based on these estimated costs and the calculations for the funding model described above, the Operating

Committee determined to impose the following fees:⁵⁷

For Industry Members (other than Execution Venue ATs):

Tier	Percentage of Industry Members	Quarterly CAT Fee
1	0.900	\$81,483
2	2.150	59,055
3	2.800	40,899
4	7.750	25,566
5	8.300	7,428
6	18.800	1,968
7	59.300	105

For Execution Venues for NMS Stocks and OTC Equity Securities:

Tier	Percentage of Equity Execution Venues	Quarterly CAT Fee
1	25.00	\$81,048
2	42.00	37,062
3	23.00	21,126
4	10.00	129

For Execution Venues for Listed Options:

Tier	Percentage of Options Execution Venues	Quarterly CAT Fee
1	75.00	\$81,381
2	25.00	37,629

The Operating Committee has calculated the schedule of effective fees for Industry Members (other than Execution Venue ATs) and Execution

Venues in the following manner. Note that the calculation of CAT Fees assumes 52 Equity Execution Venues, 15 Options Execution Venues and 1,541

Industry Members (other than Execution Venue ATs) as of June 2017.

CALCULATION OF ANNUAL TIER FEES FOR INDUSTRY MEMBERS ("IM")

Industry Member tier	Percentage of Industry Members	Percentage of Industry Member Recovery	Percentage of total recovery
Tier 1	0.900	12.00	9.00
Tier 2	2.150	20.50	15.38
Tier 3	2.800	18.50	13.88
Tier 4	7.750	32.00	24.00
Tier 5	8.300	10.00	7.50
Tier 6	18.800	6.00	4.50
Tier 7	59.300	1.00	0.75
Total	100	100	75

⁵⁶ This \$5,000,000 represents the gradual accumulation of the funds for a target operating reserve of \$11,425,000.

⁵⁷ Note that all monthly, quarterly and annual CAT Fees have been rounded to the nearest dollar.

Industry Member tier	Estimated number of Industry Members
Tier 1	14
Tier 2	33
Tier 3	43
Tier 4	119
Tier 5	128
Tier 6	290
Tier 7	914
Total	1,541

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Calculation 1.1 (Calculation of a Tier 1 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 0.9\% \text{ [% of Tier 1 IMs]} = 14 \text{ [Estimated Tier 1 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 12\% \text{ [% of Tier 1 IM Recovery]}}{14 \text{ [Estimated Tier 1 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$27,161}$$

Calculation 1.2 (Calculation of a Tier 2 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 2.15\% \text{ [% of Tier 2 IMs]} = 33 \text{ [Estimated Tier 2 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 20.5\% \text{ [% of Tier 2 IM Recovery]}}{33 \text{ [Estimated Tier 2 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$19,685}$$

Calculation 1.3 (Calculation of a Tier 3 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 2.125\% \text{ [% of Tier 3 IMs]} = 43 \text{ [Estimated Tier 3 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 18.5\% \text{ [% of Tier 3 IM Recovery]}}{43 \text{ [Estimated Tier 3 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$13,633}$$

Calculation 1.4 (Calculation of a Tier 4 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 7.75\% \text{ [% of Tier 4 IMs]} = 119 \text{ [Estimated Tier 4 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 32\% \text{ [% of Tier 4 IM Recovery]}}{119 \text{ [Estimated Tier 4 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$8522}$$

Calculation 1.5 (Calculation of a Tier 5 Industry Member Annual Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 8.3\% \text{ [% of Tier 5 IMs]} = 128 \text{ [Estimated Tier 5 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 7.75\% \text{ [% of Tier 5 IM Recovery]}}{128 \text{ [Estimated Tier 5 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$2476}$$

Calculation 1.6 (Calculation of a Tier 6 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 18.8\% \text{ [% of Tier 6 IMs]} = 290 \text{ [Estimated Tier 6 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 6\% \text{ [% of Tier 6 IM Recovery]}}{290 \text{ [Estimated Tier 6 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$656}$$

Calculation 1.7 (Calculation of a Tier 7 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 59.3\% \text{ [% of Tier 7 IMs]} = 914 \text{ [Estimated Tier 7 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 1\% \text{ [% of Tier 7 IM Recovery]}}{914 \text{ [Estimated Tier 7 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$35}$$

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CALCULATION OF ANNUAL TIER FEES FOR EQUITY EXECUTION VENUES (“EV”)

Equity Execution Venue tier	Percentage of Equity Execution Venues	Percentage of Execution Venue Recovery	Percentage of total recovery
Tier 1	25.00	33.25	8.31
Tier 2	42.00	25.73	6.43
Tier 3	23.00	8.00	2.00
Tier 4	10.00	49.00	0.01
Total	100	67	16.75

Equity Execution Venue tier	Estimated number of Equity Execution Venues
Tier 1	13
Tier 2	22
Tier 3	12
Tier 4	5
Total	52

Calculation 2.1 (Calculation of a Tier 1 Equity Execution Venue Monthly Fee)

$$52 \text{ [Estimated Tot. Equity EVs]} \times 25\% \text{ [% of Tier 1 Equity EVs]} = 13 \text{ [Estimated Tier 1 Equity EVs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann.CAT Costs]} \times 33.25\% \text{ [EV \% of Tot.Ann.CAT Costs]} \times 26\% \text{ [% of Tier 1 Equity EV Recovery]}}{13 \text{ [Estimated Tier 1 Equity EVs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$27,016}$$

Calculation 2.2 (Calculation of a Tier 2 Equity Execution Venue Monthly Fee)

$$52 \text{ [Estimated Tot. Equity EVs]} \times 42\% \text{ [% of Tier 2 Equity EVs]} = 22 \text{ [Estimated Tier 2 Equity EVs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann.CAT Costs]} \times 25\% \text{ [EV \% of Tot.Ann.CAT Costs]} \times 25.73\% \text{ [% of Tier 2 Equity EV Recovery]}}{22 \text{ [Estimated Tier 2 Equity EVs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$12,353}$$

Calculation 2.3 (Calculation of a Tier 3 Equity Execution Venue Monthly Fee)

$$52 \text{ [Estimated Tot. Equity EVs]} \times 23\% \text{ [% of Tier 2 Equity EVs]} = 12 \text{ [Estimated Tier 2 Equity EVs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann.CAT Costs]} \times 25\% \text{ [EV \% of Tot.Ann.CAT Costs]} \times 8\% \text{ [% of Tier 2 Equity EV Recovery]}}{12 \text{ [Estimated Tier 2 Equity EVs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$7,042}$$

Calculation 2.4 (Calculation of a Tier 4 Equity Execution Venue Monthly Fee)

$$52 \text{ [Estimated Tot. Equity EVs]} \times 10\% \text{ [% of Tier 2 Equity EVs]} = 5 \text{ [Estimated Tier 2 Equity EVs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann.CAT Costs]} \times 25\% \text{ [EV \% of Tot.Ann.CAT Costs]} \times 0.02\% \text{ [% of Tier 2 Equity EV Recovery]}}{5 \text{ [Estimated Tier 2 Equity EVs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$42}$$

CALCULATION OF ANNUAL TIER FEES FOR OPTIONS EXECUTION VENUES (“EV”)

Options Execution Venue tier	Percentage of Options Execution Venues	Percentage of Execution Venue Recovery	Percentage of total recovery
Tier 1	75.00	28.25	7.06
Tier 2	25.00	4.75	1.19
Total	100	33	8.25

Options Execution Venue tier	Estimated number of Options Execution Venues
Tier 1	11
Tier 2	4
Total	15

Calculation 3.1 (Calculation of a Tier 1 Options Execution Venue Monthly Fee)

$$15 \text{ [Estimated Tot. Options EVs]} \times 75\% \text{ [% of Tier 1 Options EVs]} = 11 \text{ [Estimated Tier 1 Options EVs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 25\% \text{ [EV \% of Tot. Ann. CAT Costs]} \times 28.25\% \text{ [% of Tier 1 Options EV Recovery]}}{11 \text{ [Estimated Tier 1 Options EVs]}} \right) \div 12 \text{ [Months per year]} = \$27,127$$

Calculation 3.2 (Calculation of a Tier 2 Options Execution Venue Annual Fee)

$$15 \text{ [Estimated Tot. Options EVs]} \times 25\% \text{ [% of Tier 2 Options EVs]} = 4 \text{ [Estimated Tier 2 Options EVs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 25\% \text{ [EV \% of Tot. Ann. CAT Costs]} \times 4.75\% \text{ [% of Tier 2 Options EV Recovery]}}{4 \text{ [Estimated Tier 2 Options EVs]}} \right) \div 12 \text{ [Months per year]} = \$12,543$$

TRACEABILITY OF TOTAL CAT FEES

Type	Industry Member tier	Estimated number of members	CAT Fees paid annually	Total recovery
Industry Members	Tier 1	14	\$325,932	\$4,563,048
	Tier 2	33	236,220	7,795,260
	Tier 3	43	163,596	7,034,628
	Tier 4	119	102,264	12,169,416
	Tier 5	128	29,712	3,803,136
	Tier 6	290	7,872	2,282,880
	Tier 7	914	420	383,880
Total .....	.....	1,541	.....	38,032,248
Equity Execution Venues	Tier 1	13	324,192	4,214,496
	Tier 2	22	148,248	3,261,456
	Tier 3	12	84,504	1,014,048
	Tier 4	5	516	2,580
Total .....	.....	52	.....	8,492,580
Options Execution Venues	Tier 1	11	325,524	3,580,764
	Tier 2	4	150,516	602,064
Total .....	.....	15	.....	4,182,828
Total .....	.....	.....	.....	50,700,000
Excess ⁵⁸ .....	.....	.....	.....	7,656

(F) Comparability of Fees

The funding principles require a funding model in which the fees charged to the CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether Execution Venue and/or Industry Members). Accordingly, in creating the model, the Operating Committee sought to establish comparable fees for the top tier of Industry Members (other than Execution Venue ATSs), Equity Execution Venues and Options Execution Venues. Specifically, each Tier 1 CAT Reporter would be required

to pay a quarterly fee of approximately \$81,000.

(G) Billing Onset

Under Section 11.1(c) of the CAT NMS Plan, to fund the development and implementation of the CAT, the Company shall time the imposition and collection of all fees on Participants and Industry Members in a manner reasonably related to the timing when the Company expects to incur such development and implementation costs. The Company is currently incurring such development and implementation costs and will continue to do so prior to the commencement of CAT reporting and thereafter. In accordance with the CAT NMS Plan, all CAT Reporters, including both Industry Members and Execution Venues (including Participants), will be invoiced as promptly as possible following the latest of the operative date of the Consolidated

Audit Trail Funding Fees for each of the Participants and the operative date of the Plan amendment adopting CAT Fees for Participants.

(H) Changes to Fee Levels and Tiers

Section 11.3(d) of the CAT NMS Plan states that “[t]he Operating Committee shall review such fee schedule on at least an annual basis and shall make any changes to such fee schedule that it deems appropriate. The Operating Committee is authorized to review such fee schedule on a more regular basis, but shall not make any changes on more than a semi-annual basis unless, pursuant to a Supermajority Vote, the Operating Committee concludes that such change is necessary for the adequate funding of the Company.” With such reviews, the Operating Committee will review the distribution of Industry Members and Execution Venues across tiers, and make any

⁵⁸ The amount in excess of the total CAT costs will contribute to the gradual accumulation of the target operating reserve of \$11.425 million.

updates to the percentage of CAT Reporters allocated to each tier as may be necessary. In addition, the reviews will evaluate the estimated ongoing CAT costs and the level of the operating reserve. To the extent that the total CAT costs decrease, the fees would be adjusted downward, and to the extent that the total CAT costs increase, the fees would be adjusted upward.⁵⁹ Furthermore, any surplus of the Company's revenues over its expenses is to be included within the operational reserve to offset future fees. The limitations on more frequent changes to the fee, however, are intended to provide budgeting certainty for the CAT Reporters and the Company.⁶⁰ To the extent that the Operating Committee approves changes to the number of tiers in the funding model or the fees assigned to each tier, then the Operating Committee will file such changes with the SEC pursuant to Rule 608 of the Exchange Act, and the Participants will file such changes with the SEC pursuant to Section 19(b) of the Exchange Act and Rule 19b-4 thereunder, and any such changes will become effective in accordance with the requirements of those provisions.

(J) Initial and Periodic Tier Reassignments

The Operating Committee has determined to calculate fee tiers every three months based on market share or message traffic, as applicable, from the prior three months. For the initial tier assignments, the Company will calculate the relevant tier for each CAT Reporter using the three months of data prior to the commencement date. As with the initial tier assignment, for the tri-monthly reassignments, the Company will calculate the relevant tier using the three months of data prior to the relevant tri-monthly date. Any movement of CAT Reporters between tiers will not change the criteria for each tier or the fee amount corresponding to each tier.

In performing the tri-monthly reassignments, the assignment of CAT Reporters in each assigned tier is relative. Therefore, a CAT Reporter's assigned tier will depend, not only on its own message traffic or market share, but also on the message traffic/market share across all CAT Reporters. For example, the percentage of Industry Members (other than Execution Venue ATSS) in each tier is relative such that such Industry Member's assigned tier

will depend on message traffic generated across all CAT Reporters as well as the total number of CAT Reporters. The Operating Committee will inform CAT Reporters of their assigned tier every three months following the periodic tiering process, as the funding model will compare an individual CAT Reporter's activity to that of other CAT Reporters in the marketplace.

The following demonstrates a tier reassignment. In accordance with the funding model, the top 75% of Options Execution Venues in market share are categorized as Tier 1 while the bottom 25% of Options Execution Venues in market share are categorized as Tier 2. In the sample scenario below, Options Execution Venue L is initially categorized as a Tier 2 Options Execution Venue in Period A due to its market share. When market share is recalculated for Period B, the market share of Execution Venue L increases, and it is therefore subsequently reranked and reassigned to Tier 1 in Period B. Correspondingly, Options Execution Venue K, initially a Tier 1 Options Execution Venue in Period A, is reassigned to Tier 2 in Period B due to decreases in its market share.

Period A			Period B		
Options Execution Venue	Market share rank	Tier	Options Execution Venue	Market share rank	Tier
Options Execution Venue A	1	1	Options Execution Venue A	1	1
Options Execution Venue B	2	1	Options Execution Venue B	2	1
Options Execution Venue C	3	1	Options Execution Venue C	3	1
Options Execution Venue D	4	1	Options Execution Venue D	4	1
Options Execution Venue E	5	1	Options Execution Venue E	5	1
Options Execution Venue F	6	1	Options Execution Venue F	6	1
Options Execution Venue G	7	1	Options Execution Venue I	7	1
Options Execution Venue H	8	1	Options Execution Venue H	8	1
Options Execution Venue I	9	1	Options Execution Venue G	9	1
Options Execution Venue J	10	1	Options Execution Venue J	10	1
Options Execution Venue K	11	1	Options Execution Venue L	11	1
Options Execution Venue L	12	2	Options Execution Venue K	12	2
Options Execution Venue M	13	2	Options Execution Venue N	13	2
Options Execution Venue N	14	2	Options Execution Venue M	14	2
Options Execution Venue O	15	2	Options Execution Venue O	15	2

For each periodic tier reassignment, the Operating Committee will review the new tier assignments, particularly those assignments for CAT Reporters that shift from the lowest tier to a higher tier. This review is intended to evaluate whether potential changes to the market or CAT Reporters (e.g., dissolution of a large CAT Reporter) adversely affect the tier reassignments.

(J) Sunset Provision

The Operating Committee developed the proposed funding model by analyzing currently available historical data. Such historical data, however, is not as comprehensive as data that will be submitted to the CAT. Accordingly, the Operating Committee believes that it will be appropriate to revisit the funding model once CAT Reporters

have actual experience with the funding model. Accordingly, the Operating Committee determined to include an automatic sunset provision for the proposed fees. Specifically, the Operating Committee determined that the CAT Fees should automatically expire two years after the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. The Operating Committee intends to monitor

⁵⁹The CAT Fees are designed to recover the costs associated with the CAT. Accordingly, CAT Fees would not be affected by increases or decreases in other non-CAT expenses incurred by the

Participants, such as any changes in costs related to the retirement of existing regulatory systems, such as OATS.

⁶⁰Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85006.

the operation of the funding model during this two year period and to evaluate its effectiveness during that period. Such a process will inform the Operating Committee’s approach to funding the CAT after the two year period.

(3) Proposed CAT Fee Schedule

The Exchange proposes the Consolidated Audit Trail Funding Fees to impose the CAT Fees determined by the Operating Committee on the Exchange’s members. The proposed fee schedule has four sections, covering definitions, the fee schedule for CAT Fees, the timing and manner of payments, and the automatic sunseting of the CAT Fees. Each of these sections is discussed in detail below.

(A) Definitions

Paragraph (a) of the proposed fee schedule sets forth the definitions for the proposed fee schedule. Paragraph (a)(1) states that, for purposes of the Consolidated Audit Trail Funding Fees, the terms “CAT”, “CAT NMS Plan,” “Industry Member,” “NMS Stock,” “OTC Equity Security”, “Options Market Maker”, and “Participant” are defined as set forth in Rule 1701 (Consolidated Audit Trail Compliance Rule—Definitions).

The proposed fee schedule imposes different fees on Equity ATSs and Industry Members that are not Equity ATSs. Accordingly, the proposed fee schedule defines the term “Equity ATS.” First, paragraph (a)(2) defines an “ATS” to mean an alternative trading system as defined in Rule 300(a) of Regulation ATS under the Securities Exchange Act of 1934, as amended, that operates pursuant to Rule 301 of Regulation ATS. This is the same definition of an ATS as set forth in Section 1.1 of the CAT NMS Plan in the definition of an “Execution Venue.” Then, paragraph (a)(4) defines an “Equity ATS” as an ATS that executes transactions in NMS Stocks and/or OTC Equity Securities.

Paragraph (a)(3) of the proposed fee schedule defines the term “CAT Fee” to mean the Consolidated Audit Trail Funding Fee(s) to be paid by Industry Members as set forth in paragraph (b) in the proposed fee schedule.

Finally, Paragraph (a)(6) defines an “Execution Venue” as a Participant or an ATS (excluding any such ATS that does not execute orders). This definition is the same substantive definition as set forth in Section 1.1 of the CAT NMS Plan. Paragraph (a)(5) defines an “Equity Execution Venue” as an Execution Venue that trades NMS Stocks and/or OTC Equity Securities.

(B) Fee Schedule

The Exchange proposes to impose the CAT Fees applicable to its Industry Members through paragraph (b) of the proposed fee schedule. Paragraph (b)(1) of the proposed fee schedule sets forth the CAT Fees applicable to Industry Members other than Equity ATSs. Specifically, paragraph (b)(1) states that the Company will assign each Industry Member (other than an Equity ATS) to a fee tier once every quarter, where such tier assignment is calculated by ranking each Industry Member based on its total message traffic (with discounts for equity market maker quotes and Options Market Maker quotes based on the trade to quote ratio for equities and options, respectively) for the three months prior to the quarterly tier calculation day and assigning each Industry Member to a tier based on that ranking and predefined Industry Member percentages. The Industry Members with the highest total quarterly message traffic will be ranked in Tier 1, and the Industry Members with lowest quarterly message traffic will be ranked in Tier 7. Each quarter, each Industry Member (other than an Equity ATS) shall pay the following CAT Fee corresponding to the tier assigned by the Company for such Industry Member for that quarter:

Tier	Percentage of Industry Members	Quarterly CAT fee
1	0.900	\$81,483
2	2.150	59,055
3	2.800	40,899
4	7.750	25,566
5	8.300	7,428
6	18.800	1,968
7	59.300	105

Paragraph (b)(2) of the proposed fee schedule sets forth the CAT Fees applicable to Equity ATSs.⁶¹ These are the same fees that Participants that trade NMS Stocks and/or OTC Equity Securities will pay. Specifically, paragraph (b)(2) states that the Company will assign each Equity ATS to a fee tier once every quarter, where such tier assignment is calculated by ranking each Equity Execution Venue based on its total market share of NMS Stocks and OTC Equity Securities (with a discount for Equity ATSs exclusively trading OTC Equity Securities based on the average shares per trade ratio between NMS Stocks and OTC Equity Securities) for the three months prior to the quarterly tier calculation day and

⁶¹ Note that no fee schedule is provided for Execution Venue ATSs that execute transactions in Listed Options, as no such Execution Venue ATSs currently exist due to trading restrictions related to Listed Options.

assigning each Equity ATS to a tier based on that ranking and predefined Equity Execution Venue percentages. The Equity ATSs with the higher total quarterly market share will be ranked in Tier 1, and the Equity ATSs with the lowest quarterly market share will be ranked in Tier 4. Specifically, paragraph (b)(2) states that, each quarter, each Equity ATS shall pay the following CAT Fee corresponding to the tier assigned by the Company for such Equity ATS for that quarter:

Tier	Percentage of Equity Execution Venues	Quarterly CAT fee
1	25.00	\$81,048
2	42.00	37,062
3	23.00	21,126
4	10.00	129

(C) Timing and Manner of Payment

Section 11.4 of the CAT NMS Plan states that the Operating Committee shall establish a system for the collection of fees authorized under the CAT NMS Plan. The Operating Committee may include such collection responsibility as a function of the Plan Processor or another administrator. To implement the payment process to be adopted by the Operating Committee, paragraph (c)(1) of the proposed fee schedule states that the Company will provide each Industry Member with one invoice each quarter for its CAT Fees as determined pursuant to paragraph (b) of the proposed fee schedule, regardless of whether the Industry Member is a member of multiple self-regulatory organizations. Paragraph (c)(1) further states that each Industry Member will pay its CAT Fees to the Company via the centralized system for the collection of CAT Fees established by the Company in the manner prescribed by the Company. The Exchange will provide Industry Members with details regarding the manner of payment of CAT Fees by Regulatory Circular.

All CAT fees will be billed and collected centrally through the Company via the Plan Processor. Although each Participant will adopt its own fee schedule regarding CAT Fees, no CAT Fees or portion thereof will be collected by the individual Participants. Each Industry Member will receive from the Company one invoice for its applicable CAT fees, not separate invoices from each Participant of which it is a member. The Industry Members will pay the CAT Fees to the Company via the centralized system for the

collection of CAT fees established by the Company.⁶²

Section 11.4 of the CAT NMS Plan also states that Participants shall require each Industry Member to pay all applicable authorized CAT Fees within thirty days after receipt of an invoice or other notice indicating payment is due (unless a longer payment period is otherwise indicated). Section 11.4 further states that, if an Industry Member fails to pay any such fee when due, such Industry Member shall pay interest on the outstanding balance from such due date until such fee is paid at a per annum rate equal to the lesser of: (i) The Prime Rate plus 300 basis points; or (ii) the maximum rate permitted by applicable law. Therefore, in accordance with Section 11.4 of the CAT NMS Plan, the Exchange proposes to adopt paragraph (c)(2) of the proposed fee schedule. Paragraph (c)(2) of the proposed fee schedule states that each Industry Member shall pay CAT Fees within thirty days after receipt of an invoice or other notice indicating payment is due (unless a longer payment period is otherwise indicated). If an Industry Member fails to pay any such fee when due, such Industry Member shall pay interest on the outstanding balance from such due date until such fee is paid at a per annum rate equal to the lesser of: (i) The Prime Rate plus 300 basis points; or (ii) the maximum rate permitted by applicable law.

(D) Sunset Provision

The Operating Committee has determined to require that the CAT Fees automatically sunset two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. Accordingly, the Exchange proposes paragraph (d) of the fee schedule, which states that “[t]hese Consolidated Audit Trailing Funding Fees will automatically expire two years after the operative date of the amendment of the CAT NMS Plan that adopts CAT fees for the Participants.”

(4) Changes to Prior CAT Fee Plan Amendment

The proposed funding model set forth in this Amendment is a revised version of the Original Proposal. The Commission received a number of comment letters in response to the Original Proposal.⁶³ The SEC suspended the Original Proposal and instituted proceedings to determine whether to

approve or disapprove it.⁶⁴ Pursuant to those proceedings, additional comment letters were submitted regarding the proposed funding model.⁶⁵ In developing this Amendment, the Operating Committee carefully considered these comments and made a number of changes to the Original Proposal to address these comments where appropriate.

This Amendment makes the following changes to the Original Proposal: (1) Adds two additional CAT Fee tiers for Equity Execution Venues; (2) discounts the market share of Execution Venue ATSS exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF by the average shares per trade ratio between NMS Stocks and OTC Equity Securities (calculated as 0.17% based on available data from the second quarter of 2017) when calculating the market share of Execution Venue ATSS exclusively trading OTC Equity Securities and FINRA; (3) discounts the Options Market Maker quotes by the trade to quote ratio for options (calculated as 0.01% based on available data for June 2016 through June 2017) when calculating message traffic for Options Market Makers; (4) discounts equity market maker quotes by the trade to quote ratio for equities (calculated as 5.43% based on available data for June 2016 through June 2017) when calculating message traffic for equity market makers; (5) decreases the number of tiers for Industry Members (other than the Execution Venue ATSS) from nine to seven; (6) changes the allocation of CAT costs between Equity Execution Venues and Options Execution Venues from 75%/25% to 67%/33%; (7) adjusts tier percentages and recovery allocations for Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSS); (8) focuses the comparability of CAT Fees on the individual entity level, rather than primarily on the comparability of affiliated entities; (9) commences invoicing of CAT Reporters as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Participants and the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants; and (10) requires the proposed fees to automatically expire two years from the operative date of the CAT NMS Plan

amendment adopting CAT Fees for the Participants.

(A) Equity Execution Venues

(i) Small Equity Execution Venues

In the Original Proposal, the Operating Committee proposed to establish two fee tiers for Equity Execution Venues. The Commission and commenters raised the concern that, by establishing only two tiers, smaller Equity Execution Venues (e.g., those Equity ATSS representing less than 1% of NMS market share) would be placed in the same fee tier as larger Equity Execution Venues, thereby imposing an undue or inappropriate burden on competition.⁶⁶ To address this concern, the Operating Committee proposes to add two additional tiers for Equity Execution Venues, a third tier for smaller Equity Execution Venues and a fourth tier for the smallest Equity Execution Venues.

Specifically, the Original Proposal had two tiers of Equity Execution Venues. Tier 1 required the largest Equity Execution Venues to pay a quarterly fee of \$63,375. Based on available data, these largest Equity Execution Venues were those that had equity market share of share volume greater than or equal to 1%.⁶⁷ Tier 2 required the remaining smaller Equity Execution Venues to pay a quarterly fee of \$38,820.

To address concerns about the potential for the \$38,820 quarterly fee to impose an undue burden on smaller Equity Execution Venues, the Operating Committee determined to move to a four tier structure for Equity Execution Venues. Tier 1 would continue to include the largest Equity Execution Venues by share volume (that is, based on currently available data, those with market share of equity share volume greater than or equal to one percent), and these Equity Execution Venues would be required to pay a quarterly fee of \$81,048. The Operating Committee determined to divide the original Tier 2 into three tiers. The new Tier 2 Equity Execution Venues, which would include the next largest Equity Execution Venues by equity share

⁶⁶ See Suspension Order at 31664; SIFMA Letter at 3.

⁶⁷ Note that while these equity market share thresholds were referenced as data points to help differentiate between Equity Execution Venue tiers, the proposed funding model is directly driven not by market share thresholds, but rather by fixed percentages of Equity Execution Venues across tiers to account for fluctuating levels of market share across time. Actual market share in any tier will vary based on the actual market activity in a given measurement period, as well as the number of Equity Execution Venues included in the measurement period.

⁶² Section 11.4 of the CAT NMS Plan.

⁶³ For a description of the comments submitted in response to the Original Proposal, see Suspension Order.

⁶⁴ Suspension Order.

⁶⁵ See MFA Letter; SIFMA Letter; FIA Principal Traders Group Letter; Belvedere Letter; Sidley Letter; Group One Letter; and Virtu Financial Letter.

volume, would be required to pay a quarterly fee of \$37,062. The new Tier 3 Equity Execution Venues would be required to pay a quarterly fee of \$21,126. The new Tier 4 Equity Execution Venues, which would include the smallest Equity Execution Venues by share volume, would be required to pay a quarterly fee of \$129.

In developing the proposed four tier structure, the Operating Committee considered keeping the existing two tiers, as well as shifting to three, four or five Equity Execution Venue tiers (the maximum number of tiers permitted under the Plan), to address the concerns regarding small Equity Execution Venues. For each of the two, three, four and five tier alternatives, the Operating Committee considered the assignment of various percentages of Equity Execution Venues to each tier as well as various percentages of Equity Execution Venue recovery allocations for each alternative. As discussed below in more detail, each of these options was considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined that the four tier alternative addressed the spectrum of different Equity Execution Venues. The Operating Committee determined that neither a two tier structure nor a three tier structure sufficiently accounted for the range of market shares of smaller Equity Execution Venues. The Operating Committee also determined that, given the limited number of Equity Execution Venues, that a fifth tier was unnecessary to address the range of market shares of the Equity Execution Venues.

By increasing the number of tiers for Equity Execution Venues and reducing the proposed CAT Fees for the smaller Equity Execution Venues, the Operating Committee believes that the proposed fees for Equity Execution Venues would not impose an undue or inappropriate burden on competition under Section 6 or Section 15A of the Exchange Act. Moreover, the Operating Committee believes that the proposed fees appropriately take into account the distinctions in the securities trading operations of different Equity Execution Venues, as required under the funding principles of the CAT NMS Plan.⁶⁸ The larger number of tiers more closely tracks the variety of sizes of equity share volume of Equity Execution Venues. In addition, the reduction in the fees for the smaller Equity Execution Venues recognizes the potential burden of larger

fees on smaller entities. In particular, the very small quarterly fee of \$129 for Tier 4 Equity Execution Venues reflects the fact that certain Equity Execution Venues have a very small share volume due to their typically more focused business models.

Accordingly, with this Amendment, the Exchange proposes to amend paragraph (b)(2) of the proposed fee schedule to add the two additional tiers for Equity Execution Venues, to establish the percentages and fees for Tiers 3 and 4 as described, and to revise the percentages and fees for Tiers 1 and 2 as described.

(ii) Execution Venues for OTC Equity Securities

In the Original Proposal, the Operating Committee proposed to group Execution Venues for OTC Equity Securities and Execution Venues for NMS Stocks in the same tier structure. The Commission and commenters raised concerns as to whether this determination to place Execution Venues for OTC Equity Securities in the same tier structure as Execution Venues for NMS Stocks would result in an undue or inappropriate burden on competition, recognizing that the application of share volume may lead to different outcomes as applied to OTC Equity Securities and NMS Stocks.⁶⁹ To address this concern, the Operating Committee proposes to discount the market share of Execution Venue ATSS exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF by the average shares per trade ratio between NMS Stocks and OTC Equity Securities (0.17% for the second quarter of 2017) in order to adjust for the greater number of shares being traded in the OTC Equity Securities market, which is generally a function of a lower per share price for OTC Equity Securities when compared to NMS Stocks.

As commenters noted, many OTC Equity Securities are priced at less than one dollar—and a significant number at less than one penny—and low-priced shares tend to trade in larger quantities. Accordingly, a disproportionately large number of shares are involved in transactions involving OTC Equity Securities versus NMS Stocks, which has the effect of overstating an Execution Venue's true market share when the Execution Venue is involved in the trading of OTC Equity Securities. Because the proposed fee tiers are based on market share calculated by share volume, Execution Venue ATSS trading OTC Equity Securities and FINRA may

be subject to higher tiers than their operations may warrant.⁷⁰ The Operating Committee proposes to address this concern in two ways. First, the Operating Committee proposes to increase the number of Equity Execution Venue tiers, as discussed above. Second, the Operating Committee determined to discount the market share of Execution Venue ATSS exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF when calculating their tier placement. Because the disparity in share volume between Execution Venues trading in OTC Equity Securities and NMS Stocks is based on the different number of shares per trade for OTC Equity Securities and NMS Stocks, the Operating Committee believes that discounting the share volume of such Execution Venue ATSS as well as the market share of the FINRA ORF would address the difference in shares per trade for OTC Equity Securities and NMS Stocks.

Specifically, the Operating Committee proposes to impose a discount based on the objective measure of the average shares per trade ratio between NMS Stocks and OTC Equity Securities. Based on available data from the second quarter of 2017, the average shares per trade ratio between NMS Stocks and OTC Equity Securities is 0.17%.

The practical effect of applying such a discount for trading in OTC Equity Securities is to shift Execution Venue ATSS exclusively trading OTC Equity Securities to tiers for smaller Execution Venues and with lower fees. For example, under the Original Proposal, one Execution Venue ATS exclusively trading OTC Equity Securities was placed in the first CAT Fee tier, which had a quarterly fee of \$63,375. With the imposition of the proposed tier changes and the discount, this ATS would be ranked in Tier 3 and would owe a quarterly fee of \$21,126.

In developing the proposed discount for Equity Execution Venue ATSS exclusively trading OTC Equity Securities and FINRA, the Operating Committee evaluated different alternatives to address the concerns related to OTC Equity Securities, including creating a separate tier structure for Execution Venues trading OTC Equity Securities (like the separate tier for Options Execution Venues) as well as the proposed discounting method for Execution Venue ATSS exclusively trading OTC Equity Securities and FINRA. For these alternatives, the Operating Committee considered how each alternative would affect the recovery allocations. In

⁶⁸ Section 11.2(b) of the CAT NMS Plan.

⁶⁹ See Suspension Order at 31664–5.

⁷⁰ Suspension Order at 31664–5.

addition, each of these options was considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee did not adopt a separate tier structure for Equity Execution Venues trading OTC Equity Securities as they determined that the proposed discount approach appropriately addresses the concern. The Operating Committee determined to adopt the proposed discount because it directly relates to the concern regarding the trading patterns and operations in the OTC Equity Securities markets, and is an objective discounting method.

By increasing the number of tiers for Equity Execution Venues and imposing a discount on the market share of share volume calculation for trading in OTC Equity Securities, the Operating Committee believes that the proposed fees for Equity Execution Venues would not impose an undue or inappropriate burden on competition under Section 6 or Section 15A of the Exchange Act. Moreover, the Operating Committee believes that the proposed fees appropriately take into account the distinctions in the securities trading operations of different Equity Execution Venues, as required under the funding principles of the CAT NMS Plan.⁷¹ As discussed above, the larger number of tiers more closely tracks the variety of sizes of equity share volume of Equity Execution Venues. In addition, the proposed discount recognizes the different types of trading operations at Equity Execution Venues trading OTC Equity Securities versus those trading NMS Stocks, thereby more closely matching the relative revenue generation by Equity Execution Venues trading OTC Equity Securities to their CAT Fees.

Accordingly, with this Amendment, the Exchange proposes to amend paragraph (b)(2) of the proposed fee schedule to indicate that the market share for Equity ATSS exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF would be discounted. In addition, as discussed above, to address concerns related to smaller ATSS, including those that exclusively trade OTC Equity Securities, the Exchange proposes to amend paragraph (b)(2) of the proposed fee schedule to add two additional tiers for Equity Execution Venues, to establish the percentages and fees for Tiers 3 and 4 as described, and to revise the percentages and fees for Tiers 1 and 2 as described.

⁷¹ Section 11.2(b) of the CAT NMS Plan.

(B) Market Makers

In the Original Proposal, the Operating Committee proposed to include both Options Market Maker quotes and equities market maker quotes in the calculation of total message traffic for such market makers for purposes of tiering for Industry Members (other than Execution Venue ATSS). The Commission and commenters raised questions as to whether the proposed treatment of Options Market Maker quotes may result in an undue or inappropriate burden on competition or may lead to a reduction in market quality.⁷² To address this concern, the Operating Committee determined to discount the Options Market Maker quotes by the trade to quote ratio for options when calculating message traffic for Options Market Makers. Similarly, to avoid disincentives to quoting behavior on the equities side as well, the Operating Committee determined to discount equity market maker quotes by the trade to quote ratio for equities when calculating message traffic for equities market makers.

In the Original Proposal, market maker quotes were treated the same as other message traffic for purposes of tiering for Industry Members (other than Execution Venue ATSS). Commenters noted, however, that charging Industry Members on the basis of message traffic will impact market makers disproportionately because of their continuous quoting obligations. Moreover, in the context of options market makers, message traffic would include bids and offers for every listed options strikes and series, which are not an issue for equities.⁷³ The Operating Committee proposes to address this concern in two ways. First, the Operating Committee proposes to discount Options Market Maker quotes when calculating the Options Market Makers' tier placement. Specifically, the Operating Committee proposes to impose a discount based on the objective measure of the trade to quote ratio for options. Based on available data from June 2016 through June 2017, the trade to quote ratio for options is 0.01%. Second, the Operating Committee proposes to discount equities market maker quotes when calculating the equities market makers' tier placement. Specifically, the Operating Committee proposes to impose a discount based on the

⁷² See Suspension Order at 31663-4; SIFMA Letter at 4-6; FIA Principal Traders Group Letter at 3; Sidley Letter at 2-6; Group One Letter at 2-6; and Belvedere Letter at 2.

⁷³ Suspension Order at 31664.

objective measure of the trade to quote ratio for equities. Based on available data for June 2016 through June 2017, this trade to quote ratio for equities is 5.43%.

The practical effect of applying such discounts for quoting activity is to shift market makers' calculated message traffic lower, leading to the potential shift to tiers for lower message traffic and reduced fees. Such an approach would move sixteen Industry Member CAT Reporters that are market makers to a lower tier than in the Original Proposal. For example, under the Original Proposal, Broker-Dealer Firm ABC was placed in the first CAT Fee tier, which had a quarterly fee of \$101,004. With the imposition of the proposed tier changes and the discount, Broker-Dealer Firm ABC, an options market maker, would be ranked in Tier 3 and would owe a quarterly fee of \$40,899.

In developing the proposed market maker discounts, the Operating Committee considered various discounts for Options Market Makers and equity market makers, including discounts of 50%, 25%, 0.00002%, as well as the 5.43% for option market makers and 0.01% for equity market makers. Each of these options were considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined to adopt the proposed discount because it directly relates to the concern regarding the quoting requirement, is an objective discounting method, and has the desired potential to shift market makers to lower fee tiers.

By imposing a discount on Options Market Makers and equities market makers' quoting traffic for the calculation of message traffic, the Operating Committee believes that the proposed fees for market makers would not impose an undue or inappropriate burden on competition under Section 6 or Section 15A of the Exchange Act. Moreover, the Operating Committee believes that the proposed fees appropriately take into account the distinctions in the securities trading operations of different Industry Members, and avoid disincentives, such as a reduction in market quality, as required under the funding principles of the CAT NMS Plan.⁷⁴ The proposed discounts recognize the different types of trading operations presented by Options Market Makers and equities market makers, as well as the value of

⁷⁴ Section 11.2(b) of the CAT NMS Plan.

the market makers' quoting activity to the market as a whole. Accordingly, the Operating Committee believes that the proposed discounts will not impact the ability of small Options Market Makers or equities market makers to provide liquidity.

Accordingly, with this Amendment, the Exchange proposes to amend paragraph (b)(1) of the proposed fee schedule to indicate that the message traffic related to equity market maker quotes and Options Market Maker quotes would be discounted. In addition, the Exchange proposes to define the term "Options Market Maker" in paragraph (a)(1) of the proposed fee schedule.

(C) Comparability/Allocation of Costs

Under the Original Proposal, 75% of CAT costs were allocated to Industry Members (other than Execution Venue ATSS) and 25% of CAT costs were allocated to Execution Venues. This cost allocation sought to maintain the greatest level of comparability across the funding model, where comparability considered affiliations among or between CAT Reporters. The Commission and commenters expressed concerns regarding whether the proposed 75%/25% allocation of CAT costs is consistent with the Plan's funding principles and the Exchange Act, including whether the allocation places a burden on competition or reduces market quality. The Commission and commenters also questioned whether the approach of accounting for affiliations among CAT Reporters in setting CAT Fees disadvantages non-affiliated CAT Reporters or otherwise burdens competition in the market for trading services.⁷⁵

In response to these concerns, the Operating Committee determined to revise the proposed funding model to focus the comparability of CAT Fees on the individual entity level, rather than primarily on the comparability of affiliated entities. In light of the interconnected nature of the various aspects of the funding model, the Operating Committee determined to revise various aspects of the model to enhance comparability at the individual entity level. Specifically, to achieve such comparability, the Operating Committee determined to (1) decrease the number of tiers for Industry Members (other than Execution Venue ATSS) from nine to seven; (2) change the allocation of CAT costs between Equity

Execution Venues and Options Execution Venues from 75%/25% to 67%/33%; and (3) adjust tier percentages and recovery allocations for Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSS). With these changes, the proposed funding model provides fee comparability for the largest individual entities, with the largest Industry Members (other than Execution Venue ATSS), Equity Execution Venues and Options Execution Venues each paying a CAT Fee of approximately \$81,000 each quarter.

(i) Number of Industry Member Tiers

In the Original Proposal, the proposed funding model had nine tiers for Industry Members (other than Execution Venue ATSS). The Operating Committee determined that reducing the number of tiers from nine tiers to seven tiers (and adjusting the predefined Industry Member Percentages as well) continues to provide a fair allocation of fees among Industry Members and appropriately distinguishes between Industry Members with differing levels of message traffic. In reaching this conclusion, the Operating Committee considered historical message traffic generated by Industry Members across all exchanges and as submitted to FINRA's OATS, and considered the distribution of firms with similar levels of message traffic, grouping together firms with similar levels of message traffic. Based on this, the Operating Committee determined that seven tiers would group firms with similar levels of message traffic, while also achieving greater comparability in the model for the individual CAT Reporters with the greatest market share or message traffic.

In developing the proposed seven tier structure, the Operating Committee considered remaining at nine tiers, as well as reducing the number of tiers down to seven when considering how to address the concerns raised regarding comparability. For each of the alternatives, the Operating Committee considered the assignment of various percentages of Industry Members to each tier as well as various percentages of Industry Member recovery allocations for each alternative. Each of these options was considered in the context of its effects on the full funding model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined that the seven tier alternative provided the most fee comparability at the individual entity level for the largest CAT Reporters,

while both providing logical breaks in tiering for Industry Members with different levels of message traffic and a sufficient number of tiers to provide for the full spectrum of different levels of message traffic for all Industry Members.

(ii) Allocation of CAT Costs Between Equity and Options Execution Venues

The Operating Committee also determined to adjust the allocation of CAT costs between Equity Execution Venues and Options Execution Venues to enhance comparability at the individual entity level. In the Original Proposal, 75% of Execution Venue CAT costs were allocated to Equity Execution Venues, and 25% of Execution Venue CAT costs were allocated to Options Execution Venues. To achieve the goal of increased comparability at the individual entity level, the Operating Committee analyzed a range of alternative splits for revenue recovery between Equity and Options Execution Venues, along with other changes in the proposed funding model. Based on this analysis, the Operating Committee determined to allocate 67 percent of Execution Venue costs recovered to Equity Execution Venues and 33 percent to Options Execution Venues. The Operating Committee determined that a 67/33 allocation between Equity and Options Execution Venues enhances the level of fee comparability for the largest CAT Reporters. Specifically, the largest Equity and Options Execution Venues would pay a quarterly CAT Fee of approximately \$81,000.

In developing the proposed allocation of CAT costs between Equity and Options Execution Venues, the Operating Committee considered various different options for such allocation, including keeping the original 75%/25% allocation, as well as shifting to a 70%/30%, 67%/33%, or 57.75%/42.25% allocation. For each of the alternatives, the Operating Committee considered the effect each allocation would have on the assignment of various percentages of Equity Execution Venues to each tier as well as various percentages of Equity Execution Venue recovery allocations for each alternative. Moreover, each of these options was considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined that the 67%/33% allocation between Equity and Options Execution Venues provided the greatest level of fee comparability at the individual entity level for the largest

⁷⁵ See Suspension Order at 31662-3; SIFMA Letter at 3; Sidley Letter at 6-7; Group One Letter at 2; and Belvedere Letter at 2.

CAT Reporters, while still providing for appropriate fee levels across all tiers for all CAT Reporters.

(iii) Allocation of Costs Between Execution Venues and Industry Members

The Operating Committee determined to allocate 25% of CAT costs to Execution Venues and 75% to Industry Members (other than Execution Venue ATs), as it had in the Original Proposal. The Operating Committee determined that this 75%/25% allocation, along with the other changes proposed above, led to the most comparable fees for the largest Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATs). The largest Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATs) would each pay a quarterly CAT Fee of approximately \$81,000.

As a preliminary matter, the Operating Committee determined that it is appropriate to allocate most of the costs to create, implement and maintain the CAT to Industry Members for several reasons. First, there are many more broker-dealers expected to report to the CAT than Participants (*i.e.*, 1,541 broker-dealer CAT Reporters versus 22 Participants). Second, since most of the costs to process CAT reportable data is generated by Industry Members, Industry Members could be expected to contribute toward such costs. Finally, as noted by the SEC, the CAT “substantially enhance[s] the ability of the SROs and the Commission to oversee today’s securities markets,”⁷⁶ thereby benefitting all market participants. After making this determination, the Operating Committee analyzed several different cost allocations, as discussed further below, and determined that an allocation where 75% of the CAT costs should be borne by the Industry Members (other than Execution Venue ATs) and 25% should be paid by Execution Venues was most appropriate and led to the greatest comparability of CAT Fees for the largest CAT Reporters.

In developing the proposed allocation of CAT costs between Execution Venues and Industry Members (other than Execution Venue ATs), the Operating Committee considered various different options for such allocation, including keeping the original 75%/25% allocation, as well as shifting to an 80%/20%, 70%/30%, or 65%/35%

allocation. Each of these options was considered in the context of the full model, including the effect on each of the changes discussed above, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. In particular, for each of the alternatives, the Operating Committee considered the effect each allocation had on the assignment of various percentages of Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATs) to each relevant tier as well as various percentages of recovery allocations for each tier. The Operating Committee determined that the 75%/25% allocation between Execution Venues and Industry Members (other than Execution Venue ATs) provided the greatest level of fee comparability at the individual entity level for the largest CAT Reporters, while still providing for appropriate fee levels across all tiers for all CAT Reporters.

(iv) Affiliations

The funding principles set forth in Section 11.2 of the Plan require that the fees charged to CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether Execution Venue and/or Industry Members). The proposed funding model satisfies this requirement. As discussed above, under the proposed funding model, the largest Equity Execution Venues, Options Execution Venues, and Industry Members (other than Execution Venue ATs) pay approximately the same fee. Moreover, the Operating Committee believes that the proposed funding model takes into consideration affiliations between or among CAT Reporters as complexes with multiple CAT Reporters will pay the appropriate fee based on the proposed fee schedule for each of the CAT Reporters in the complex. For example, a complex with a Tier 1 Equity Execution Venue and Tier 2 Industry Member will pay the same as another complex with a Tier 1 Equity Execution Venue and Tier 2 Industry Member.

(v) Fee Schedule Changes

Accordingly, with this Amendment, the Exchange proposes to amend paragraphs (b)(1) and (2) of the proposed fee schedule to reflect the changes discussed in this section. Specifically, the Exchange proposes to amend paragraph (b)(1) and (2) of the

proposed fee schedule to update the number of tiers, and the fees and percentages assigned to each tier to reflect the described changes.

(D) Market Share/Message Traffic

In the Original Proposal, the Operating Committee proposed to charge Execution Venues based on market share and Industry Members (other than Execution Venue ATs) based on message traffic. Commenters questioned the use of the two different metrics for calculating CAT Fees.⁷⁷ The Operating Committee continues to believe that the proposed use of market share and message traffic satisfies the requirements of the Exchange Act and the funding principles set forth in the CAT NMS Plan. Accordingly, the proposed funding model continues to charge Execution Venues based on market share and Industry Members (other than Execution Venue ATs) based on message traffic.

In drafting the Plan and the Original Proposal, the Operating Committee expressed the view that the correlation between message traffic and size does not apply to Execution Venues, which they described as producing similar amounts of message traffic regardless of size. The Operating Committee believed that charging Execution Venues based on message traffic would result in both large and small Execution Venues paying comparable fees, which would be inequitable, so the Operating Committee determined that it would be more appropriate to treat Execution Venues differently from Industry Members in the funding model. Upon a more detailed analysis of available data, however, the Operating Committee noted that Execution Venues have varying levels of message traffic. Nevertheless, the Operating Committee continues to believe that a bifurcated funding model—where Industry Members (other than Execution Venue ATs) are charged fees based on message traffic and Execution Venues are charged based on market share—complies with the Plan and meets the standards of the Exchange Act for the reasons set forth below.

Charging Industry Members based on message traffic is the most equitable means for establishing fees for Industry Members (other than Execution Venue ATs). This approach will assess fees to Industry Members that create larger volumes of message traffic that are relatively higher than those fees charged to Industry Members that create smaller volumes of message traffic. Since

⁷⁶ Securities Exchange Act Rel. No. 67457 (Jul 18, 2012), 77 FR 45722, 45726 (Aug. 1, 2012) (“Rule 613 Adopting Release”).

⁷⁷ Suspension Order at 31663; FIA Principal Traders Group Letter at 2.

message traffic, along with fixed costs of the Plan Processor, is a key component of the costs of operating the CAT, message traffic is an appropriate criterion for placing Industry Members in a particular fee tier.

The Operating Committee also believes that it is appropriate to charge Execution Venues CAT Fees based on their market share. In contrast to Industry Members (other than Execution Venue ATs), which determine the degree to which they produce the message traffic that constitutes CAT Reportable Events, the CAT Reportable Events of Execution Venues are largely derivative of quotations and orders received from Industry Members that the Execution Venues are required to display. The business model for Execution Venues, however, is focused on executions in their markets. As a result, the Operating Committee believes that it is more equitable to charge Execution Venues based on their market share rather than their message traffic.

Similarly, focusing on message traffic would make it more difficult to draw distinctions between large and small exchanges, including options exchanges in particular. For instance, the Operating Committee analyzed the message traffic of Execution Venues and Industry Members for the period of April 2017 to June 2017 and placed all CAT Reporters into a nine-tier framework (*i.e.*, a single tier may include both Execution Venues and Industry Members). The Operating Committee's analysis found that the majority of exchanges (15 total) were grouped in Tiers 1 and 2. Moreover, virtually all of the options exchanges were in Tiers 1 and 2.⁷⁸ Given the concentration of options exchanges in Tiers 1 and 2, the Operating Committee believes that using a funding model based purely on message traffic would make it more difficult to distinguish between large and small options exchanges, as compared to the proposed bifurcated fee approach.

In addition, the Operating Committee also believes that it is appropriate to treat ATs as Execution Venues under the proposed funding model since ATs have business models that are similar to those of exchanges, and ATs also compete with exchanges. For these reasons, the Operating Committee believes that charging Execution Venues based on market share is more appropriate and equitable than charging

Execution Venues based on message traffic.

(E) Time Limit

In the Original Proposal, the Operating Committee did not impose any time limit on the application of the proposed CAT Fees. As discussed above, the Operating Committee developed the proposed funding model by analyzing currently available historical data. Such historical data, however, is not as comprehensive as data that will be submitted to the CAT. Accordingly, the Operating Committee believes that it will be appropriate to revisit the funding model once CAT Reporters have actual experience with the funding model. Accordingly, the Operating Committee proposes to include a sunset provision in the proposed fee model. The proposed CAT Fees will sunset two years after the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. Specifically, the Exchange proposes to add paragraph (d) of the proposed fee schedule to include this sunset provision. Such a provision will provide the Operating Committee and other market participants with the opportunity to reevaluate the performance of the proposed funding model.

(F) Tier Structure/Decreasing Cost per Unit

In the Original Proposal, the Operating Committee determined to use a tiered fee structure. The Commission and commenters questioned whether the decreasing cost per additional unit (of message traffic in the case of Industry Members, or of share volume in the case of Execution Venues) in the proposed fee schedules burdens competition by disadvantaging small Industry Members and Execution Venues and/or by creating barriers to entry in the market for trading services and/or the market for broker-dealer services.⁷⁹

The Operating Committee does not believe that decreasing cost per additional unit in the proposed fee schedules places an unfair competitive burden on Small Industry Members and Execution Venues. While the cost per unit of message traffic or share volume necessarily will decrease as volume increases in any tiered fee model using fixed fee percentages and, as a result, Small Industry Members and small Execution Venues may pay a larger fee per message or share, this comment fails to take account of the substantial differences in the absolute fees paid by

Small Industry Members and small Execution Venues as opposed to large Industry Members and large Execution Venues. For example, under the fee proposals, Tier 7 Industry Members would pay a quarterly fee of \$105, while Tier 1 Industry Members would pay a quarterly fee of \$81,483. Similarly, a Tier 4 Equity Execution Venue would pay a quarterly fee of \$129, while a Tier 1 Equity Execution Venue would pay a quarterly fee of \$81,048. Thus, Small Industry Members and small Execution Venues are not disadvantaged in terms of the total fees that they actually pay. In contrast to a tiered model using fixed fee percentages, the Operating Committee believes that strictly variable or metered funding models based on message traffic or share volume would be more likely to affect market behavior and may present administrative challenges (*e.g.*, the costs to calculate and monitor fees may exceed the fees charged to the smallest CAT Reporters).

(G) Other Alternatives Considered

In addition to the various funding model alternatives discussed above regarding discounts, number of tiers and allocation percentages, the Operating Committee also discussed other possible funding models. For example, the Operating Committee considered allocating the total CAT costs equally among each of the Participants, and then permitting each Participant to charge its own members as it deems appropriate.⁸⁰ The Operating Committee determined that such an approach raised a variety of issues, including the likely inconsistency of the ensuing charges, potential for lack of transparency, and the impracticality of multiple SROs submitting invoices for CAT charges. The Operating Committee therefore determined that the proposed funding model was preferable to this alternative.

(H) Industry Member Input

Commenters expressed concern regarding the level of Industry Member input into the development of the proposed funding model, and certain commenters have recommended a greater role in the governance of the CAT.⁸¹ The Participants previously addressed this concern in its letters responding to comments on the Plan and the CAT Fees.⁸² As discussed in

⁸⁰ See FIA Principal Traders Group Letter at 2; Belvedere Letter at 4.

⁸¹ See Suspension Order at 31662; MFA Letter at 1-2.

⁸² Letter from Participants to Brent J. Fields, Secretary, SEC (Sept. 23, 2016) ("Plan Response Letter"); Letter from CAT NMS Plan Participants to

⁷⁸ The Participants note that this analysis did not place MIAX PEARL in Tier 1 or Tier 2 since the exchange commenced trading on February 6, 2017.

⁷⁹ Suspension Order at 31667.

those letters, the Participants discussed the funding model with the Development Advisory Group (“DAG”), the advisory group formed to assist in the development of the Plan, during its original development.⁸³ Moreover, Industry Members currently have a voice in the affairs of the Operating Committee and operation of the CAT generally through the Advisory Committee established pursuant to Rule 613(b)(7) and Section 4.13 of the Plan. The Advisory Committee attends all meetings of the Operating Committee, as well as meetings of various subcommittees and working groups, and provides valuable and critical input for the Participants’ and Operating Committee’s consideration. The Operating Committee continues to believe that that Industry Members have an appropriate voice regarding the funding of the Company.

(I) Conflicts of Interest

Commenters also raised concerns regarding Participant conflicts of interest in setting the CAT Fees.⁸⁴ The Participants previously responded to this concern in both the Plan Response Letter and the Fee Rule Response Letter.⁸⁵ As discussed in those letters, the Plan, as approved by the SEC, adopts various measures to protect against the potential conflicts issues raised by the Participants’ fee-setting authority. Such measures include the operation of the Company as a not for profit business league and on a break-even basis, and the requirement that the Participants file all CAT Fees under Section 19(b) of the Exchange Act. The Operating Committee continues to believe that these measures adequately protect against concerns regarding conflicts of interest in setting fees, and that additional measures, such as an independent third party to evaluate an appropriate CAT Fee, are unnecessary.

(J) Fee Transparency

Commenters also argued that they could not adequately assess whether the CAT Fees were fair and equitable because the Operating Committee has not provided details as to what the Participants are receiving in return for the CAT Fees.⁸⁶ The Operating Committee provided a detailed

discussion of the proposed funding model in the Plan, including the expenses to be covered by the CAT Fees. In addition, the agreement between the Company and the Plan Processor sets forth a comprehensive set of services to be provided to the Company with regard to the CAT. Such services include, without limitation: user support services (e.g., a help desk); tools to allow each CAT Reporter to monitor and correct their submissions; a comprehensive compliance program to monitor CAT Reporters’ adherence to Rule 613; publication of detailed Technical Specifications for Industry Members and Participants; performing data linkage functions; creating comprehensive data security and confidentiality safeguards; creating query functionality for regulatory users (i.e., the Participants, and the SEC and SEC staff); and performing billing and collection functions. The Operating Committee further notes that the services provided by the Plan Processor and the costs related thereto were subject to a bidding process.

(K) Funding Authority

Commenters also questioned the authority of the Operating Committee to impose CAT Fees on Industry Members.⁸⁷ The Participants previously responded to this same comment in the Plan Response Letter and the Fee Rule Response Letter.⁸⁸ As the Participants previously noted, SEC Rule 613 specifically contemplates broker-dealers contributing to the funding of the CAT. In addition, as noted by the SEC, the CAT “substantially enhance[s] the ability of the SROs and the Commission to oversee today’s securities markets,”⁸⁹ thereby benefitting all market participants. Therefore, the Operating Committee continues to believe that it is equitable for both Participants and Industry Members to contribute to funding the cost of the CAT.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with the provisions of Section 6(b)(5) of the Act,⁹⁰ which require, among other things, that the Exchange rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest, and not designed to

permit unfair discrimination between customers, issuers, brokers and dealers, and Section 6(b)(4) of the Act,⁹¹ which requires that Exchange rules provide for equitable allocation of reasonable dues, fees and other charges among its members and issuers and other persons using its facilities. As discussed above, the SEC approved the bifurcated, tiered, fixed fee funding model in the CAT NMS Plan, finding it was reasonable and that it equitably allocated fees among Participants and Industry Members. The Exchange believes that the proposed tiered fees adopted pursuant to the funding model approved by the SEC in the CAT NMS Plan are reasonable, equitably allocated and not unfairly discriminatory.

The Exchange believes that this proposal is consistent with the Act because it implements, interprets or clarifies the provisions of the Plan, and is designed to assist the Exchange and its Industry Members in meeting regulatory obligations pursuant to the Plan. In approving the Plan, the SEC noted that the Plan “is necessary and appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanism of a national market system, or is otherwise in furtherance of the purposes of the Act.”⁹² To the extent that this proposal implements, interprets or clarifies the Plan and applies specific requirements to Industry Members, the Exchange believes that this proposal furthers the objectives of the Plan, as identified by the SEC, and is therefore consistent with the Act.

The Exchange believes that the proposed tiered fees are reasonable. First, the total CAT Fees to be collected would be directly associated with the costs of establishing and maintaining the CAT, where such costs include Plan Processor costs and costs related to insurance, third party services and the operational reserve. The CAT Fees would not cover Participant services unrelated to the CAT. In addition, any surplus CAT Fees cannot be distributed to the individual Participants; such surpluses must be used as a reserve to offset future fees. Given the direct relationship between the fees and the CAT costs, the Exchange believes that the total level of the CAT Fees is reasonable.

In addition, the Exchange believes that the proposed CAT Fees are reasonably designed to allocate the total costs of the CAT equitably between and

Brent J. Fields, Secretary, SEC (June 29, 2017) (“Fee Rule Response Letter”).

⁸³ Fee Rule Response Letter at 2; Plan Response Letter at 18.

⁸⁴ See Suspension Order at 31662; FIA Principal Traders Group at 3.

⁸⁵ See Plan Response Letter at 16, 17; Fee Rule Response Letter at 10–12.

⁸⁶ See FIA Principal Traders Group at 3; SIFMA Letter at 3.

⁸⁷ See Suspension Order at 31661–2; SIFMA Letter at 2.

⁸⁸ See Plan Response Letter at 9–10; Fee Rule Response Letter at 3–4.

⁸⁹ Rule 613 Adopting Release at 45726.

⁹⁰ 15 U.S.C. 78f(b)(5).

⁹¹ 15 U.S.C. 78f(b)(4).

⁹² Approval Order at 84697.

among the Participants and Industry Members, and are therefore not unfairly discriminatory. As discussed in detail above, the proposed tiered fees impose comparable fees on similarly situated CAT Reporters. For example, those with a larger impact on the CAT (measured via message traffic or market share) pay higher fees, whereas CAT Reporters with a smaller impact pay lower fees. Correspondingly, the tiered structure lessens the impact on smaller CAT Reporters by imposing smaller fees on those CAT Reporters with less market share or message traffic. In addition, the fee structure takes into consideration distinctions in securities trading operations of CAT Reporters, including ATSS trading OTC Equity Securities, and equity and options market makers.

Moreover, the Exchange believes that the division of the total CAT costs between Industry Members and Execution Venues, and the division of the Execution Venue portion of total costs between Equity and Options Execution Venues, is reasonably designed to allocate CAT costs among CAT Reporters. The 75%/25% division between Industry Members (other than Execution Venue ATSS) and Execution Venues maintains the greatest level of comparability across the funding model. For example, the cost allocation establishes fees for the largest Industry Members (*i.e.*, those Industry Members in Tier 1) that are comparable to the largest Equity Execution Venues and Options Execution Venues (*i.e.*, those Execution Venues in Tier 1).

Furthermore, the allocation of total CAT cost recovery recognizes the difference in the number of CAT Reporters that are Industry Members (other than Execution Venue ATSS) versus CAT Reporters that are Execution Venues. Similarly, the 67%/33% allocation between Equity and Options Execution Venues also helps to provide fee comparability for the largest CAT Reporters.

Finally, the Exchange believes that the proposed fees are reasonable because they would provide ease of calculation, ease of billing and other administrative functions, and predictability of a fixed fee. Such factors are crucial to estimating a reliable revenue stream for the Company and for permitting CAT Reporters to reasonably predict their payment obligations for budgeting purposes.

B. Self-Regulatory Organization's Statement on Burden on Competition

Section 6(b)(8) of the Act⁹³ requires that Exchange rules not impose any burden on competition that is not

necessary or appropriate. The Exchange does not believe that the proposed amendments to its Fee Schedule will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange notes that the proposed rule change implements provisions of the CAT NMS Plan approved by the Commission, and is designed to assist the Exchange in meeting its regulatory obligations pursuant to the Plan. Similarly, all national securities exchanges and FINRA are proposing this proposed fee schedule to implement the requirements of the CAT NMS Plan. Therefore, this is not a competitive fee filing and, therefore, it does not raise competition issues between and among the exchanges and FINRA.

Moreover, as previously described, the Exchange believes that the proposed rule change fairly and equitably allocates costs among CAT Reporters. In particular, the proposed fee schedule is structured to impose comparable fees on similarly situated CAT Reporters, and lessen the impact on smaller CAT Reporters. CAT Reporters with similar levels of CAT activity will pay similar fees. For example, Industry Members (other than Execution Venue ATSS) with higher levels of message traffic will pay higher fees, and those with lower levels of message traffic will pay lower fees. Similarly, Execution Venue ATSS and other Execution Venues with larger market share will pay higher fees, and those with lower levels of market share will pay lower fees. Therefore, given that there is generally a relationship between message traffic and/or market share to the CAT Reporter's size, smaller CAT Reporters generally pay less than larger CAT Reporters. Accordingly, the Exchange does not believe that the CAT Fees would have a disproportionate effect on smaller or larger CAT Reporters. In addition, ATSS and exchanges will pay the same fees based on market share. Therefore, the Exchange does not believe that the fees will impose any burden on the competition between ATSS and exchanges. Accordingly, the Exchange believes that the proposed fees will minimize the potential for adverse effects on competition between CAT Reporters in the market.

Furthermore, the tiered, fixed fee funding model limits the disincentives to providing liquidity to the market. Therefore, the proposed fees are structured to limit burdens on competitive quoting and other liquidity provision in the market.

In addition, the Operating Committee believes that the proposed changes to

the Original Proposal, as discussed above in detail, address certain competitive concerns raised by commenters, including concerns related to, among other things, smaller ATSS, ATSS trading OTC Equity Securities, market making quoting and fee comparability. As discussed above, the Operating Committee believes that the proposals address the competitive concerns raised by commenters.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Solicitation of Comments on Amendment No. 1

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment No. 1 is consistent with the Act. In particular, the Commission seeks comment on the following:

Allocation of Costs

(1) Commenters' views as to whether the allocation of CAT costs is consistent with the funding principle expressed in the CAT NMS Plan that requires the Operating Committee to "avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality."⁹⁴

(2) Commenters' views as to whether the allocation of 25% of CAT costs to the Execution Venues (including all the Participants) and 75% to Industry Members, will incentivize or disincentivize the Participants to effectively and efficiently manage the CAT costs incurred by the Participants since they will only bear 25% of such costs.

(3) Commenters' views on the determination to allocate 75% of all costs incurred by the Participants from November 21, 2016 to November 21, 2017 to Industry Members (other than Execution Venue ATSS), when such costs are development and build costs and when Industry Member reporting is scheduled to commence a year later, including views on whether such "fees, costs and expenses . . . [are] fairly and reasonably shared among the Participants and Industry Members" in accordance with the CAT NMS Plan.⁹⁵

(4) Commenters' views on whether an analysis of the ratio of the expected Industry Member-reported CAT messages to the expected SRO-reported

⁹³ 15 U.S.C. 78f(b)(8).

⁹⁴ Section 11.2(e) of the CAT NMS Plan.

⁹⁵ Section 11.1(c) of the CAT NMS Plan.

CAT messages should be the basis for determining the allocation of costs between Industry Members and Execution Venues.⁹⁶

(5) Any additional data analysis on the allocation of CAT costs, including any existing supporting evidence.

Comparability

(6) Commenters' views on the shift in the standard used to assess the comparability of CAT Fees, with the emphasis now on comparability of individual entities instead of affiliated entities, including views as to whether this shift is consistent with the funding principle expressed in the CAT NMS Plan that requires the Operating Committee to establish a fee structure in which the fees charged to "CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether Execution Venues and/or Industry Members)."⁹⁷

(7) Commenters' views as to whether the reduction in the number of tiers for Industry Members (other than Execution Venue ATs) from nine to seven, the revised allocation of CAT costs between Equity Execution Venues and Options Execution Venues from a 75%/25% split to a 67%/33% split, and the adjustment of all tier percentages and recovery allocations achieves comparability across individual entities, and whether these changes should have resulted in a change to the allocation of 75% of total CAT costs to Industry Members (other than Execution Venue ATs) and 25% of such costs to Execution Venues.

Discounts

(8) Commenters' views as to whether the discounts for options market-makers, equities market-makers, and Equity ATs trading OTC Equity Securities are clear, reasonable, and consistent with the funding principle expressed in the CAT NMS Plan that requires the Operating Committee to "avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality,"⁹⁸ including views as to

⁹⁶ The Notice for the CAT NMS Plan did not provide a comprehensive count of audit trail message traffic from different regulatory data sources, but the Commission did estimate the ratio of all SRO audit trail messages to OATS audit trail messages to be 1.9431. See Securities Exchange Act Release No. 77724 (April 27, 2016), 81 FR 30613, 30721 n.919 and accompanying text (May 17, 2016).

⁹⁷ Section 11.2(c) of the CAT NMS Plan.

⁹⁸ Section 11.2(e) of the CAT NMS Plan.

whether the discounts for market-makers limit any potential disincentives to act as a market-maker and/or to provide liquidity due to CAT fees.

Calculation of Costs and Imposition of CAT Fees

(9) Commenters' views as to whether the amendment provides sufficient information regarding the amount of costs incurred from November 21, 2016 to November 21, 2017, particularly, how those costs were calculated, how those costs relate to the proposed CAT Fees, and how costs incurred after November 21, 2017 will be assessed upon Industry Members and Execution Venues;

(10) Commenters' views as to whether the timing of the imposition and collection of CAT Fees on Execution Venues and Industry Members is reasonably related to the timing of when the Company expects to incur such development and implementation costs.⁹⁹

(11) Commenters' views on dividing CAT costs equally among each of the Participants, and then each Participant charging its own members as it deems appropriate, taking into consideration the possibility of inconsistency in charges, the potential for lack of transparency, and the impracticality of multiple SROs submitting invoices for CAT charges.

Burden on Competition and Barriers to Entry

(12) Commenters' views as to whether the allocation of 75% of CAT costs to Industry Members (other than Execution Venue ATs) imposes any burdens on competition to Industry Members, including views on what baseline competitive landscape the Commission should consider when analyzing the proposed allocation of CAT costs.

(13) Commenters' views on the burdens on competition, including the relevant markets and services and the impact of such burdens on the baseline competitive landscape in those relevant markets and services.

(14) Commenters' views on any potential burdens imposed by the fees on competition between and among CAT Reporters, including views on which baseline markets and services the fees could have competitive effects on and whether the fees are designed to minimize such effects.

(15) Commenters' general views on the impact of the proposed fees on economies of scale and barriers to entry.

(16) Commenters' views on the baseline economies of scale and barriers to entry for Industry Members and

Execution Venues and the relevant markets and services over which these economies of scale and barriers to entry exist.

(17) Commenters' views as to whether a tiered fee structure necessarily results in less active tiers paying more per unit than those in more active tiers, thus creating economies of scale, with supporting information if possible.

(18) Commenters' views as to how the level of the fees for the least active tiers would or would not affect barriers to entry.

(19) Commenters' views on whether the difference between the cost per unit (messages or market share) in less active tiers compared to the cost per unit in more active tiers creates regulatory economies of scale that favor larger competitors and, if so:

(a) How those economies of scale compare to operational economies of scale; and

(b) Whether those economies of scale reduce or increase the current advantages enjoyed by larger competitors or otherwise alter the competitive landscape.

(20) Commenters' views on whether the fees could affect competition between and among national securities exchanges and FINRA, in light of the fact that implementation of the fees does not require the unanimous consent of all such entities, and, specifically:

(a) Whether any of the national securities exchanges or FINRA are disadvantaged by the fees; and

(b) If so, whether any such disadvantages would be of a magnitude that would alter the competitive landscape.

(21) Commenters' views on any potential burden imposed by the fees on competitive quoting and other liquidity provision in the market, including, specifically:

(a) Commenters' views on the kinds of disincentives that discourage liquidity provision and/or disincentives that the Commission should consider in its analysis;

(b) Commenters' views as to whether the fees could disincentivize the provision of liquidity; and

(c) Commenters' views as to whether the fees limit any disincentives to provide liquidity.

(22) Commenters' views as to whether the amendment adequately responds to and/or addresses comments received on related filings.

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or

⁹⁹ Section 11.1(c) of the CAT NMS Plan.

• Send an email to rule-comments@sec.gov. Please include File Number SR-MIAX-2017-18 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-MIAX-2017-18. 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 website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-MIAX-2017-18, and should be submitted on or before January 4, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁰⁰

Robert W. Errett,
Deputy Secretary.

[FR Doc. 2017-27016 Filed 12-13-17; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-82247; File No. SR-OCC-2017-808]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing of Advance Notice, as Modified by Amendment No. 1, Concerning the Adoption of a New Minimum Cash Requirement for the Clearing Fund

December 8, 2017.

Pursuant to Section 806(e)(1) of Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, entitled Payment, Clearing and Settlement Supervision Act of 2010 ("Clearing Supervision Act")¹ and Rule 19b-4(n)(1)(i) under the Securities Exchange Act of 1934 ("Act"),² notice is hereby given that on November 14, 2017, The Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission ("Commission") an advance notice as described in Items I, II and III below, which Items have been prepared by OCC. On November 22, 2017, OCC filed Amendment No. 1 to the advance notice.³ The Commission is publishing this notice to solicit comments on the advance notice from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Advance Notice

This advance notice is filed in connection with a proposed change would (1) revise OCC's By-Laws to adopt a new minimum cash requirement for the Clearing Fund; (2) revise OCC's By-Laws to provide for the pass-through of interest earned on Clearing Fund cash held in OCC's Federal Reserve bank account; (3) enact changes to OCC's Fee Policy that reflect the pass through of interest earned on Clearing Fund cash held in OCC's Federal Reserve bank account; and (4) make certain conforming changes to OCC's Rules and By-Laws to affect the aforementioned changes.

The proposed changes to OCC's By-Laws and Rules were submitted as Exhibits 5A and 5B of the filing, and OCC's Fee Policy was submitted as

¹ 12 U.S.C. 5465(e)(1).

² 17 CFR 240.19b-4(n)(1)(i).

³ In Amendment No. 1, OCC modified the proposed change to Article VIII, Section 4(a) of the By-Laws to clarify that interest earned on Clearing Fund cash deposits held at a Federal Reserve Bank accruing to the benefit of Clearing Members would be calculated daily based on each Clearing Member's pro rata share of Clearing Fund cash. OCC did not propose any other changes to the filing in Amendment No. 1.

confidential Exhibit 5C of the filing.⁴ The proposed change is described in detail in Item 10 below. All terms with initial capitalization not defined herein have the same meaning as set forth in OCC's By-Laws and Rules.⁵

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Advance Notice

In its filing with the Commission, OCC included statements concerning the purpose of and basis for the advance notice and discussed any comments it received on the advance notice. The text of these statements may be examined at the places specified in Item IV below. OCC has prepared summaries, set forth in sections A and B below, of the most significant aspects of these statements.

(A) Clearing Agency's Statement on Comments on the Advance Notice Received From Members, Participants or Others

Written comments were not and are not intended to be solicited with respect to the proposed rule change and none have been received. OCC will notify the Commission of any written comments received by OCC.

(B) Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing, and Settlement Supervision Act

Description of the Proposed Change

OCC proposes to establish a minimum cash contribution requirement for its Clearing Fund in order to increase the amount of qualifying liquid resources available to OCC to account for extreme scenarios that may result in liquidity demands exceeding OCC's current Cover 1 liquidity resources, as calculated under the current historically-based methodology, and provide for a more consistent level of cash resources in its available prefunded financial resources. The proposed rule change also would provide for the pass-through of interest income earned on such deposits to its Clearing Members. OCC's current practices and the proposed changes to such practices are described in more detail below.

Current Practice

Presently, Article VIII, Section 3(a) of OCC's By-Laws provides that Clearing Fund contributions shall be in the form of cash and Government securities, but neither OCC's By-Laws nor Rules

⁴ OCC has filed a proposed rule change with the Commission in connection with the proposed change. See SR-OCC-2017-019.

⁵ OCC's By-Laws and Rules can be found on OCC's public website: <http://optionsclearing.com/about/publications/bylaws.jsp>.

provides a minimum cash requirement for contributions in the Clearing Fund. Article VIII, Section 4(a) of OCC's By-Laws allows for OCC to invest cash contributions to the Clearing Fund, partially or wholly, in OCC's account in Government securities, and to the extent that such contributions are not so invested they shall be deposited by OCC in a separate account or accounts for Clearing Fund contributions in approved custodians. Article VIII, Section 4(a) of OCC's By-Laws, however, presently does not account for the treatment of interest earned on cash deposits held in the OCC's Federal Reserve bank account.

Proposed Change

1. Minimum Cash Clearing Fund Requirement

OCC proposes to establish a minimum cash contribution requirement for its Clearing Fund in order to increase the amount of highly liquid resources available to OCC to account for extreme scenarios that may result in liquidity demands exceeding OCC's current Cover 1 liquidity resources, as calculated under the current historically-based methodology, and provide for a more consistent level of cash resources in its available prefunded financial resources.⁶ Specifically, the proposed rule change would require that Clearing Members collectively contribute \$3 billion in cash to the Clearing Fund ("Cash Clearing Fund Requirement"). Each Clearing Member's proportionate share of the Cash Clearing Fund Requirement shall be equal in percentage to its proportionate share of the Clearing Fund as determined by the Clearing Fund allocation methodology in current Rule 1001.

OCC has historically sized its liquidity resources based on historically observed liquidity demands and analysis of potential large forecasted liquidity demands over at least the next twelve months. OCC forecasts its future daily settlement activity under normal market conditions (*e.g.*, mark-to-market settlements, and settlements resulting from the expiration of derivatives contracts) and compares such demands to its resources to ensure that at all times it will maintain a positive liquidity position to meet settlement obligations.

⁶ OCC's Current Cover 1 liquidity resources are sized based on the liquidity needed to address exposures derived solely from historical results. Introducing the Cash Clearing Fund Requirement would increase OCC's liquidity resources to address the exposures observed in a stress liquidity analysis performed using proposed sizing stress tests for OCC's Clearing Fund.

OCC has performed an analysis of its stress liquidity demands based on a 1-in-70 year hypothetical market event. OCC started its analysis by selecting the largest historical peak monthly settlements that occurred over the historical look back period of data generated by the stress test system. It then also selected certain large non-expiration days to supplement the analysis. From this it estimated the mark-to-market and cash settled exercise and assignment obligations for the members driving the historical peak demand under the proposed stress tests scenario to determine the stressed peak demand. Through this analysis, OCC observed that peak stressed liquidity demands of the largest 1 or 2 members, which normally occur in conjunction with certain monthly expirations, can exceed the size OCC's committed liquidity facilities (which currently total \$3 billion). In these cases, while OCC did have cash in the Clearing Fund to supplement its liquidity resources, and the total of credit facilities and cash in the Clearing Fund did cover these peak stressed liquidity demands, OCC is unable to rely on these cash contributions to be present at any given time since there is no obligation on members to maintain any amount of their contribution in cash. As a result, OCC believes it is necessary to increase or otherwise ensure the availability of highly liquid resources in the Clearing Fund to account for extreme scenarios that may result in liquidity demands exceeding OCC's Cover 1 liquidity resources, as calculated under the current historically-based methodology. The proposed Cash Clearing Fund Requirement, when taken together with OCC's \$3 billion in committed liquidity facilities, would provide liquidity resources sufficient to cover 100% of the peak stressed liquidity demands of the largest 1 or 2 members observed in OCC's analysis.

In addition, the proposed changes would allow OCC's Executive Chairman, Chief Administrative Officer ("CAO"), or Chief Operating Officer ("COO"), upon providing notice to the Risk Committee, to temporarily increase the amount of cash required to be maintained in the Clearing Fund up to an amount that includes the size of the Clearing Fund as determined in accordance with Rule 1001 for the month in question for the protection of OCC, clearing members or the general public. Any determination by the Executive Chairman, CAO and/or COO to implement a temporary increase in Clearing Fund size would (i) be based upon then-existing facts and

circumstances, (ii) be in furtherance of the integrity of OCC and the stability of the financial system, and (iii) take into consideration the legitimate interests of Clearing Members and market participants.

The proposed rule change would require that any temporary increase in the Cash Clearing Fund Requirement be reviewed by the Risk Committee as soon as practicable, but in any event within 20 calendar days of the increase. In its review, the Risk Committee shall determine whether (1) the increase in the minimum Cash Clearing Fund Requirement is no longer required or (2) OCC's Clearing Fund contribution requirements and other related rules should be modified to ensure that OCC continues to maintain sufficient liquid resources to cover its largest aggregate payment obligations in extreme but plausible market conditions. In the event that the Risk Committee would determine to permanently increase the Cash Clearing Fund Requirement, OCC would initiate any regulatory approval process required to effect such a change.⁷ A Clearing Member will be required to satisfy any increase in its required cash contribution pursuant to an increase in the Cash Clearing Fund Requirement no later than one hour before the close of the Fedwire on the business day following OCC's issuance of an instruction to increase cash contributions.

These changes would be reflected in new paragraph (a)(i) of Section 3 of Article VIII of OCC's By-Laws, as well as in new Interpretation and Policy .04 to Section 3 of Article VIII.

2. Interest Pass Through for Clearing Fund Cash Held at the Federal Reserve

In connection with the proposed Cash Clearing Fund Requirement, substantially all of OCC's Clearing Fund deposits consisting of cash would be held in an account established by OCC at a Federal Reserve Bank.⁸ OCC proposes that it would pass the interest income earned in such account through to its Clearing Members. As a result, OCC proposes to revise Article VIII, Section 4(a) of OCC's By-Laws to include a sentence to provide that any interest earned on cash deposits held at

⁷ However, OCC will not decrease the Cash Clearing Fund Requirement while the regulatory approvals for a change in the Cash Clearing Fund Requirement are being obtained to ensure that OCC continues to maintain sufficient liquid resources to cover its liquidity demands during that time.

⁸ OCC notes that it would retain the discretion to maintain a small portion of Clearing Fund cash deposits in other accounts (*e.g.*, accounts with commercial banks) for various reasons, including facilitating normal substitution activity by its Clearing Members.

a Federal Reserve Bank shall accrue to the benefit of Clearing Members (calculated daily based on each Clearing Member's pro rata share of Clearing Fund cash deposits), provided that such Clearing Members have provided OCC with all tax documentation as OCC may from time to time require in order to effectuate such payment.⁹

3. Changes to the Fee Policy to Accommodate Interest Passed Through to Clearing Members

In order to accommodate the pass through of interest income, OCC would also amend its Fee Policy to add definitions for "Pass-Through Interest Revenue" and "Operating Expenses" to exclude from the calculation of the Business Risk Buffer projected interest revenue and expense, respectively, related to the pass-through of earned interest from OCC to Clearing Members.¹⁰ OCC also proposes to add a new example of the Business Risk Buffer calculation reflecting this change and make clarifying changes throughout the Policy to incorporate the use of the new defined terms. In addition, OCC proposes to amend the Fee Policy to remove references to "Proposed Rule 17Ad-22(e)(15)" to reflect the adoption of the Commission's Covered Clearing Agency Standards.

4. Conforming Changes

In conjunction with the aforementioned changes, OCC is also proposing to make four related conforming changes. First, OCC proposes to revise Interpretation and Policy .01 of Rule 1001 to reflect that the new minimum Clearing Fund size is \$3 billion (instead of \$1 billion) plus 110% of the size of OCC's committed liquidity facilities, which conforms to the proposed new minimum cash requirement for the Clearing Fund. Second, OCC proposes to amend the definition of "Approved Custodian" in Article I, Section 1 of the By-Laws to clarify that the Federal Reserve Bank may also be an Approved Custodian, to the extent it is available to OCC. Third, OCC is proposing to delete existing Article VIII, Section 4(b), regarding the establishment of a segregated funds

account for cash contributions to the Clearing Fund. The segregated funds account allows a Clearing Member to contribute cash to a bank or trust company account maintained in the name of OCC, subject to OCC's exclusive control, but the account also includes the name of the Clearing Member and any interest accrues to the Clearing Member rather than OCC. OCC proposes to eliminate the account type because Clearing Members have not expressed interest in using such an account, no such accounts are in use today, and moving forward, substantially all cash Clearing Fund contributions will be held in OCC's account at the Federal Reserve Bank. Fourth, OCC proposes to introduce new language to Article VIII, Section 4(a) to clarify that cash contributions to the Clearing Fund that are deposited at approved custodians may be commingled with the Clearing Fund contributions of different Clearing Members.

Expected Effect on and Management of Risk

The proposal is expected to improve OCC's liquidity risk management by establishing the Cash Clearing Fund Requirement and by permitting OCC to temporarily increase that requirement. The Cash Clearing Fund Requirement would increase the amount of highly liquid resources available to OCC to account for extreme scenarios that may result in liquidity demands exceeding OCC's current Cover 1 liquidity resources, as calculated under the current historically-based methodology. The Cash Clearing Fund Requirement also would provide a more consistent level of cash resources in OCC's available prefunded financial resources, thereby further strengthening OCC's liquidity risk management.

The proposed ability to allow OCC to temporarily increase its minimum Clearing Fund cash up to an amount that includes the size of the Clearing Fund as determined in accordance with Rule 1001 is expected to enhance OCC's liquidity risk management by providing a process to effectively replenish the liquid resources that OCC may employ during a stress event and would provide OCC with an additional means of addressing liquidity shortfalls that otherwise would not be covered by OCC's liquid resources and would provide a form of replenishment of OCC's liquid resources. OCC recognizes that exercising its authority to increase the minimum amount of cash in the Clearing Fund could potentially impose a liquidity constraint on its clearing members, and for this reason, OCC has

limited its authority to increase the minimum amount of cash in the Clearing Fund to circumstances in which such increase would protect OCC, clearing members or the general public and required that any such increase be based upon then-existing facts and circumstances, be in furtherance of the integrity of OCC and the stability of the financial system, and take into consideration the legitimate interests of clearing members and market participants.

OCC expects that its proposal to pass through interest earned on Clearing Fund cash deposits at a Federal Reserve Bank ultimately may potentially benefit clearing members' by providing them with a comparatively higher rate of return on their deposited cash (as compared to a comparable account with a commercial bank). This potential increased rate of return may ultimately strengthen the financial position of certain of OCC's clearing members.

Consistency With the Clearing Supervision Act

The stated purpose of the Clearing Supervision Act is to mitigate systemic risk in the financial system and promote financial stability by, among other things, promoting uniform risk management standards for systemically important financial market utilities and strengthening the liquidity of systemically important financial market utilities.¹¹

Section 805(a)(2) of the Clearing Supervision Act¹² also authorizes the Commission to prescribe risk management standards for the payment, clearing and settlement activities of designated clearing entities, like OCC, for which the Commission is the supervisory agency. Section 805(b) of the Clearing Supervision Act¹³ states that the objectives and principles for risk management standards prescribed under Section 805(a) shall be to:

- Promote robust risk management;
- promote safety and soundness;
- reduce systemic risks; and
- support the stability of the broader financial system.

The Commission has adopted risk management standards under Section 805(a)(2) of the Clearing Supervision Act and the Act in furtherance of these objectives and principles, including those standards adopted pursuant to the Commission rules cited below.¹⁴ For the

⁹ Article VIII, Section 4(a) currently states that all interest gained on cash Clearing Fund deposits belongs to OCC.

¹⁰ While interest income earned by OCC from its Federal Reserve bank account would be passed on to its Clearing Members, OCC anticipates that it would charge a cash management fee to cover associated costs (*i.e.*, administrative and similar costs). OCC would file a separate proposed rule change with the Commission, subject to receiving all necessary regulatory approvals for the proposed changes described herein, prior to implementing any cash management fee.

¹¹ 12 U.S.C. 5461(b).

¹² 12 U.S.C. 5464(a)(2).

¹³ 12 U.S.C. 5464(b).

¹⁴ 17 CFR 240.17Ad-22. See Securities Exchange Act Release Nos. 68080 (October 22, 2012), 77 FR 66220 (November 2, 2012) (S7-08-11) ("Clearing

reasons set forth below, OCC believes that the proposed change is consistent with the risk management standards promulgated under Section 805(a) of the Clearing Supervision Act.¹⁵

Rule 17Ad–22(e)(7)¹⁶ requires that a covered clearing agency (“CCA”) establish, implement, maintain and enforce written policies and procedures reasonably designed to effectively measure, monitor and manage liquidity risk that arises in or is borne by the CCA. Rule 17Ad–22(e)(7)(i)¹⁷ requires CCAs to establish, implement, maintain, and enforce written policies and procedures reasonably designed to effectively measure, monitor, and manage the liquidity risk that arises in or is borne by OCC by maintaining sufficient liquid resources at the minimum in all relevant currencies to effect same-day settlement, and where appropriate, intraday and multiday settlement of payment obligations with a high degree of confidence under a wide range of stress scenarios, that includes but is not limited to, the default of the participant family that would generate the largest aggregate payment obligation for OCC in extreme but plausible market conditions. As explained above, OCC has performed an analysis of its stress liquidity demands using proposed sizing stress tests for the Clearing Fund and has observed that peak stressed liquidity demands of the largest 1 or 2 members, which normally occur in conjunction with certain monthly expirations, can exceed the size OCC’s committed liquidity facilities (which currently total \$3 billion). OCC believes that the proposed minimum \$3 billion Cash Clearing Fund Requirement will adjust OCC’s available liquidity resources to account for extreme scenarios that may result in liquidity demands exceeding OCC’s Cover 1 liquidity resources. In this regard, OCC believes the proposed Cash Clearing Fund Requirement is designed to satisfy the requirements of Rule 17Ad–22(e)(7)(i).¹⁸

Further, Rule 17Ad–22(e)(7)(viii)¹⁹ requires that a CCA address foreseeable liquidity shortfalls that would not be covered by its liquid resources and Rule

17Ad–22(e)(7)(ix)²⁰ requires that a CCA describe its process to replenish any liquid resources that it may employ during a stress event. OCC believes that the proposed authority to temporarily increase the minimum cash requirement from \$3 billion up to an amount that includes the size of the Clearing Fund (as determined in accordance with Rule 1001 for the month in question) would provide OCC with an additional means of addressing liquidity shortfalls that otherwise would not be covered by OCC’s liquid resources. Further, because the Clearing Fund is a resource that is replenished in accordance with Section 6 of Article VIII of OCC’s By-Laws, to the extent that Clearing Members are required to replenish their required contributions—in whole or in part—with cash following a proportionate charge during, the proposed change would provide a form of replenishment of OCC’s liquid resources. In this regard, OCC believes the proposed authority to require up to an all cash Clearing Fund requirement is designed to satisfy the requirements of Rules 17Ad–22(e)(7)(viii) and (ix).²¹

III. Date of Effectiveness of the Advance Notice and Timing for Commission Action

The proposed change may be implemented if the Commission does not object to the proposed change within 60 days of the later of (i) the date the proposed change was filed with the Commission or (ii) the date any additional information requested by the Commission is received. OCC shall not implement the proposed change if the Commission has any objection to the proposed change.

The Commission may extend the period for review by an additional 60 days if the proposed change raises novel or complex issues, subject to the Commission providing the clearing agency with prompt written notice of the extension. A proposed change may be implemented in less than 60 days from the date the advance notice is filed, or the date further information requested by the Commission is received, if the Commission notifies the clearing agency in writing that it does not object to the proposed change and authorizes the clearing agency to implement the proposed change on an earlier date, subject to any conditions imposed by the Commission.

OCC shall post notice on its website of proposed changes that are implemented.

The proposal shall not take effect until all regulatory actions required with respect to the proposal are completed.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the advance notice is consistent with the Clearing Supervision Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission’s internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR–OCC–2017–808 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

All submissions should refer to File Number SR–OCC–2017–808. 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 website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the advance notice that are filed with the Commission, and all written communications relating to the advance notice between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission’s Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of OCC and on OCC’s website at https://www.theocc.com/components/docs/legal/rules_and_bylaws/sr_occ_17_808.pdf.

All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–OCC–2017–808 and

Agency Standards’); 78961 (September 28, 2016), 81 FR 70786 (October 13, 2016) (S7–03–14) (“Standards for Covered Clearing Agencies”). The Standards for Covered Clearing Agencies became effective on December 12, 2016. OCC is a “covered clearing agency” as defined in Rule 17Ad–22(a)(5) and therefore is subject to section (e) of Rule 17Ad–22.

¹⁵ 12 U.S.C. 5464(b)(1) and (4).

¹⁶ 17 CFR 240.17Ad–22(e)(7).

¹⁷ 17 CFR 240.17Ad–22(e)(7)(i).

¹⁸ 17 CFR 240.17Ad–22(e)(7)(i).

¹⁹ 17 CFR 240.17Ad–22(e)(7)(viii).

²⁰ 17 CFR 240.17Ad–22(e)(7)(ix).

²¹ 17 CFR 240.17Ad–22(e)(7)(viii) and (ix).

should be submitted on or before December 29, 2017.

By the Commission.

Eduardo A. Aleman,
Assistant Secretary.

[FR Doc. 2017-26913 Filed 12-13-17; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-82239; File No. SR-NASDAQ-2017-127]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Exchange's Transaction Fees at Chapter XV, Section 2(1)

December 8, 2017.

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 December 1, 2017, The Nasdaq Stock Market LLC ("Nasdaq" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Exchange's transaction fees at Chapter XV, Section 2(1), which governs the pricing for Nasdaq Participants using the Nasdaq Options Market ("NOM"), Nasdaq's facility for executing and routing standardized equity and index options.

The text of the proposed rule change is available on the Exchange's website at <http://nasdaq.cchwallstreet.com/>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the

places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Exchange's transaction fees at Chapter XV, Section 2(1) to introduce a new NOM Market Maker³ Rebate to Add Liquidity in Non-Penny Pilot Options. Today, the Exchange charges Participants a \$0.35 per contract NOM Market Maker Fee for Adding Liquidity in Non-Penny Pilot Options.⁴ To incentivize Participants to add NOM Market Maker liquidity in Non-Penny Pilot Options, the Exchange offers Participants an opportunity to reduce this \$0.35 per contract fee to \$0.00 per contract, provided the Participant adds NOM Market Maker liquidity in Non-Penny Pilot Options of 7,500 or more ADV contracts per day in a month.⁵

In order to further incentivize NOM Market Makers to transact in Non-Penny Pilot Options on NOM, the Exchange proposes to introduce a new NOM Market Maker Rebate to Add Liquidity in Non Penny-Pilot Options, provided the Participant adds NOM Market Maker liquidity in Non-Penny Pilot Options of 10,000 or more ADV contracts per day in a month. The Participant would receive a \$0.30 per contract Rebate to Add Liquidity in Non-Penny Pilot Options as a NOM Market Maker. Participants that qualify for this proposed rebate would not be charged the NOM Market Maker Fee for Adding Liquidity in Non-Penny Pilot Options by virtue of already having qualified for the discounted fee of \$0.00 in note 5 (*i.e.*, by meeting the lower NOM Market Maker Non-Penny volume threshold of 7,500 or more ADV contracts per day).

In essence, the Exchange is creating a new volume threshold that is higher than the existing threshold with this proposal. As such, there will be two NOM Market Maker volume-based tiers for adding liquidity in Non-Penny Pilot Options, the lower of which would provide a discounted fee of \$0.00 from

³ The term "NOM Market Maker" or ("M") is a Participant that has registered as a Market Maker on NOM pursuant to Chapter VII, Section 2, and must also remain in good standing pursuant to Chapter VII, Section 4. In order to receive NOM Market Maker pricing in all securities, the Participant must be registered as a NOM Market Maker in at least one security. See Chapter XV.

⁴ See Chapter XV, Section 2(1).

⁵ *Id.* at note 5.

\$0.35 for the qualifying Participant, while the higher would provide a rebate of \$0.30 for the qualifying Participant in lieu of the \$0.35 fee. Accordingly, the Exchange proposes to amend the existing volume requirement for the discounted fee in note 5 to state that Participants that add NOM Market Maker liquidity in Non-Penny Pilot Options of 7,500 to 9,999 ADV contracts per day in a month will be assessed a \$0.00 per contract Non-Penny Options Fee for Adding Liquidity in that month. Participants that add Non-Penny NOM Market Maker liquidity of 10,000 or more ADV contracts per day in a month will not be charged a Non-Penny Options Fee for Adding Liquidity and will instead receive the proposed \$0.30 per contract Non-Penny Rebate to Add Liquidity. Finally, the Exchange proposes to clarify in note 5 that the \$0.35 fee for adding liquidity will apply unless Participants meet the proposed volume thresholds, as described above.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁶ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,⁷ in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The proposed change to offer Participants that send NOM Market Maker order flow the opportunity to receive a \$0.30 per contract Non-Penny Rebate to Add Liquidity, provided the Participant adds NOM Market Maker liquidity in Non-Penny Pilot Options of 10,000 or more ADV contracts per day in a month, is reasonable because the Exchange seeks to further incentivize Participants to add NOM Market Maker liquidity in Non-Penny Pilot Options to obtain the rebate. The Exchange believes that its proposal will encourage Participants to select NOM as a venue and in turn benefit other market participants with the opportunity to interact with such liquidity. Other options exchanges also offer volume-based rebates to market makers for adding liquidity.⁸

The Exchange also believes that the proposed NOM Market Maker Non-

⁶ 15 U.S.C. 78f(b).

⁷ 15 U.S.C. 78f(b)(4) and (5).

⁸ See MIAx Pearl Fee Schedule, Section 1)a) for the non-penny maker rebates offered to MIAx Pearl market makers. See also Nasdaq GEMX Schedule of Fees, Section I for the non-penny maker rebates offered to GEMX market makers.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

Penny Rebate to Add Liquidity is equitable and not unfairly discriminatory because all NOM Market Makers can qualify for the rebate by meeting the volume requirements described above. Furthermore, NOM Market Makers, unlike other market participants, add value through continuous quoting⁹ and the commitment of capital. In addition, encouraging NOM Market Makers to add greater liquidity benefits all market participants in the quality of order interaction. As such, the Exchange believes it is equitable and not unfairly discriminatory to offer only NOM Market Makers the opportunity to earn the proposed rebate because of the obligations borne by these market participants, as noted herein.

The Exchange also believes that the proposed change to amend the existing NOM Market Maker Non-Penny volume threshold from “7,500 or more ADV contracts” to “7,500 to 9,999 ADV contracts” is reasonable because the Exchange is essentially adding a higher volume-based tier with this proposal. The Exchange believes that the proposed change would clarify how the two NOM Market Maker Non-Penny tiers are applied—meeting the volume threshold in the lower tier would qualify the Participant for a discounted fee, and meeting the volume threshold in the higher tier would qualify the Participant for a rebate in lieu of the fee, as described above. In the same vein, the proposed change to clarify in note 5 that the \$0.35 fee for adding liquidity will apply unless Participants meet these volume thresholds is reasonable because it will clarify how the fee and rebate program proposed herein will apply.

The Exchange further believes that these clarifying changes to amend the existing NOM Market Maker Non-Penny volume threshold and describe how the \$0.35 fee will apply are equitable and not unfairly discriminatory because the changes will apply to all qualifying Participants.

⁹Pursuant to Chapter VII (Market Participants), Section 5 (Obligations of Market Makers), in registering as a market maker, an Options Participant commits himself to various obligations. Transactions of a Market Maker in its market making capacity must constitute a course of dealings reasonably calculated to contribute to the maintenance of a fair and orderly market, and Market Makers should not make bids or offers or enter into transactions that are inconsistent with such course of dealings. Further, all Market Makers are designated as specialists on NOM for all purposes under the Act or rules thereunder. See Chapter VII, Section 5.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed rebate and corresponding changes to the volume-based thresholds described above are all designed to increase competition by encouraging NOM Market Makers to provide greater liquidity and maintain tight markets in Non-Penny Pilot Options. The Exchange operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.¹⁰

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: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

¹⁰ 15 U.S.C. 78s(b)(3)(A)(ii).

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2017-127 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2017-127. 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 website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2017-127 and should be submitted on or before January 4, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹¹

Eduardo A. Aleman,
Assistant Secretary.

[FR Doc. 2017-26910 Filed 12-13-17; 8:45 am]

BILLING CODE 8011-01-P

¹¹ 17 CFR 200.30-3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–82252; File No. SR–CHX–2017–08]

Self-Regulatory Organizations; Chicago Stock Exchange, Inc.; Notice of Filing of Amendment No. 2 to the Proposed Rule Change To Amend the Schedule of Fees and Assessments To Adopt a Fee Schedule To Establish Fees for Industry Members Related to the National Market System Plan Governing the Consolidated Audit Trail

December 8, 2017.

On May 3, 2017, Chicago Stock Exchange, Inc. (“Exchange” or “CHX”) 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 adopt a fee schedule to establish the fees for Industry Members related to the National Market System Plan Governing the Consolidated Audit Trail (“CAT NMS Plan”). The proposed rule change was published in the **Federal Register** for comment on May 22, 2017. ³ The Commission received seven comment letters on the proposed rule change, ⁴ and a response to

comments from the CAT NMS Plan Participants. ⁵ On June 30, 2017, the Commission temporarily suspended and initiated proceedings to determine whether to approve or disapprove the proposed rule change. ⁶ The Commission thereafter received seven comment letters, ⁷ and a response to comments from the Participants. ⁸ On November 9, 2017, the Exchange filed Amendment No. 1 to the proposed rule change. ⁹ On November 9, 2017, the Commission extended the time period within which to approve the proposed rule change or disapprove the proposed rule change to

comments/sr-batsedgx-2017-22/batsedgx201722-154443.pdf. The Commission also received a comment letter which is not pertinent to these proposed rule changes. See Letter from Christina Crouch, Smart Ltd., to Brent J. Fields, Secretary, Commission (dated June 5, 2017), available at: <https://www.sec.gov/comments/sr-batsbxz-2017-38/batsbxz201738-1785545-153152.htm>.

⁵ See Letter from CAT NMS Plan Participants to Brent J. Fields, Secretary, Commission (dated June 29, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-1832632-154584.pdf>.

⁶ See Securities Exchange Act Release No. 81067 (June 30, 2017), 82 FR 31656 (July 7, 2017).

⁷ See Letter from W. Hardy Callcott, Partner, Sidley Austin LLP, to Brent J. Fields, Secretary, Commission (dated July 27, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2148338-157737.pdf>; Letter from Kevin Coleman, General Counsel and Chief Compliance Officer, Belvedere Trading LLC, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2148360-157740.pdf>; Letter from Joanna Mallers, Secretary, FIA Principal Traders Group, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2150977-157744.pdf>; Letter from Stuart J. Kaswell, Executive Vice President and Managing Director, General Counsel, Managed Funds Association, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2150818-157743.pdf>; Letter from John Kinahan, Chief Executive Officer, Group One Trading, L.P., to Brent J. Fields, Secretary, Commission (dated August 10, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-2214568-160619.pdf>; Letter from Joseph Molluso, Executive Vice President and CFO, Virtu Financial, to Brent J. Fields, Secretary, Commission (dated August 18, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-2238648-160830.pdf>.

⁸ See Letter from Michael Simon, Chair, CAT NMS Plan Operating Committee, to Brent J. Fields, Secretary, Commission (dated November 2, 2017), available at <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2674608-161412.pdf>.

⁹ Amendment No. 1 to the proposed rule change replaced and superseded the Original Proposal in its entirety. See Securities Exchange Act Release No. 82251 (December 8, 2017).

January 14, 2018. ¹⁰ On November 30, 2017, the Exchange filed Amendment No. 2 to the proposed rule change, as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments from interested persons on Amendment No. 2.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

On May 3, 2017, the Chicago Stock Exchange, Inc. (“Exchange” or “CHX”) filed with the Securities and Exchange Commission (“Commission” or “SEC”) proposed rule change SR–CHX–2017–08 (the “Original Proposal”), pursuant to which the Exchange proposed to adopt a fee schedule to establish the fees for Industry Members related to the National Market System Plan Governing the Consolidated Audit Trail (the “CAT NMS Plan” or “Plan”). ¹¹ On November 9, 2017, the Exchange filed an amendment to the Original Proposal (“First Amendment”). The Exchange files this proposed rule change (the “Second Amendment”) to amend the Original Proposal as amended by the First Amendment.

The text of this proposed rule change is available on the Exchange’s website at (www.chx.com) and in the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the CHX included statements concerning the purpose of and basis for the proposed rule changes and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The CHX has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Changes

1. Purpose

The Exchange, BOX Options Exchange LLC, Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe

¹⁰ See Securities Exchange Act Release No. 82049 (November 9, 2017), 82 FR 53549 (November 16, 2017).

¹¹ Unless otherwise specified, capitalized terms used in this fee filing are defined as set forth herein, the CAT Compliance Rule Series, in the CAT NMS Plan, or the Original Proposal.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ See Securities Exchange Act Release No. 80691 (May 16, 2017), 82 FR 23344 (May 22, 2017) (“Original Proposal”).

⁴ Since the CAT NMS Plan Participants’ proposed rule changes to adopt fees to be charged to Industry Members to fund the consolidated audit trail are substantively identical, the Commission is considering all comments received on the proposed rule changes regardless of the comment file to which they were submitted. See text accompanying notes 12–15 *infra*, for a list of the CAT NMS Plan Participants. See Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, to Brent J. Fields, Secretary, Commission (dated June 6, 2017), available at: <https://www.sec.gov/comments/sr-batsbxz-2017-38/batsbxz201738-1788188-153228.pdf>; Letter from Patricia L. Cerny and Steven O’Malley, Compliance Consultants, to Brent J. Fields, Secretary, Commission (dated June 12, 2017), available at: <https://www.sec.gov/comments/sr-cboe-2017-040/cboe2017040-1799253-153675.pdf>; Letter from Daniel Zinn, General Counsel, OTC Markets Group Inc., to Eduardo A. Aleman, Assistant Secretary, Commission (dated June 13, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-1801717-153703.pdf>; Letter from Joanna Mallers, Secretary, FIA Principal Traders Group, to Brent J. Fields, Secretary, Commission (dated June 22, 2017), available at: <https://www.sec.gov/comments/sr-cboe-2017-040/cboe2017040-1819670-154195.pdf>; Letter from Stuart J. Kaswell, Executive Vice President and Managing Director, General Counsel, Managed Funds Association, to Brent J. Fields, Secretary, Commission (dated June 23, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-1822454-154283.pdf>; and Letter from Suzanne H. Shatto, Investor, to Commission (dated June 27, 2017), available at: <https://www.sec.gov/>

EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe C2 Exchange, Inc., Cboe Exchange, Inc.,¹² Financial Industry Regulatory Authority, Inc. (“FINRA”), Investors’ Exchange LLC, Miami International Securities Exchange, LLC, MIA X PEARL, LLC, NASDAQ BX, Inc., Nasdaq GEMX, LLC, Nasdaq ISE, LLC, Nasdaq MRX, LLC,¹³ NASDAQ PHLX LLC, The NASDAQ Stock Market LLC, New York Stock Exchange LLC, NYSE American LLC,¹⁴ NYSE Arca, Inc. and NYSE National, Inc.¹⁵ (collectively, the “Plan Participants”)¹⁶ filed with the Commission, pursuant to Section 11A of the Exchange Act¹⁷ and Rule 608 of Regulation NMS thereunder,¹⁸ the CAT NMS Plan.¹⁹ The Plan Participants filed the Plan to comply with Rule 613 of Regulation NMS under the Exchange Act. The Plan was published for comment in the **Federal Register** on May 17, 2016,²⁰ and approved by the Commission, as modified, on November 15, 2016.²¹ The Plan is designed to create, implement and maintain a consolidated audit trail (“CAT”) that would capture customer and order event information for orders in NMS

¹²Note that Bats BYX Exchange, Inc., Bats BZX Exchange, Inc., Bats EDGA Exchange, Inc., Bats EDGX Exchange, Inc., LLC, C2 Options Exchange, Incorporated, and Chicago Board Options Exchange, Incorporated, have been renamed Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe C2 Exchange, Inc., Cboe Exchange, Inc., respectively.

¹³ISE Gemini, LLC, ISE Mercury, LLC and International Securities Exchange, LLC have been renamed Nasdaq GEMX, LLC, Nasdaq MRX, LLC, and Nasdaq ISE, LLC, respectively. See Securities Exchange Act Rel. No. 80248 (Mar. 15, 2017), 82 FR 14547 (Mar. 21, 2017); Securities Exchange Act Rel. No. 80326 (Mar. 29, 2017), 82 FR 16460 (Apr. 4, 2017); and Securities Exchange Act Rel. No. 80325 (Mar. 29, 2017), 82 FR 16445 (Apr. 4, 2017).

¹⁴NYSE MKT LLC has been renamed NYSE American LLC. See Securities Exchange Act Rel. No. 80283 (Mar. 21, 2017), 82 FR 15244 (Mar. 27, 2017).

¹⁵National Stock Exchange, Inc. has been renamed NYSE National, Inc. See Securities Exchange Act Rel. No. 79902 (Jan. 30, 2017), 82 FR 9258 (Feb. 3, 2017).

¹⁶A “Participant” is a “member” of the Exchange for purposes of the Act. See CHX Article 1, Rule 1(s). For clarity, the term “Plan Participant” will be used herein when referring to Participants of the Plan.

¹⁷15 U.S.C. 78k–1.

¹⁸17 CFR 242.608.

¹⁹See Letter from the Plan Participants to Brent J. Fields, Secretary, Commission, dated September 30, 2014; and Letter from Plan Participants to Brent J. Fields, Secretary, Commission, dated February 27, 2015. On December 24, 2015, the Plan Participants submitted an amendment to the CAT NMS Plan. See Letter from Plan Participants to Brent J. Fields, Secretary, Commission, dated December 23, 2015.

²⁰Securities Exchange Act Rel. No. 77724 (Apr. 27, 2016), 81 FR 30614 (May 17, 2016).

²¹Securities Exchange Act Rel. No. 79318 (Nov. 15, 2016), 81 FR 84696 (Nov. 23, 2016) (“Approval Order”).

Securities and OTC Equity Securities, across all markets, from the time of order inception through routing, cancellation, modification, or execution in a single consolidated data source. The Plan accomplishes this by creating CAT NMS, LLC (the “Company”), of which each Plan Participant is a member, to operate the CAT.²² Under the CAT NMS Plan, the Operating Committee of the Company (“Operating Committee”) has discretion to establish funding for the Company to operate the CAT, including establishing fees that the Plan Participants will pay, and establishing fees for Industry Members that will be implemented by the Plan Participants (“CAT Fees”).²³ The Plan Participants are required to file with the SEC under Section 19(b) of the Exchange Act any such CAT Fees applicable to Industry Members that the Operating Committee approves.²⁴ Accordingly, the Exchange submitted the Original Proposal to propose the Consolidated Audit Trail Funding Fees, which would require Industry Members that are Exchange members to pay the CAT Fees determined by the Operating Committee.

The Commission published the Original Proposal for public comment in the **Federal Register** on May 22, 2017,²⁵ and received comments in response to the Original Proposal or similar fee filings by other Plan Participants.²⁶ On June 30, 2017, the Commission suspended, and instituted proceedings to determine whether to approve or disapprove, the Original Proposal.²⁷ The Commission received seven comment letters in response to those proceedings.²⁸

²²The Plan also serves as the limited liability company agreement for the Company.

²³Section 11.1(b) of the CAT NMS Plan.

²⁴*Id.*

²⁵Exchange Act Rel. No. 80691 (May 16, 2017), 82 FR 23344 (May 22, 2017).

²⁶For a summary of comments, see generally Securities Exchange Act Rel. No. 81067 (June 30, 2017), 82 FR 31656 (July 7, 2017) (“Suspension Order”).

²⁷Suspension Order.

²⁸See Letter from Stuart J. Kaswell, Executive Vice President, Managing Director and General Counsel, Managed Funds Association, to Brent J. Fields, Secretary, SEC (July 28, 2017) (“MFA Letter”); Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA, to Brent J. Fields, Secretary, SEC (July 28, 2017) (“SIFMA Letter”); Joanna Mallers, Secretary, FIA Principal Traders Group, to Brent J. Fields, Secretary, SEC (July 28, 2017) (“FIA Principal Traders Group Letter”); Letter from Kevin Coleman, General Counsel & Chief Compliance Officer, Belvedere Trading LLC, to Brent J. Fields, Secretary, SEC (July 28, 2017) (“Belvedere Letter”); Letter from W. Hardy Callcott, Sidley Austin LLP, to Brent J. Fields, Secretary, SEC (July 27, 2017) (“Sidley Letter”); Letter from John Kinahan, Chief Executive Officer, Group One Trading, L.P., to Brent J. Fields, Secretary, SEC (Aug. 10, 2017) (“Group One

In response to the comments on the Original Proposal, the Operating Committee determined to make the following changes to the funding model: (1) Adds two additional CAT Fee tiers for Equity Execution Venues; (2) discounts the market share of Execution Venue ATSs exclusively trading OTC Equity Securities as well as the market share of the FINRA over-the-counter reporting facility (“ORF”) by the average shares per trade ratio between NMS Stocks and OTC Equity Securities (calculated as 0.17% based on available data from the second quarter of June 2017) when calculating the market share of Execution Venue ATS exclusively trading OTC Equity Securities and FINRA; (3) discounts the Options Market Maker quotes by the trade to quote ratio for options (calculated as 0.01% based on available data for June 2016 through June 2017) when calculating message traffic for Options Market Makers; (4) discounts equity market maker quotes by the trade to quote ratio for equities (calculated as 5.43% based on available data for June 2016 through June 2017) when calculating message traffic for equity market makers; (5) decreases the number of tiers for Industry Members (other than the Execution Venue ATSs) from nine to seven; (6) changes the allocation of CAT costs between Equity Execution Venues and Options Execution Venues from 75%/25% to 67%/33%; (7) adjusts tier percentages and recovery allocations for Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSs); (8) focuses the comparability of CAT Fees on the individual entity level, rather than primarily on the comparability of affiliated entities; (9) commences invoicing of CAT Reporters as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Plan Participants and the operative date of the CAT NMS Plan amendment adopting CAT Fees for Plan Participants; and (10) requires the proposed fees to automatically expire two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for Plan Participants. On November 9, 2017, the Exchange filed the First Amendment and proposed to amend the Original Proposal to reflect these changes.

The Exchange submits this Second Amendment to revise the proposal as set

Letter”); and Letter from Joseph Molluso, Executive Vice President, Virtu Financial, to Brent J. Fields, Secretary, SEC (Aug. 18, 2017) (“Virtu Financial Letter”).

forth in the First Amendment to discount the OTC Equity Securities market share of all Execution Venue ATSS trading OTC Equity Securities, rather than applying the discount solely to those Execution Venue ATSS that exclusively trade OTC Equity Securities, when calculating the market share of Execution Venue ATSS trading OTC Equity Securities. As discussed in the First Amendment:

The Operating Committee determined to discount the market share of Execution Venue ATSS exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF in recognition of the different trading characteristics of the OTC Equity Securities market as compared to the market in NMS Stocks. Many OTC Equity Securities are priced at less than one dollar—and a significant number at less than one penny—per share and low-priced shares tend to trade in larger quantities. Accordingly, a disproportionately large number of shares are involved in transactions involving OTC Equity Securities versus NMS Stocks. Because the proposed fee tiers are based on market share calculated by share volume, Execution Venue ATSS exclusively trading OTC Equity Securities and FINRA would likely be subject to higher tiers than their operations may warrant.²⁹

The Operating Committee believes that this argument applies equally to both Execution Venue ATSS exclusively trading OTC Equity Securities and to Execution Venue ATSS that trade OTC Equity Securities as well as other securities. Accordingly, the Exchange proposes to amend paragraph (b)(2) of the Consolidated Audit Trail Funding Fees to apply the discount to all Execution Venue ATSS trading OTC Equity Securities. Specifically, the Exchange proposes to change the parenthetical regarding the OTC Equity Securities discount in paragraph (b)(2) of the proposed fee schedule from “with a discount for Equity ATSS exclusively trading OTC Equity Securities based on the average shares per trade ratio between NMS Stocks and OTC Equity Securities” to “with a discount for OTC Equity Securities market share of Equity ATSS trading OTC Equity Securities based on the average shares per trade ratio between NMS Stocks and OTC Equity Securities.”

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6(b)(5) of the Act,³⁰ which require, among other things, that the Exchange’s rules must be designed to prevent fraudulent and

manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest, and not designed to permit unfair discrimination between customers, issuers, brokers and dealer, and Section 6(b)(4) of the Act,³¹ which requires that exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using its facilities. The Exchange believes that the proposed change is consistent with the Act, and that the proposed fees are reasonable, equitably allocated and not unfairly discriminatory. In particular, the Exchange believes that the proposed change would treat all Equity ATSS trading OTC Equity Securities in a comparable manner when calculating applicable fees. In addition, the fee structure takes into consideration distinctions in securities trading operations of CAT Reporters, including all ATSS trading OTC Equity Securities.

B. Self-Regulatory Organization’s Statement of Burden on Competition

Section 6(b)(8) of the Act³² require that the Exchange’s rules not impose any burden on competition that is not necessary or appropriate. The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. As previously described, the Exchange believes that the proposed rule change fairly and equitably allocates costs among CAT Reporters. In particular, the proposed fee schedule is structured to impose comparable fees on similarly situated CAT Reporters. The Exchange believes that the proposed change would treat all Equity ATSS trading OTC Equity Securities in a comparable manner when calculating applicable fees. In addition, the fee structure takes into consideration distinctions in securities trading operations of CAT Reporters, including all ATSS trading OTC Equity Securities. Moreover, the Operating Committee believes that the proposed changes address certain competitive concerns raised by commenters related to ATSS trading OTC Equity Securities.

C. Self-Regulatory Organization’s Statement on Comments Regarding the Proposed Rule Changes Received From Members, Plan Participants or Others

The Exchange set forth responses to comments received regarding the Original Proposal in the First

Amendment. In addition, the proposed changes set forth in this Second Amendment further respond to comments made regarding ATSS trading OTC Equity Securities.

III. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposal, as amended by Amendment No. 1 and Amendment No. 2, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission’s internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-CHX-2017-08 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-CHX-2017-08. 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 website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission’s Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-CHX-2017-08, and should

²⁹ See Amendment No. 1 to SR-CHX-2016-08 (November 9, 2017) at 32.

³⁰ 15 U.S.C. 78f(b)(5).

³¹ 15 U.S.C. 78f(b)(4).

³² 15 U.S.C. 78f(b)(8).

be submitted on or before January 4, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³³

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2017-26919 Filed 12-13-17; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-82285; File No. SR-NASDAQ-2017-046]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC.; Notice of Filing of Amendment No. 2 to a Proposed Rule Change To Adopt Rule 7004 and Chapter XV, Section 11

December 11, 2017.

On May 2, 2017, The Nasdaq Stock Market LLC. (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to adopt a fee schedule to establish the fees for Industry Members related to the National Market System Plan Governing the Consolidated Audit Trail (“CAT NMS Plan”). The proposed rule change was published in the *Federal Register* for comment on May 22, 2017.³ The Commission received seven comment letters on the proposed rule change,⁴ and a response to

comments from the Participants.⁵ On June 30, 2017, the Commission temporarily suspended and initiated proceedings to determine whether to approve or disapprove the proposed rule change.⁶ The Commission thereafter received seven comment letters,⁷ and a response to comments from the Participants.⁸ On November 6, 2017, the Exchange filed Amendment No. 1 to the proposed rule change.⁹ On

(dated June 22, 2017), available at: <https://www.sec.gov/comments/sr-cboe-2017-040/cboe2017040-1819670-154195.pdf>; Letter from Stuart J. Kaswell, Executive Vice President and Managing Director, General Counsel, Managed Funds Association, to Brent J. Fields, Secretary, Commission (dated June 23, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-1822454-154283.pdf>; and Letter from Suzanne H. Shatto, Investor, to Commission (dated June 27, 2017), available at: <https://www.sec.gov/comments/sr-batsedgx-2017-22/batsedgx201722-154443.pdf>. The Commission also received a comment letter which is not pertinent to these proposed rule changes. See Letter from Christina Crouch, Smart Ltd., to Brent J. Fields, Secretary, Commission (dated June 5, 2017), available at: <https://www.sec.gov/comments/sr-batsbx-2017-38/batsbx201738-1785545-153152.htm>.

⁵ See Letter from CAT NMS Plan Participants to Brent J. Fields, Secretary, Commission (dated June 29, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-1832632-154584.pdf>.

⁶ See Securities Exchange Act Release No. 81067 (June 30, 2017), 82 FR 31656 (July 7, 2017).

⁷ See Letter from W. Hardy Calcott, Partner, Sidley Austin LLP, to Brent J. Fields, Secretary, Commission (dated July 27, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2148338-157737.pdf>; Letter from Kevin Coleman, General Counsel and Chief Compliance Officer, Belvedere Trading LLC, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2148360-157740.pdf>; Letter from Joanna Mallers, Secretary, FIA Principal Traders Group, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2151228-157745.pdf>; Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2150977-157744.pdf>; Letter from Stuart J. Kaswell, Executive Vice President and Managing Director, General Counsel, Managed Funds Association, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2150818-157743.pdf>; Letter from John Kinahan, Chief Executive Officer, Group One Trading, L.P., to Brent J. Fields, Secretary, Commission (dated August 10, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-2214568-160619.pdf>; Letter from Joseph Molluso, Executive Vice President and CFO, Virtu Financial, to Brent J. Fields, Commission (dated August 18, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-2238648-160830.pdf>.

⁸ See Letter from Michael Simon, Chair, CAT NMS Plan Operating Committee, to Brent J. Fields, Commission, Secretary (dated November 2, 2017), available at <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2674608-161412.pdf>.

⁹ Amendment No. 1 to the proposed rule change replaced and superseded the Original Proposal in

November 9, 2017, the Commission extended the time period within which to approve the proposed rule change or disapprove the proposed rule change to January 14, 2018.¹⁰ On December 4, 2017, the Exchange filed Amendment No. 2 to the proposed rule change, as described in Items I and II below, which Items have been prepared by the Exchange.¹¹ The Commission is publishing this notice to solicit comments from interested persons on Amendment No. 2.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

On May 2, 2017, The Nasdaq Stock Market LLC filed with the Securities and Exchange Commission (“Commission” or “SEC”) proposed rule change SR-NASDAQ-2017-046 (the “Original Proposal”), pursuant to which the Exchange proposed to adopt a fee schedule to establish the fees for Industry Members related to the National Market System Plan Governing the Consolidated Audit Trail (the “CAT NMS Plan” or “Plan”).¹² The Exchange is filing this proposed rule change (the “Amendment”) to amend the Original Proposal. On November 6, 2017, the Exchange filed an amendment to the Original Proposal (“Amendment No. 1”), which replaced the Original Proposal in its entirety. The Exchange is now filing this Amendment No. 2 to replace Amendment No. 1 in its entirety. This Amendment No. 2 describes the changes from the Original Proposal.

With this Amendment No. 2, the Exchange is including *Exhibit 4*, which reflects the changes to the text of the proposed rule change as set forth in the Original Proposal, and *Exhibit 5*, which reflects all proposed changes to the Exchange’s current rule text.

The text of the proposed rule change is available on the Exchange’s website at <http://nasdaq.cchwallstreet.com/>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

its entirety. Amendment No. 1 is available on the Commission’s website for Nasdaq at: <https://www.sec.gov/comments/sr-nasdaq-2017-046/nasdaq2017046-2673136-161450.pdf>.

¹⁰ See Securities Exchange Act Release No. 82049 (November 9, 2017), 82 FR 53549 (November 16, 2017).

¹¹ Amendment No. 2 replaces and supersedes Amendment No. 1 in its entirety.

¹² Unless otherwise specified, capitalized terms used in this fee filing are defined as set forth herein, the CAT Compliance Rule Series, in the CAT NMS Plan, or the Original Proposal.

³³ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 80696 (May 16, 2017), 82 FR 23439 (May 22, 2017) (“Original Proposal”).

⁴ Since the CAT NMS Plan Participants’ proposed rule changes to adopt fees to be charged to Industry Members to fund the consolidated audit trail are substantively identical, the Commission is considering all comments received on the proposed rule changes regardless of the comment file to which they were submitted. See text accompanying notes 13–16 *infra*, for a list of the CAT NMS Plan Participants. See Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, to Brent J. Fields, Secretary, Commission (dated June 6, 2017), available at: <https://www.sec.gov/comments/sr-batsbx-2017-38/batsbx201738-1788188-153228.pdf>; Letter from Patricia L. Cerny and Steven O’Malley, Compliance Consultants, to Brent J. Fields, Secretary, Commission (dated June 12, 2017), available at: <https://www.sec.gov/comments/sr-cboe-2017-040/cboe2017040-1799253-153675.pdf>; Letter from Daniel Zinn, General Counsel, OTC Markets Group Inc., to Eduardo A. Aleman, Assistant Secretary, Commission (dated June 13, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-1801717-153703.pdf>; Letter from Joanna Mallers, Secretary, FIA Principal Traders Group, to Brent J. Fields, Secretary, Commission

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

BOX Options Exchange LLC, Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe C2 Exchange, Inc., Cboe Exchange, Inc.,¹³ Chicago Stock Exchange, Inc., Financial Industry Regulatory Authority, Inc. ("FINRA"), Investors' Exchange LLC, Miami International Securities Exchange, LLC, MIAX PEARL, LLC, Nasdaq BX, Inc., Nasdaq GEMX, LLC, Nasdaq ISE, LLC, Nasdaq MRX, LLC,¹⁴ Nasdaq PHLX LLC, The Nasdaq Stock Market LLC, New York Stock Exchange LLC, NYSE American LLC,¹⁵ NYSE Arca, Inc. and NYSE National, Inc.¹⁶ (collectively, the "Participants") filed with the Commission, pursuant to Section 11A of the Exchange Act¹⁷ and Rule 608 of Regulation NMS thereunder,¹⁸ the CAT

¹³ Note that Bats BYX Exchange, Inc., Bats BZX Exchange, Inc., Bats EDGA Exchange, Inc., Bats EDGX Exchange, Inc., LLC, C2 Options Exchange, Incorporated, and Chicago Board Options Exchange, Incorporated, have been renamed Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe C2 Exchange, Inc., Cboe Exchange, Inc., respectively.

¹⁴ ISE Gemini, LLC, ISE Mercury, LLC and International Securities Exchange, LLC have been renamed Nasdaq GEMX, LLC, Nasdaq MRX, LLC, and Nasdaq ISE, LLC, respectively. See Securities Exchange Act Release No. 80248 (March 15, 2017), 82 FR 14547 (March 21, 2017); Securities Exchange Act Release No. 80326 (March 29, 2017), 82 FR 16460 (April 4, 2017); and Securities Exchange Act Release No. 80325 (March 29, 2017), 82 FR 16445 (April 4, 2017).

¹⁵ NYSE MKT LLC has been renamed NYSE American LLC. See Securities Exchange Act Release No. 80283 (March 21, 2017), 82 FR 15244 (March 27, 2017).

¹⁶ National Stock Exchange, Inc. has been renamed NYSE National, Inc. See Securities Exchange Act Release No. 79902 (January 30, 2017), 82 FR 9258 (February 3, 2017).

¹⁷ 15 U.S.C. 78k-1.

¹⁸ 17 CFR 242.608.

NMS Plan.¹⁹ The Participants filed the Plan to comply with Rule 613 of Regulation NMS under the Exchange Act. The Plan was published for comment in the **Federal Register** on May 17, 2016,²⁰ and approved by the Commission, as modified, on November 15, 2016.²¹ The Plan is designed to create, implement and maintain a consolidated audit trail ("CAT") that would capture customer and order event information for orders in NMS Securities and OTC Equity Securities, across all markets, from the time of order inception through routing, cancellation, modification, or execution in a single consolidated data source. The Plan accomplishes this by creating CAT NMS, LLC (the "Company"), of which each Participant is a member, to operate the CAT.²² Under the CAT NMS Plan, the Operating Committee of the Company ("Operating Committee") has discretion to establish funding for the Company to operate the CAT, including establishing fees that the Participants will pay, and establishing fees for Industry Members that will be implemented by the Participants ("CAT Fees").²³ The Participants are required to file with the SEC under Section 19(b) of the Exchange Act any such CAT Fees applicable to Industry Members that the Operating Committee approves.²⁴ Accordingly, the Exchange submitted the Original Proposal to propose the Consolidated Audit Trail Funding Fees, which would require Industry Members that are SRO members to pay the CAT Fees determined by the Operating Committee.

The Commission published the Original Proposal for public comment in the **Federal Register** on May 22, 2017,²⁵ and received comments in response to the Original Proposal or similar fee filings by other Participants.²⁶ On June 30, 2017, the Commission suspended,

¹⁹ See Letter from the Participants to Brent J. Fields, Secretary, Commission, dated September 30, 2014; and Letter from Participants to Brent J. Fields, Secretary, Commission, dated February 27, 2015. On December 24, 2015, the Participants submitted an amendment to the CAT NMS Plan. See Letter from Participants to Brent J. Fields, Secretary, Commission, dated December 23, 2015.

²⁰ Securities Exchange Act Release No. 77724 (April 27, 2016), 81 FR 30614 (May 17, 2016).

²¹ Securities Exchange Act Release No. 79318 (November 15, 2016), 81 FR 84696 (November 23, 2016) ("Approval Order").

²² The Plan also serves as the limited liability company agreement for the Company.

²³ Section 11.1(b) of the CAT NMS Plan.

²⁴ *Id.*

²⁵ See Securities Exchange Act Release No. 80696 (May 16, 2017), 82 FR 23439 (May 22, 2017) (SR-NASDAQ-2017-046).

²⁶ For a summary of comments, see generally Securities Exchange Act Release No. 81067 (June 30, 2017), 82 FR 31656 (July 7, 2017) ("Suspension Order").

and instituted proceedings to determine whether to approve or disapprove, the Original Proposal.²⁷ The Commission received seven comment letters in response to those proceedings.²⁸

In response to the comments on the Original Proposal, the Operating Committee determined to make the following changes to the funding model: (1) Adds two additional CAT Fee tiers for Equity Execution Venues; (2) discounts the OTC Equity Securities market share of Execution Venue ATSs trading OTC Equity Securities as well as the market share of the FINRA over-the-counter reporting facility ("ORF") by the average shares per trade ratio between NMS Stocks and OTC Equity Securities (calculated as 0.17% based on available data from the second quarter of 2017) when calculating the market share of Execution Venue ATS trading OTC Equity Securities and FINRA; (3) discounts the Options Market Maker quotes by the trade to quote ratio for options (calculated as 0.01% based on available data for June 2016 through June 2017) when calculating message traffic for Options Market Makers; (4) discounts equity market maker quotes by the trade to quote ratio for equities (calculated as 5.43% based on available data for June 2016 through June 2017) when calculating message traffic for equity market makers; (5) decreases the number of tiers for Industry Members (other than the Execution Venue ATSs) from nine to seven; (6) changes the allocation of CAT costs between Equity Execution Venues and Options Execution Venues from 75%/25% to 67%/33%; (7) adjusts tier percentages and recovery allocations for Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSs); (8) focuses the comparability of CAT Fees on the individual entity level, rather

²⁷ Suspension Order.

²⁸ See Letter from Stuart J. Kaswell, Executive Vice President, Managing Director and General Counsel, Managed Funds Association, to Brent J. Fields, Secretary, SEC (July 28, 2017) ("MFA Letter"); Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA, to Brent J. Fields, Secretary, SEC (July 28, 2017) ("SIFMA Letter"); Joanna Mallers, Secretary, FIA Principal Traders Group, to Brent J. Fields, Secretary, SEC (July 28, 2017) ("FIA Principal Traders Group Letter"); Letter from Kevin Coleman, General Counsel & Chief Compliance Officer, Belvedere Trading LLC, to Brent J. Fields, Secretary, SEC (July 28, 2017) ("Belvedere Letter"); Letter from W. Hardy Callcott, Sidley Austin LLP, to Brent J. Fields, Secretary, SEC (July 27, 2017) ("Sidley Letter"); Letter from John Kinahan, Chief Executive Officer, Group One Trading, L.P., to Brent J. Fields, Secretary, SEC (Aug. 10, 2017) ("Group One Letter"); and Letter from Joseph Molluso, Executive Vice President, Virtu Financial, to Brent J. Fields, Secretary, SEC (Aug. 18, 2017) ("Virtu Financial Letter").

than primarily on the comparability of affiliated entities; (9) commences invoicing of CAT Reporters as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Participants and the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants; and (10) requires the proposed fees to automatically expire two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. As discussed in detail below, the Exchange proposes to amend the Original Proposal to reflect these changes.

(1) Executive Summary

The following provides an executive summary of the CAT funding model approved by the Operating Committee, as well as Industry Members' rights and obligations related to the payment of CAT Fees calculated pursuant to the CAT funding model, as amended by this Amendment. A detailed description of the CAT funding model and the CAT Fees, as amended by this Amendment, as well as the changes made to the Original Proposal follows this executive summary.

(A) CAT Funding Model

- **CAT Costs.** The CAT funding model is designed to establish CAT-specific fees to collectively recover the costs of building and operating the CAT from all CAT Reporters, including Industry Members and Participants. The overall CAT costs used in calculating the CAT Fees in this fee filing are comprised of Plan Processor CAT costs and non-Plan Processor CAT costs incurred, and estimated to be incurred, from November 21, 2016 through November 21, 2017. Although the CAT costs from November 21, 2016 through November 21, 2017 were used in calculating the CAT Fees, the CAT Fees set forth in this fee filing would be in effect until the automatic sunset date, as discussed below. (See Section 3(a)(2)(E) below)

- **Bifurcated Funding Model.** The CAT NMS Plan requires a bifurcated funding model, where costs associated with building and operating the CAT would be borne by (1) Participants and Industry Members that are Execution Venues for Eligible Securities through fixed tier fees based on market share, and (2) Industry Members (other than alternative trading systems ("ATs")) that execute transactions in Eligible Securities ("Execution Venue ATs") through fixed tier fees based on message traffic for Eligible Securities. (See Section 3(a)(2) below)

- **Industry Member Fees.** Each Industry Member (other than Execution Venue ATs) will be placed into one of seven tiers of fixed fees, based on "message traffic" in Eligible Securities for a defined period (as discussed below). Prior to the start of CAT reporting, "message traffic" will be comprised of historical equity and equity options orders, cancels, quotes and executions provided by each exchange and FINRA over the previous three months. After an Industry Member begins reporting to the CAT, "message traffic" will be calculated based on the Industry Member's Reportable Events reported to the CAT. Industry Members with lower levels of message traffic will pay a lower fee and Industry Members with higher levels of message traffic will pay a higher fee. To avoid disincentives to quoting behavior, Options Market Maker and equity market maker quotes will be discounted when calculating message traffic. (See Section 3(a)(2)(B) below)

- **Execution Venue Fees.** Each Equity Execution Venue will be placed in one of four tiers of fixed fees based on market share, and each Options Execution Venue will be placed in one of two tiers of fixed fees based on market share. Equity Execution Venue market share will be determined by calculating each Equity Execution Venue's proportion of the total volume of NMS Stock and OTC Equity shares reported by all Equity Execution Venues during the relevant time period. For purposes of calculating market share, the OTC Equity Securities market share of Execution Venue ATs trading OTC Equity Securities as well as the market share of the FINRA ORF will be discounted. Similarly, market share for Options Execution Venues will be determined by calculating each Options Execution Venue's proportion of the total volume of Listed Options contracts reported by all Options Execution Venues during the relevant time period. Equity Execution Venues with a larger market share will pay a larger CAT Fee than Equity Execution Venues with a smaller market share. Similarly, Options Execution Venues with a larger market share will pay a larger CAT Fee than Options Execution Venues with a smaller market share. (See Section 3(a)(2)(C) below)

- **Cost Allocation.** For the reasons discussed below, in designing the model, the Operating Committee determined that 75 percent of total costs recovered would be allocated to Industry Members (other than Execution Venue ATs) and 25 percent would be allocated to Execution Venues. In addition, the Operating Committee

determined to allocate 67 percent of Execution Venue costs recovered to Equity Execution Venues and 33 percent to Options Execution Venues. (See Section 3(a)(2)(D) below)

- **Comparability of Fees.** The CAT funding model charges CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) comparable CAT Fees. (See Section 3(a)(2)(F) below)

(B) CAT Fees for Industry Members

- **Fee Schedule.** The quarterly CAT Fees for each tier for Industry Members are set forth in the two fee schedules in the Consolidated Audit Trail Funding Fees, one for Equity ATs and one for Industry Members other than Equity ATs. (See Section 3(a)(3)(B) below)

- **Quarterly Invoices.** Industry Members will be billed quarterly for CAT Fees, with the invoices payable within 30 days. The quarterly invoices will identify within which tier the Industry Member falls. (See Section 3(a)(3)(C) below)

- **Centralized Payment.** Each Industry Member will receive from the Company one invoice for its applicable CAT Fees, not separate invoices from each Participant of which it is a member. Each Industry Member will pay its CAT Fees to the Company via the centralized system for the collection of CAT Fees established by the Operating Committee. (See Section 3(a)(3)(C) below)

- **Billing Commencement.** Industry Members will begin to receive invoices for CAT Fees as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Participants and the operative date of the Plan amendment adopting CAT Fees for Participants. (See Section 3(a)(2)(G) below)

- **Sunset Provision.** The Consolidated Audit Trail Funding Fees will sunset automatically two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. (See Section 3(a)(2)(J) below)

(2) Description of the CAT Funding Model

Article XI of the CAT NMS Plan requires the Operating Committee to approve the operating budget, including projected costs of developing and operating the CAT for the upcoming year. In addition to a budget, Article XI of the CAT NMS Plan provides that the Operating Committee has discretion to establish funding for the Company, consistent with a bifurcated funding model, where costs associated with building and operating the Central

Repository would be borne by (1) Participants and Industry Members that are Execution Venues through fixed tier fees based on market share, and (2) Industry Members (other than Execution Venue ATs) through fixed tier fees based on message traffic. In its order approving the CAT NMS Plan, the Commission determined that the proposed funding model was “reasonable”²⁹ and “reflects a reasonable exercise of the Participants’ funding authority to recover the Participants’ costs related to the CAT.”³⁰

More specifically, the Commission stated in approving the CAT NMS Plan that “[t]he Commission believes that the proposed funding model is reasonably designed to allocate the costs of the CAT between the Participants and Industry Members.”³¹ The Commission further noted the following:

The Commission believes that the proposed funding model reflects a reasonable exercise of the Participants’ funding authority to recover the Participants’ costs related to the CAT. The CAT is a regulatory facility jointly owned by the Participants and . . . the Exchange Act specifically permits the Participants to charge their members fees to fund their self-regulatory obligations. The Commission further believes that the proposed funding model is designed to impose fees reasonably related to the Participants’ self-regulatory obligations because the fees would be directly associated with the costs of establishing and maintaining the CAT, and not unrelated SRO services.³²

Accordingly, the funding model approved by the Operating Committee imposes fees on both Participants and Industry Members.

As discussed in Appendix C of the CAT NMS Plan, in developing and approving the approved funding model, the Operating Committee considered the advantages and disadvantages of a variety of alternative funding and cost allocation models before selecting the proposed model.³³ After analyzing the various alternatives, the Operating Committee determined that the proposed tiered, fixed fee funding model provides a variety of advantages in comparison to the alternatives.

In particular, the fixed fee model, as opposed to a variable fee model, provides transparency, ease of calculation, ease of billing and other administrative functions, and predictability of a fixed fee. Such factors

are crucial to estimating a reliable revenue stream for the Company and for permitting CAT Reporters to reasonably predict their payment obligations for budgeting purposes. Additionally, a strictly variable or metered funding model based on message volume would be far more likely to affect market behavior and place an inappropriate burden on competition.

In addition, reviews from varying time periods of current broker-dealer order and trading data submitted under existing reporting requirements showed a wide range in activity among broker-dealers, with a number of broker-dealers submitting fewer than 1,000 orders per month and other broker-dealers submitting millions and even billions of orders in the same period. Accordingly, the CAT NMS Plan includes a tiered approach to fees. The tiered approach helps ensure that fees are equitably allocated among similarly situated CAT Reporters and furthers the goal of lessening the impact on smaller firms.³⁴ In addition, in choosing a tiered fee structure, the Operating Committee concluded that the variety of benefits offered by a tiered fee structure, discussed above, outweighed the fact that CAT Reporters in any particular tier would pay different rates per message traffic order event or per market share (e.g., an Industry Member with the largest amount of message traffic in one tier would pay a smaller amount per order event than an Industry Member in the same tier with the least amount of message traffic). Such variation is the natural result of a tiered fee structure.³⁵ The Operating Committee considered several approaches to developing a tiered model, including defining fee tiers based on such factors as size of firm, message traffic or trading dollar volume. After analyzing the alternatives, it was concluded that the tiering should be based on message traffic which will reflect the relative impact of CAT Reporters on the CAT System.

Accordingly, the CAT NMS Plan contemplates that costs will be allocated across the CAT Reporters on a tiered basis in order to allocate higher costs to those CAT Reporters that contribute more to the costs of creating, implementing and maintaining the CAT and lower costs to those that contribute less.³⁶ The fees to be assessed at each tier are calculated so as to recoup a

proportion of costs appropriate to the message traffic or market share (as applicable) from CAT Reporters in each tier. Therefore, Industry Members generating the most message traffic will be in the higher tiers, and will be charged a higher fee. Industry Members with lower levels of message traffic will be in lower tiers and will be assessed a smaller fee for the CAT.³⁷

Correspondingly, Execution Venues with the highest market shares will be in the top tier, and will be charged higher fees. Execution Venues with the lowest market shares will be in the lowest tier and will be assessed smaller fees for the CAT.³⁸

The CAT NMS Plan states that Industry Members (other than Execution Venue ATs) will be charged based on message traffic, and that Execution Venues will be charged based on market share.³⁹ While there are multiple factors that contribute to the cost of building, maintaining and using the CAT, processing and storage of incoming message traffic is one of the most significant cost drivers for the CAT.⁴⁰ Thus, the CAT NMS Plan provides that the fees payable by Industry Members (other than Execution Venue ATs) will be based on the message traffic generated by such Industry Member.⁴¹

In contrast to Industry Members, which determine the degree to which they produce message traffic that constitute CAT Reportable Events, the CAT Reportable Events of the Execution Venues are largely derivative of quotations and orders received from Industry Members that they are required to display. The business model for Execution Venues (other than FINRA), however, is focused on executions in their markets. As a result, the Operating Committee believes that it is more equitable to charge Execution Venues based on their market share rather than their message traffic.

Focusing on message traffic would make it more difficult to draw distinctions between large and small Execution Venues and, in particular, between large and small options exchanges. For instance, the Operating Committee analyzed the message traffic of Execution Venues and Industry Members for the period of April 2017 to June 2017 and placed all CAT Reporters into a nine-tier framework (i.e., a single tier may include both Execution Venues and Industry Members). The Operating

²⁹ Approval Order at 84796.

³⁰ *Id.* at 84794.

³¹ *Id.* at 84795.

³² *Id.* at 84794.

³³ Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85006.

³⁴ Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85006.

³⁵ Moreover, as the SEC noted in approving the CAT NMS Plan, “[t]he Participants also have offered a reasonable basis for establishing a funding model based on broad tiers, in that it may be easier to implement.” Approval Order at 84796.

³⁶ Approval Order at 85005.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Section 11.3(a) and (b) of the CAT NMS Plan.

⁴⁰ Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85005.

⁴¹ Section 11.3(b) of the CAT NMS Plan.

Committee's analysis found that the majority of exchanges (15 total) were grouped in Tiers 1 and 2. Moreover, virtually all of the options exchanges were in Tiers 1 and 2.⁴² Given the resulting concentration of options exchanges in Tiers 1 and 2 under this approach, the analysis shows that a funding model for Execution Venues based on message traffic would make it more difficult to distinguish between large and small options exchanges, as compared to the proposed fee approach that bases fees for Execution Venues on market share.

The CAT NMS Plan's funding model also is structured to avoid a "reduction in market quality."⁴³ The tiered, fixed fee funding model is designed to limit the disincentives to providing liquidity to the market. For example, the Operating Committee expects that a firm that has a large volume of quotes would likely be categorized in one of the upper tiers, and would not be assessed a fee for this traffic directly as they would under a more directly metered model. In contrast, strictly variable or metered funding models based on message volume are far more likely to affect market behavior. In approving the CAT NMS Plan, the SEC stated that "[t]he Participants also offered a reasonable basis for establishing a funding model based on broad tiers, in that it may be . . . less likely to have an incremental deterrent effect on liquidity provision."⁴⁴

The funding model also is structured to avoid a reduction market quality because it discounts Options Market Maker and equity market maker quotes when calculating message traffic for Options Market Makers and equity market makers, respectively. As discussed in more detail below, the Operating Committee determined to discount the Options Market Maker quotes by the trade to quote ratio for options when calculating message traffic for Options Market Makers. Similarly, to avoid disincentives to quoting behavior on the equities side as well, the Operating Committee determined to discount equity market maker quotes by the trade to quote ratio for equities when calculating message traffic for equity market makers. The proposed discounts recognize the value of the market makers' quoting activity to the market as a whole.

The CAT NMS Plan is further structured to avoid potential conflicts

raised by the Operating Committee determining fees applicable to its own members—the Participants. First, the Company will operate on a "break-even" basis, with fees imposed to cover costs and an appropriate reserve. Any surpluses will be treated as an operational reserve to offset future fees and will not be distributed to the Participants as profits.⁴⁵ To ensure that the Participants' operation of the CAT will not contribute to the funding of their other operations, Section 11.1(c) of the CAT NMS Plan specifically states that "[a]ny surplus of the Company's revenues over its expenses shall be treated as an operational reserve to offset future fees." In addition, as set forth in Article VIII of the CAT NMS Plan, the Company "intends to operate in a manner such that it qualifies as a 'business league' within the meaning of Section 501(c)(6) of the [Internal Revenue] Code." To qualify as a business league, an organization must "not [be] organized for profit and no part of the net earnings of [the organization can] inure[] to the benefit of any private shareholder or individual."⁴⁶ As the SEC stated when approving the CAT NMS Plan, "the Commission believes that the Company's application for Section 501(c)(6) business league status addresses issues raised by commenters about the Plan's proposed allocation of profit and loss by mitigating concerns that the Company's earnings could be used to benefit individual Participants."⁴⁷ The Internal Revenue Service recently has determined that the Company is exempt from federal income tax under Section 501(c)(6) of the Internal Revenue Code.

The funding model also is structured to take into account distinctions in the securities trading operations of Participants and Industry Members. For example, the Operating Committee designed the model to address the different trading characteristics in the OTC Equity Securities market. Specifically, the Operating Committee proposes to discount the OTC Equity Securities market share of Execution Venue ATSS trading OTC Equity Securities as well as the market share of the FINRA ORF by the average shares per trade ratio between NMS Stocks and OTC Equity Securities to adjust for the greater number of shares being traded in the OTC Equity Securities market, which is generally a function of a lower per share price for OTC Equity Securities when compared to NMS

Stocks. In addition, the Operating Committee also proposes to discount Options Market Maker and equity market maker message traffic in recognition of their role in the securities markets. Furthermore, the funding model creates separate tiers for Equity and Options Execution Venues due to the different trading characteristics of those markets.

Finally, by adopting a CAT-specific fee, the Operating Committee will be fully transparent regarding the costs of the CAT. Charging a general regulatory fee, which would be used to cover CAT costs as well as other regulatory costs, would be less transparent than the selected approach of charging a fee designated to cover CAT costs only.

A full description of the funding model is set forth below. This description includes the framework for the funding model as set forth in the CAT NMS Plan, as well as the details as to how the funding model will be applied in practice, including the number of fee tiers and the applicable fees for each tier. The complete funding model is described below, including those fees that are to be paid by the Participants. The proposed Consolidated Audit Trail Funding Fees, however, do not apply to the Participants; the proposed Consolidated Audit Trail Funding Fees only apply to Industry Members. The CAT Fees for Participants will be imposed separately by the Operating Committee pursuant to the CAT NMS Plan.

(A) Funding Principles

Section 11.2 of the CAT NMS Plan sets forth the principles that the Operating Committee applied in establishing the funding for the Company. The Operating Committee has considered these funding principles as well as the other funding requirements set forth in the CAT NMS Plan and in Rule 613 in developing the proposed funding model. The following are the funding principles in Section 11.2 of the CAT NMS Plan:

- To create transparent, predictable revenue streams for the Company that are aligned with the anticipated costs to build, operate and administer the CAT and other costs of the Company;
- To establish an allocation of the Company's related costs among Participants and Industry Members that is consistent with the Exchange Act, taking into account the timeline for implementation of the CAT and distinctions in the securities trading operations of Participants and Industry Members and their relative impact upon the Company's resources and operations;

⁴² The Operating Committee notes that this analysis did not place MIAx PEARL in Tier 1 or Tier 2 since the exchange commenced trading on February 6, 2017.

⁴³ Section 11.2(e) of the CAT NMS Plan.

⁴⁴ Approval Order at 84796.

⁴⁵ *Id.* at 84792.

⁴⁶ 26 U.S.C. 501(c)(6).

⁴⁷ Approval Order at 84793.

- To establish a tiered fee structure in which the fees charged to: (i) CAT Reporters that are Execution Venues, including ATSS, are based upon the level of market share; (ii) Industry Members' non-ATS activities are based upon message traffic; (iii) the CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether Execution Venue and/or Industry Members);

- To provide for ease of billing and other administrative functions;
- To avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality; and
- To build financial stability to support the Company as a going concern.

(B) Industry Member Tiering

Under Section 11.3(b) of the CAT NMS Plan, the Operating Committee is required to establish fixed fees to be payable by Industry Members, based on message traffic generated by such Industry Member, with the Operating Committee establishing at least five and no more than nine tiers.

The CAT NMS Plan clarifies that the fixed fees payable by Industry Members pursuant to Section 11.3(b) shall, in addition to any other applicable message traffic, include message traffic generated by: (i) An ATS that does not execute orders that is sponsored by such Industry Member; and (ii) routing orders to and from any ATS sponsored by such Industry Member. In addition, the Industry Member fees will apply to Industry Members that act as routing broker-dealers for exchanges. The Industry Member fees will not be applicable, however, to an ATS that qualifies as an Execution Venue, as discussed in more detail in the section on Execution Venue tiering.

In accordance with Section 11.3(b), the Operating Committee approved a tiered fee structure for Industry Members (other than Execution Venue ATSS) as described in this section. In determining the tiers, the Operating Committee considered the funding principles set forth in Section 11.2 of the CAT NMS Plan, seeking to create funding tiers that take into account the relative impact on CAT System resources of different Industry Members, and that establish comparable fees among the CAT Reporters with the most Reportable Events. The Operating Committee has determined that

establishing seven tiers results in an allocation of fees that distinguishes between Industry Members with differing levels of message traffic. Thus, each such Industry Member will be placed into one of seven tiers of fixed fees, based on "message traffic" for a defined period (as discussed below).

A seven tier structure was selected to provide a wide range of levels for tiering Industry Members such that Industry Members submitting significantly less message traffic to the CAT would be adequately differentiated from Industry Members submitting substantially more message traffic. The Operating Committee considered historical message traffic from multiple time periods, generated by Industry Members across all exchanges and as submitted to FINRA's Order Audit Trail System ("OATS"), and considered the distribution of firms with similar levels of message traffic, grouping together firms with similar levels of message traffic. Based on this, the Operating Committee determined that seven tiers would group firms with similar levels of message traffic, charging those firms with higher impact on the CAT more, while lowering the burden on Industry Members that have less CAT-related activity. Furthermore, the selection of seven tiers establishes comparable fees among the largest CAT Reporters.

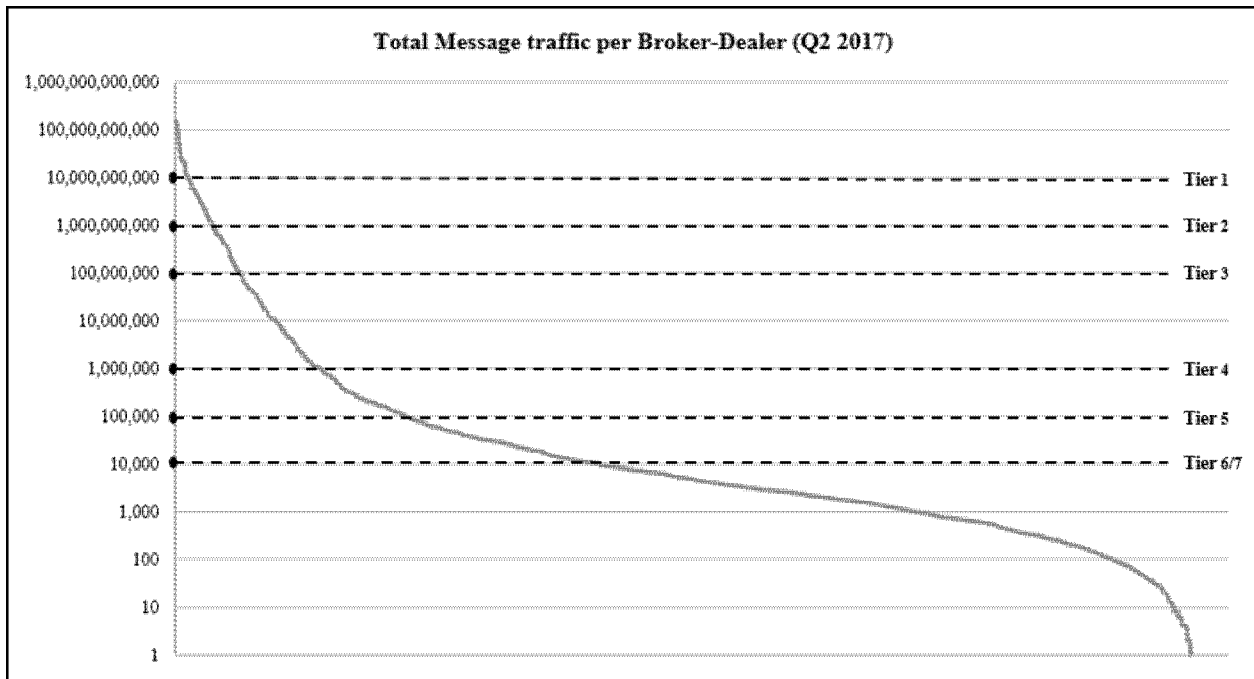
Each Industry Member (other than Execution Venue ATSS) will be ranked by message traffic and tiered by predefined Industry Member percentages (the "Industry Member Percentages"). The Operating Committee determined to use predefined percentages rather than fixed volume thresholds to ensure that the total CAT Fees collected recover the expected CAT costs regardless of changes in the total level of message traffic. To determine the fixed percentage of Industry Members in each tier, the Operating Committee analyzed historical message traffic generated by Industry Members across all exchanges and as submitted to OATS, and considered the distribution of firms with similar levels of message traffic, grouping together firms with similar levels of message traffic. Based on this, the Operating Committee identified seven tiers that would group firms with similar levels of message traffic.

The percentage of costs recovered by each Industry Member tier will be determined by predefined percentage allocations (the "Industry Member Recovery Allocation"). In determining the fixed percentage allocation of costs recovered for each tier, the Operating Committee considered the impact of CAT Reporter message traffic on the

CAT System as well as the distribution of total message volume across Industry Members while seeking to maintain comparable fees among the largest CAT Reporters. Accordingly, following the determination of the percentage of Industry Members in each tier, the Operating Committee identified the percentage of total market volume for each tier based on the historical message traffic upon which Industry Members had been initially ranked. Taking this into account along with the resulting percentage of total recovery, the percentage allocation of costs recovered for each tier were assigned, allocating higher percentages of recovery to tiers with higher levels of message traffic while avoiding any inappropriate burden on competition. Furthermore, by using percentages of Industry Members and costs recovered per tier, the Operating Committee sought to include elasticity within the funding model, allowing the funding model to respond to changes in either the total number of Industry Members or the total level of message traffic.

The following chart illustrates the breakdown of seven Industry Member tiers across the monthly average of total equity and equity options orders, cancels, quotes and executions in the second quarter of 2017 as well as message traffic thresholds between the largest of Industry Member message traffic gaps. The Operating Committee referenced similar distribution illustrations to determine the appropriate division of Industry Member percentages in each tier by considering the grouping of firms with similar levels of message traffic and seeking to identify relative breakpoints in the message traffic between such groupings. In reviewing the chart and its corresponding table, note that while these distribution illustrations were referenced to help differentiate between Industry Member tiers, the proposed funding model is driven by fixed percentages of Industry Members across tiers to account for fluctuating levels of message traffic over time. This approach also provides financial stability for the CAT by ensuring that the funding model will recover the required amounts regardless of changes in the number of Industry Members or the amount of message traffic. Actual messages in any tier will vary based on the actual traffic in a given measurement period, as well as the number of firms included in the measurement period. The Industry Member Percentages and Industry Member Recovery Allocation for each tier will remain fixed with each Industry Member's tier to be reassigned

periodically, as described below in Section 3(a)(2)(I).



Industry Member tier	Approximate message traffic per Industry Member (Q2 2017) (orders, quotes, cancels and executions)
Tier 1	>10,000,000,000
Tier 2	1,000,000,000–10,000,000,000
Tier 3	100,000,000–1,000,000,000
Tier 4	1,000,000–100,000,000
Tier 5	100,000–1,000,000
Tier 6	10,000–100,000
Tier 7	<10,000

Based on the above analysis, the Operating Committee approved the following Industry Member Percentages and Industry Member Recovery Allocations:

Industry Member tier	Percentage of Industry Members	Percentage of Industry Member Recovery	Percentage of total recovery
Tier 1	0.900	12.00	9.00
Tier 2	2.150	20.50	15.38
Tier 3	2.800	18.50	13.88
Tier 4	7.750	32.00	24.00
Tier 5	8.300	10.00	7.50
Tier 6	18.800	6.00	4.50
Tier 7	59.300	1.00	0.75
Total	100	100	75

For the purposes of creating these tiers based on message traffic, the Operating Committee determined to define the term “message traffic” separately for the period before the commencement of CAT reporting and

for the period after the start of CAT reporting. The different definition for message traffic is necessary as there will be no Reportable Events as defined in the Plan, prior to the commencement of CAT reporting. Accordingly, prior to the

start of CAT reporting, “message traffic” will be comprised of historical equity and equity options orders, cancels, quotes and executions provided by each exchange and FINRA over the previous three months. Prior to the start of CAT

reporting, orders would be comprised of the total number of equity and equity options orders received and originated by a member of an exchange or FINRA over the previous three-month period, including principal orders, cancel/replace orders, market maker orders originated by a member of an exchange, and reserve (iceberg) orders as well as executions originated by a member of FINRA, and excluding order rejects, system-modified orders, order routes and implied orders.⁴⁸ In addition, prior to the start of CAT reporting, cancels would be comprised of the total number of equity and equity option cancels received and originated by a member of an exchange or FINRA over a three-month period, excluding order modifications (*e.g.*, order updates, order splits, partial cancels) and multiple cancels of a complex order. Furthermore, prior to the start of CAT reporting, quotes would be comprised of information readily available to the exchanges and FINRA, such as the total number of historical equity and equity options quotes received and originated by a member of an exchange or FINRA over the prior three-month period. Additionally, prior to the start of CAT reporting, executions would be comprised of the total number of equity and equity option executions received or originated by a member of an exchange or FINRA over a three-month period.

After an Industry Member begins reporting to the CAT, “message traffic” will be calculated based on the Industry Member’s Reportable Events reported to the CAT as will be defined in the Technical Specifications.⁴⁹

Quotes of Options Market Makers and equity market makers will be included in the calculation of total message traffic for those market makers for purposes of tiering under the CAT funding model both prior to CAT reporting and once CAT reporting commences.⁵⁰ To

address potential concerns regarding burdens on competition or market quality of including quotes in the calculation of message traffic, however, the Operating Committee determined to discount the Options Market Maker quotes by the trade to quote ratio for options when calculating message traffic for Options Market Makers. Based on available data for June 2016 through June 2017, the trade to quote ratio for options is 0.01%. Similarly, to avoid disincentives to quoting behavior on the equities side, the Operating Committee determined to discount equity market maker quotes by the trade to quote ratio for equities. Based on available data for June 2016 through June 2017, the trade to quote ratio for equities is 5.43%.⁵¹ The trade to quote ratio for options and the trade to quote ratio for equities will be calculated every three months when tiers are recalculated (as discussed below).

The Operating Committee has determined to calculate fee tiers every three months, on a calendar quarter basis, based on message traffic from the prior three months. Based on its analysis of historical data, the Operating Committee believes that calculating tiers based on three months of data will provide the best balance between reflecting changes in activity by Industry Members while still providing predictability in the tiering for Industry Members. Because fee tiers will be calculated based on message traffic from the prior three months, the Operating Committee will begin calculating message traffic based on an Industry Member’s Reportable Events reported to the CAT once the Industry Member has been reporting to the CAT for three months. Prior to that, fee tiers will be calculated as discussed above with regard to the period prior to CAT reporting.

(C) Execution Venue Tiering

Under Section 11.3(a) of the CAT NMS Plan, the Operating Committee is required to establish fixed fees payable by Execution Venues. Section 1.1 of the CAT NMS Plan defines an Execution Venue as “a Participant or an alternative trading system (“ATS”) (as defined in Rule 300 of Regulation ATS) that

exemption provided for Options Market Maker quotes, Options Market Maker quotes will be included in the calculation of total message traffic for Options Market Makers for purposes of tiering under the CAT funding model both prior to CAT reporting and once CAT reporting commences.

⁵¹ The trade to quote ratios were calculated based on the inverse of the average of the monthly equity SIP and OPRA quote to trade ratios from June 2016–June 2017 that were compiled by the Financial Information Forum using data from Nasdaq and SIA.

operates pursuant to Rule 301 of Regulation ATS (excluding any such ATS that does not execute orders).”⁵²

The Operating Committee determined that ATSs should be included within the definition of Execution Venue. The Operating Committee believes that it is appropriate to treat ATSs as Execution Venues under the proposed funding model since ATSs have business models that are similar to those of exchanges, and ATSs also compete with exchanges.

Given the differences between Execution Venues that trade NMS Stocks and/or OTC Equity Securities and Execution Venues that trade Listed Options, Section 11.3(a) addresses Execution Venues that trade NMS Stocks and/or OTC Equity Securities separately from Execution Venues that trade Listed Options. Equity and Options Execution Venues are treated separately for two reasons. First, the differing quoting behavior of Equity and Options Execution Venues makes comparison of activity between such Execution Venues difficult. Second, Execution Venue tiers are calculated based on market share of share volume, and it is therefore difficult to compare market share between asset classes (*i.e.*, equity shares versus options contracts). Discussed below is how the funding model treats the two types of Execution Venues.

(I) NMS Stocks and OTC Equity Securities

Section 11.3(a)(i) of the CAT NMS Plan states that each Execution Venue that (i) executes transactions or, (ii) in the case of a national securities association, has trades reported by its members to its trade reporting facility or facilities for reporting transactions effected otherwise than on an exchange, in NMS Stocks or OTC Equity Securities will pay a fixed fee depending on the market share of that Execution Venue in NMS Stocks and OTC Equity Securities, with the Operating Committee establishing at least two and not more than five tiers of fixed fees, based on an Execution Venue’s NMS Stocks and OTC Equity Securities market share. For these purposes, market share for Execution Venues that execute transactions will be calculated by share volume, and market share for a national securities association that has trades reported by its members to its trade reporting facility or facilities for reporting transactions effected otherwise than on an exchange in NMS

⁵² Although FINRA does not operate an execution venue, because it is a Participant, it is considered an “Execution Venue” under the Plan for purposes of determining fees.

⁴⁸ Consequently, firms that do not have “message traffic” reported to an exchange or OATS before they are reporting to the CAT would not be subject to a fee until they begin to report information to CAT.

⁴⁹ If an Industry Member (other than an Execution Venue ATS) has no orders, cancels, quotes and executions prior to the commencement of CAT Reporting, or no Reportable Events after CAT reporting commences, then the Industry Member would not have a CAT Fee obligation.

⁵⁰ The SEC approved exemptive relief permitting Options Market Maker quotes to be reported to the Central Repository by the relevant Options Exchange in lieu of requiring that such reporting be done by both the Options Exchange and the Options Market Maker, as required by Rule 613 of Regulation NMS. *See* Securities Exchange Act Release No. 77265 (March 1, 2017), 81 FR 11856 (March 7, 2016). This exemption applies to Options Market Maker quotes for CAT reporting purposes only. Therefore, notwithstanding the reporting

Stocks or OTC Equity Securities will be calculated based on share volume of trades reported, provided, however, that the share volume reported to such national securities association by an Execution Venue shall not be included in the calculation of such national security association's market share.

In accordance with Section 11.3(a)(i) of the CAT NMS Plan, the Operating Committee approved a tiered fee structure for Equity Execution Venues and Option Execution Venues. In determining the Equity Execution Venue Tiers, the Operating Committee considered the funding principles set forth in Section 11.2 of the CAT NMS Plan, seeking to create funding tiers that take into account the relative impact on system resources of different Equity Execution Venues, and that establish comparable fees among the CAT Reporters with the most Reportable Events. Each Equity Execution Venue will be placed into one of four tiers of fixed fees, based on the Execution Venue's NMS Stocks and OTC Equity Securities market share. In choosing four tiers, the Operating Committee performed an analysis similar to that discussed above with regard to the non-Execution Venue Industry Members to determine the number of tiers for Equity Execution Venues. The Operating Committee determined to establish four tiers for Equity Execution Venues, rather than a larger number of tiers as established for non-Execution Venue Industry Members, because the four tiers were sufficient to distinguish between the smaller number of Equity Execution Venues based on market share. Furthermore, the selection of four tiers serves to help establish comparability among the largest CAT Reporters.

Each Equity Execution Venue will be ranked by market share and tiered by predefined Execution Venue percentages, (the "Equity Execution Venue Percentages"). In determining the fixed percentage of Equity Execution Venues in each tier, the Operating Committee reviewed historical market share of share volume for Execution Venues. Equity Execution Venue market

shares of share volume were sourced from market statistics made publicly-available by Bats Global Markets, Inc. ("Bats"). ATS market shares of share volume was sourced from market statistics made publicly-available by FINRA. FINRA trade reporting facility ("TRF") and ORF market share of share volume was sourced from market statistics made publicly available by FINRA. Based on data from FINRA and *otcmarkets.com*, ATSS accounted for 39.12% of the share volume across the TRFs and ORFs during the recent tiering period. A 39.12/60.88 split was applied to the ATS and non-ATS breakdown of FINRA market share, with FINRA tiered based only on the non-ATS portion of its market share of share volume.

The Operating Committee determined to discount the OTC Equity Securities market share of Execution Venue ATSS trading OTC Equity Securities as well as the market share of the FINRA ORF in recognition of the different trading characteristics of the OTC Equity Securities market as compared to the market in NMS Stocks. Many OTC Equity Securities are priced at less than one dollar—and a significant number at less than one penny—per share and low-priced shares tend to trade in larger quantities. Accordingly, a disproportionately large number of shares are involved in transactions involving OTC Equity Securities versus NMS Stocks. Because the proposed fee tiers are based on market share calculated by share volume, Execution Venue ATSS trading OTC Equity Securities and FINRA would likely be subject to higher tiers than their operations may warrant. To address this potential concern, the Operating Committee determined to discount the OTC Equity Securities market share of Execution Venue ATSS trading OTC Equity Securities and the market share of the FINRA ORF by multiplying such market share by the average shares per trade ratio between NMS Stocks and OTC Equity Securities in order to adjust for the greater number of shares being traded in the OTC Equity Securities market. Based on available data for the

second quarter of 2017, the average shares per trade ratio between NMS Stocks and OTC Equity Securities is 0.17%.⁵³ The average shares per trade ratio between NMS Stocks and OTC Equity Securities will be recalculated every three months when tiers are recalculated.

Based on this, the Operating Committee considered the distribution of Execution Venues, and grouped together Execution Venues with similar levels of market share. The percentage of costs recovered by each Equity Execution Venue tier will be determined by predefined percentage allocations (the "Equity Execution Venue Recovery Allocation"). In determining the fixed percentage allocation of costs to be recovered from each tier, the Operating Committee considered the impact of CAT Reporter market share activity on the CAT System as well as the distribution of total market volume across Equity Execution Venues while seeking to maintain comparable fees among the largest CAT Reporters. Accordingly, following the determination of the percentage of Execution Venues in each tier, the Operating Committee identified the percentage of total market volume for each tier based on the historical market share upon which Execution Venues had been initially ranked. Taking this into account along with the resulting percentage of total recovery, the percentage allocation of cost recovery for each tier were assigned, allocating higher percentages of recovery to the tier with a higher level of market share while avoiding any inappropriate burden on competition. Furthermore, by using percentages of Equity Execution Venues and cost recovery per tier, the Operating Committee sought to include elasticity within the funding model, allowing the funding model to respond to changes in either the total number of Equity Execution Venues or changes in market share.

Based on this analysis, the Operating Committee approved the following Equity Execution Venue Percentages and Recovery Allocations:

• Equity Execution Venue tier	• Percentage of Equity Execution Venues	• Percentage of Execution Venue Recovery	• Percentage of total recovery
• Tier 1	• 25.00	• 33.25	• 8.31
• Tier 2	• 42.00	• 25.73	• 6.43
• Tier 3	• 23.00	• 8.00	• 2.00

⁵³ The average shares per trade ratio for both NMS Stocks and OTC Equity Securities from the second quarter of 2017 was calculated using publicly

available market volume data from Bats and OTC Markets Group, and the totals were divided to

determine the average number of shares per trade between NMS Stocks and OTC Equity Securities.

• Equity Execution Venue tier	• Percentage of Equity Execution Venues	• Percentage of Execution Venue Recovery	• Percentage of total recovery
• Tier 4	• 10.00	• 0.02	• 0.01
• Total	• 100	• 67	• 16.75

(II) Listed Options

Section 11.3(a)(ii) of the CAT NMS Plan states that each Execution Venue that executes transactions in Listed Options will pay a fixed fee depending on the Listed Options market share of that Execution Venue, with the Operating Committee establishing at least two and no more than five tiers of fixed fees, based on an Execution Venue's Listed Options market share. For these purposes, market share will be calculated by contract volume.

In accordance with Section 11.3(a)(ii) of the CAT NMS Plan, the Operating Committee approved a tiered fee structure for Options Execution Venues. In determining the tiers, the Operating Committee considered the funding principles set forth in Section 11.2 of the CAT NMS Plan, seeking to create funding tiers that take into account the relative impact on system resources of different Options Execution Venues, and that establish comparable fees among the CAT Reporters with the most Reportable Events. Each Options Execution Venue will be placed into one of two tiers of fixed fees, based on the Execution Venue's Listed Options market share. In choosing two tiers, the Operating Committee performed an analysis similar to that discussed above with regard to Industry Members (other than Execution Venue ATSS) to

determine the number of tiers for Options Execution Venues. The Operating Committee determined to establish two tiers for Options Execution Venues, rather than a larger number, because the two tiers were sufficient to distinguish between the smaller number of Options Execution Venues based on market share. Furthermore, due to the smaller number of Options Execution Venues, the incorporation of additional Options Execution Venue tiers would result in significantly higher fees for Tier 1 Options Execution Venues and reduce comparability between Execution Venues and Industry Members. Furthermore, the selection of two tiers served to establish comparable fees among the largest CAT Reporters.

Each Options Execution Venue will be ranked by market share and tiered by predefined Execution Venue percentages, (the "Options Execution Venue Percentages"). To determine the fixed percentage of Options Execution Venues in each tier, the Operating Committee analyzed the historical and publicly available market share of Options Execution Venues to group Options Execution Venues with similar market shares across the tiers. Options Execution Venue market share of share volume were sourced from market statistics made publicly-available by

Bats. The process for developing the Options Execution Venue Percentages was the same as discussed above with regard to Equity Execution Venues.

The percentage of costs to be recovered from each Options Execution Venue tier will be determined by predefined percentage allocations (the "Options Execution Venue Recovery Allocation"). In determining the fixed percentage allocation of cost recovery for each tier, the Operating Committee considered the impact of CAT Reporter market share activity on the CAT System as well as the distribution of total market volume across Options Execution Venues while seeking to maintain comparable fees among the largest CAT Reporters. Furthermore, by using percentages of Options Execution Venues and cost recovery per tier, the Operating Committee sought to include elasticity within the funding model, allowing the funding model to respond to changes in either the total number of Options Execution Venues or changes in market share. The process for developing the Options Execution Venue Recovery Allocation was the same as discussed above with regard to Equity Execution Venues.

Based on this analysis, the Operating Committee approved the following Options Execution Venue Percentages and Recovery Allocations:

Options Execution Venue tier	Percentage of Options Execution Venues	Percentage of Execution Venue Recovery	Percentage of total recovery
Tier 1	75.00	28.25	7.06
Tier 2	25.00	4.75	1.19
Total	100	33	8.25

(III) Market Share/Tier Assignments

The Operating Committee determined that, prior to the start of CAT reporting, market share for Execution Venues would be sourced from publicly-available market data. Options and equity volumes for Participants will be sourced from market data made publicly available by Bats while Execution Venue ATS volumes will be sourced from market data made publicly available by FINRA and OTC Markets.

Set forth in the Appendix are two charts, one listing the current Equity Execution Venues, each with its rank and tier, and one listing the current Options Execution Venues, each with its rank and tier.

After the commencement of CAT reporting, market share for Execution Venues will be sourced from data reported to the CAT. Equity Execution Venue market share will be determined by calculating each Equity Execution

Venue's proportion of the total volume of NMS Stock and OTC Equity shares reported by all Equity Execution Venues during the relevant time period (with the discounting of OTC Equity Securities market share of Execution Venue ATSS trading OTC Equity Securities as well as the market share of the FINRA ORF, as described above). Similarly, market share for Options Execution Venues will be determined by calculating each Options Execution

Venue's proportion of the total volume of Listed Options contracts reported by all Options Execution Venues during the relevant time period.

The Operating Committee has determined to calculate fee tiers for Execution Venues every three months based on market share from the prior three months. Based on its analysis of historical data, the Operating Committee believes calculating tiers based on three months of data will provide the best balance between reflecting changes in activity by Execution Venues while still providing predictability in the tiering for Execution Venues.

(D) Allocation of Costs

In addition to the funding principles discussed above, including comparability of fees, Section 11.1(c) of the CAT NMS Plan also requires expenses to be fairly and reasonably shared among the Participants and Industry Members. Accordingly, in developing the proposed fee schedules pursuant to the funding model, the Operating Committee calculated how the CAT costs would be allocated between Industry Members and Execution Venues, and how the portion of CAT costs allocated to Execution Venues would be allocated between Equity Execution Venues and Options Execution Venues. These determinations are described below.

(I) Allocation Between Industry Members and Execution Venues

In determining the cost allocation between Industry Members (other than Execution Venue ATSs) and Execution Venues, the Operating Committee analyzed a range of possible splits for revenue recovery from such Industry Members and Execution Venues, including 80%/20%, 75%/25%, 70%/30% and 65%/35% allocations. Based on this analysis, the Operating Committee determined that 75 percent of total costs recovered would be allocated to Industry Members (other than Execution Venue ATSs) and 25 percent would be allocated to Execution Venues. The Operating Committee determined that this 75%/25% division maintained the greatest level of comparability across the funding model. For example, the cost allocation establishes fees for the largest Industry Members (*i.e.*, those Industry Members in Tiers 1) that are comparable to the largest Equity Execution Venues and Options Execution Venues (*i.e.*, those Execution Venues in Tier 1).

Furthermore, the allocation of total CAT cost recovery recognizes the difference in the number of CAT Reporters that are Industry Members versus CAT Reporters that are Execution Venues. Specifically, the cost allocation takes into consideration that there are approximately 23 times more Industry Members expected to report to the CAT than Execution Venues (*e.g.*, an estimated 1541 Industry Members versus 67 Execution Venues as of June 2017).

(II) Allocation Between Equity Execution Venues and Options Execution Venues

The Operating Committee also analyzed how the portion of CAT costs allocated to Execution Venues would be allocated between Equity Execution Venues and Options Execution Venues. In considering this allocation of costs, the Operating Committee analyzed a range of alternative splits for revenue recovered between Equity and Options Execution Venues, including a 70%/30%, 67%/33%, 65%/35%, 50%/50% and 25%/75% split. Based on this analysis, the Operating Committee determined to allocate 67 percent of Execution Venue costs recovered to Equity Execution Venues and 33 percent to Options Execution Venues. The Operating Committee determined that a 67%/33% allocation between Equity and Options Execution Venues maintained the greatest level of fee equitability and comparability based on the current number of Equity and Options Execution Venues. For example, the allocation establishes fees for the larger Equity Execution Venues that are comparable to the larger Options Execution Venues. Specifically, Tier 1 Equity Execution Venues would pay a quarterly fee of \$81,047 and Tier 1 Options Execution Venues would pay a quarterly fee of \$81,379. In addition to fee comparability between Equity Execution Venues and Options Execution Venues, the allocation also establishes equitability between larger (Tier 1) and smaller (Tier 2) Execution Venues based upon the level of market share. Furthermore, the allocation is intended to reflect the relative levels of current equity and options order events.

(E) Fee Levels

The Operating Committee determined to establish a CAT-specific fee to collectively recover the costs of building and operating the CAT. Accordingly,

under the funding model, the sum of the CAT Fees is designed to recover the total cost of the CAT. The Operating Committee has determined overall CAT costs to be comprised of Plan Processor costs and non-Plan Processor costs, which are estimated to be \$50,700,000 in total for the year beginning November 21, 2016.⁵⁴

The Plan Processor costs relate to costs incurred and to be incurred through November 21, 2017 by the Plan Processor and consist of the Plan Processor's current estimates of average yearly ongoing costs, including development costs, which total \$37,500,000. This amount is based upon the fees due to the Plan Processor pursuant to the Company's agreement with the Plan Processor.

The non-Plan Processor estimated costs incurred and to be incurred by the Company through November 21, 2017 consist of three categories of costs. The first category of such costs are third party support costs, which include legal fees, consulting fees and audit fees from November 21, 2016 until the date of filing as well as estimated third party support costs for the rest of the year. These amount to an estimated \$5,200,000. The second category of non-Plan Processor costs are estimated cyber-insurance costs for the year. Based on discussions with potential cyber-insurance providers, assuming \$2–5 million cyber-insurance premium on \$100 million coverage, the Company has estimated \$3,000,000 for the annual cost. The final cost figures will be determined following receipt of final underwriter quotes. The third category of non-Plan Processor costs is the CAT operational reserve, which is comprised of three months of ongoing Plan Processor costs (\$9,375,000), third party support costs (\$1,300,000) and cyber-insurance costs (\$750,000). The Operating Committee aims to accumulate the necessary funds to establish the three-month operating reserve for the Company through the CAT Fees charged to CAT Reporters for the year. On an ongoing basis, the Operating Committee will account for any potential need to replenish the operating reserve or other changes to total cost during its annual budgeting process. The following table summarizes the Plan Processor and non-Plan Processor cost components which comprise the total estimated CAT costs of \$50,700,000 for the covered period.

⁵⁴ It is anticipated that CAT-related costs incurred prior to November 21, 2016 will be addressed via a separate filing.

Cost category	Cost component	Amount
Plan Processor	Operational Costs	\$37,500,000
	Third Party Support Costs	5,200,000
Non-Plan Processor	Operational Reserve	⁵⁵ 5,000,000
	Cyber-insurance Costs	3,000,000
Estimated Total		50,700,000

Based on these estimated costs and the calculations for the funding model described above, the Operating

Committee determined to impose the following fees:⁵⁶

For Industry Members (other than Execution Venue ATs):

Tier	Percentage of Industry Members	Quarterly CAT Fee
1	0.900	\$81,483
2	2.150	59,055
3	2.800	40,899
4	7.750	25,566
5	8.300	7,428
6	18.800	1,968
7	59.300	105

For Execution Venues for NMS Stocks and OTC Equity Securities:

Tier	Percentage of Equity Execution Venues	Quarterly CAT Fee
1	25.00	\$81,048
2	42.00	37,062
3	23.00	21,126
4	10.00	129

For Execution Venues for Listed Options:

Tier	Percentage of Options Execution Venues	Quarterly CAT Fee
1	75.00	\$81,381
2	25.00	37,629

The Operating Committee has calculated the schedule of effective fees for Industry Members (other than Execution Venue ATs) and Execution

Venues in the following manner. Note that the calculation of CAT Fees assumes 52 Equity Execution Venues, 15 Options Execution Venues and 1,541

Industry Members (other than Execution Venue ATs) as of June 2017.

Industry Member tier	Percentage of Industry Members	Percentage of Industry Member Recovery	Percentage of total recovery
Tier 1	0.900	12.00	9.00
Tier 2	2.150	20.50	15.38
Tier 3	2.800	18.50	13.88
Tier 4	7.750	32.00	24.00
Tier 5	8.300	10.00	7.50
Tier 6	18.800	6.00	4.50

⁵⁵ This \$5,000,000 represents the gradual accumulation of the funds for a target operating reserve of \$11,425,000.

⁵⁶ Note that all monthly, quarterly and annual CAT Fees have been rounded to the nearest dollar.

Industry Member tier	Percentage of Industry Members	Percentage of Industry Member Recovery	Percentage of total recovery
Tier 7	59.300	1.00	0.75
Total	100	100	75

Industry Member tier	Estimated number of Industry Members
Tier 1	14
Tier 2	33
Tier 3	43
Tier 4	119
Tier 5	128
Tier 6	290
Tier 7	914
Total	1,541

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Calculation 1.1 (Calculation of a Tier 1 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 0.9\% \text{ [% of Tier 1 IMs]} = 14 \text{ [Estimated Tier 1 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 12\% \text{ [% of Tier 1 IM Recovery]}}{14 \text{ [Estimated Tier 1 IMs]}} \right) \div 12 \text{ [Months per year]} =$$

\$27,161

Calculation 1.2 (Calculation of a Tier 2 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 2.15\% \text{ [% of Tier 2 IMs]} = 33 \text{ [Estimated Tier 2 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 20.5\% \text{ [% of Tier 2 IM Recovery]}}{33 \text{ [Estimated Tier 2 IMs]}} \right) \div 12 \text{ [Months per year]} =$$

\$19,685

Calculation 1.3 (Calculation of a Tier 3 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 2.125\% \text{ [% of Tier 3 IMs]} = 43 \text{ [Estimated Tier 3 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 18.5\% \text{ [% of Tier 3 IM Recovery]}}{43 \text{ [Estimated Tier 3 IMs]}} \right) \div 12 \text{ [Months per year]} =$$

\$13,633

Calculation 1.4 (Calculation of a Tier 4 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 7.75\% \text{ [% of Tier 4 IMs]} = 119 \text{ [Estimated Tier 4 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 32\% \text{ [% of Tier 4 IM Recovery]}}{119 \text{ [Estimated Tier 4 IMs]}} \right) \div 12 \text{ [Months per year]} =$$

\$8522

Calculation 1.5 (Calculation of a Tier 5 Industry Member Annual Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 8.3\% \text{ [% of Tier 5 IMs]} = 128 \text{ [Estimated Tier 5 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 7.75\% \text{ [% of Tier 5 IM Recovery]}}{128 \text{ [Estimated Tier 5 IMs]}} \right) \div 12 \text{ [Months per year]} =$$

\$2476

Calculation 1.6 (Calculation of a Tier 6 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 18.8\% \text{ [% of Tier 6 IMs]} = 290 \text{ [Estimated Tier 6 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 6\% \text{ [% of Tier 6 IM Recovery]}}{290 \text{ [Estimated Tier 6 IMs]}} \right) \div 12 \text{ [Months per year]} =$$

\$656

Calculation 1.7 (Calculation of a Tier 7 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 59.3\% \text{ [% of Tier 7 IMs]} = 914 \text{ [Estimated Tier 7 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 1\% \text{ [% of Tier 7 IM Recovery]}}{914 \text{ [Estimated Tier 7 IMs]}} \right) \div 12 \text{ [Months per year]} =$$

\$35

• Equity Execution Venue tier	• Percentage of Equity Execution Venues	• Percentage of Execution Venue Recovery	• Percentage of total recovery
• Tier 1	• 25.00	• 33.25	• 8.31
• Tier 2	• 42.00	• 25.73	• 6.43
• Tier 3	• 23.00	• 8.00	• 2.00
• Tier 4	• 10.00	• 49.00	• 0.01
• Total	• 100	• 67	• 16.75

Equity Execution Venue tier	Estimated number of Equity Execution Venues
Tier 1	13
Tier 2	22
Tier 3	12
Tier 4	5
Total	52

Calculation 2.1 (Calculation of a Tier 1 Equity Execution Venue Monthly Fee)

$$52 \text{ [Estimated Tot. Equity EVs]} \times 25\% \text{ [% of Tier 1 Equity EVs]} = 13 \text{ [Estimated Tier 1 Equity EVs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 25\% \text{ [EV \% of Tot. Ann. CAT Costs]} \times 26\% \text{ [% of Tier 1 Equity EV Recovery]}}{13 \text{ [Estimated Tier 1 Equity EVs]}} \right) \div 12 \text{ [Months per year]} = \$27,016$$

Calculation 2.2 (Calculation of a Tier 2 Equity Execution Venue Monthly Fee)

$$52 \text{ [Estimated Tot. Equity EVs]} \times 42\% \text{ [% of Tier 2 Equity EVs]} = 22 \text{ [Estimated Tier 2 Equity EVs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 25\% \text{ [EV \% of Tot. Ann. CAT Costs]} \times 25.73\% \text{ [% of Tier 2 Equity EV Recovery]}}{22 \text{ [Estimated Tier 2 Equity EVs]}} \right) \div 12 \text{ [Months per year]} = \$12,353$$

Calculation 2.3 (Calculation of a Tier 3 Equity Execution Venue Monthly Fee)

$$52 \text{ [Estimated Tot. Equity EVs]} \times 23\% \text{ [% of Tier 2 Equity EVs]} = 12 \text{ [Estimated Tier 2 Equity EVs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 25\% \text{ [EV \% of Tot. Ann. CAT Costs]} \times 8\% \text{ [% of Tier 2 Equity EV Recovery]}}{12 \text{ [Estimated Tier 2 Equity EVs]}} \right) \div 12 \text{ [Months per year]} = \$7,042$$

Calculation 2.4 (Calculation of a Tier 4 Equity Execution Venue Monthly Fee)

$$52 \text{ [Estimated Tot. Equity EVs]} \times 10\% \text{ [% of Tier 2 Equity EVs]} = 5 \text{ [Estimated Tier 2 Equity EVs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 25\% \text{ [EV \% of Tot. Ann. CAT Costs]} \times 0.02\% \text{ [% of Tier 2 Equity EV Recovery]}}{5 \text{ [Estimated Tier 2 Equity EVs]}} \right) \div 12 \text{ [Months per year]} = \$42$$

CALCULATION OF ANNUAL TIER FEES FOR OPTIONS EXECUTION VENUES ["EV"]

Options Execution Venue tier	Percentage of Options Execution Venues	Percentage of Execution Venue Recovery	Percentage of total recovery
Tier 1	75.00	28.25	7.06
Tier 2	25.00	4.75	1.19
Total	100	33	8.25

Options Execution Venue tier	Estimated number of Options Execution Venues
Tier 1	11
Tier 2	4
Total	15

Calculation 3.1 (Calculation of a Tier 1 Options Execution Venue Monthly Fee)

$$15 \text{ [Estimated Tot. Options EVs]} \times 75\% \text{ [% of Tier 1 Options EVs]} = 11 \text{ [Estimated Tier 1 Options EVs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 25\% \text{ [EV \% of Tot. Ann. CAT Costs]} \times 28.25\% \text{ [EV \% of Tier 1 Options EV Recovery]}}{11 \text{ [Estimated Tier 1 Options EVs]}} \right) \div 12 \text{ [Months per year]} = \$27,127$$

Calculation 3.2 (Calculation of a Tier 2 Options Execution Venue Annual Fee)

$$15 \text{ [Estimated Tot. Options EVs]} \times 25\% \text{ [% of Tier 2 Options EVs]} = 4 \text{ [Estimated Tier 2 Options EVs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 25\% \text{ [EV \% of Tot. Ann. CAT Costs]} \times 4.75\% \text{ [EV \% of Tier 2 Options EV Recovery]}}{4 \text{ [Estimated Tier 2 Options EVs]}} \right) \div 12 \text{ [Months per year]} = \$12,543$$

TRACEABILITY OF TOTAL CAT FEES

Type	Industry Member tier	Estimated number of members	CAT Fees paid annually	Total recovery
Industry Members	Tier 1	14	\$325,932	\$4,563,048
	Tier 2	33	236,220	7,795,260
	Tier 3	43	163,596	7,034,628
	Tier 4	119	102,264	12,169,416
	Tier 5	128	29,712	3,803,136
	Tier 6	290	7,872	2,282,880
	Tier 7	914	420	383,880
Total		1,541		38,032,248
Equity Execution Venues	Tier 1	13	324,192	4,214,496
	Tier 2	22	148,248	3,261,456
	Tier 3	12	84,504	1,014,048
	Tier 4	5	516	2,580
Total		52		8,492,580
Options Execution Venues	Tier 1	11	325,524	3,580,764
	Tier 2	4	150,516	602,064
Total		15		4,182,828
Total				50,700,000
Excess ⁵⁷				\$7,656

(F) Comparability of Fees

The funding principles require a funding model in which the fees charged to the CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability

⁵⁷ The amount in excess of the total CAT costs will contribute to the gradual accumulation of the target operating reserve of \$11.425 million.

purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether Execution Venue and/or Industry Members). Accordingly, in creating the model, the Operating Committee sought to establish comparable fees for the top tier of Industry Members (other than Execution Venue ATSS), Equity Execution Venues and Options Execution Venues. Specifically, each Tier 1 CAT Reporter would be required

to pay a quarterly fee of approximately \$81,000.

(G) Billing Onset

Under Section 11.1(c) of the CAT NMS Plan, to fund the development and implementation of the CAT, the Company shall time the imposition and collection of all fees on Participants and Industry Members in a manner reasonably related to the timing when the Company expects to incur such

development and implementation costs. The Company is currently incurring such development and implementation costs and will continue to do so prior to the commencement of CAT reporting and thereafter. In accordance with the CAT NMS Plan, all CAT Reporters, including both Industry Members and Execution Venues (including Participants), will be invoiced as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Participants and the operative date of the Plan amendment adopting CAT Fees for Participants.

(H) Changes to Fee Levels and Tiers

Section 11.3(d) of the CAT NMS Plan states that “[t]he Operating Committee shall review such fee schedule on at least an annual basis and shall make any changes to such fee schedule that it deems appropriate. The Operating Committee is authorized to review such fee schedule on a more regular basis, but shall not make any changes on more than a semi-annual basis unless, pursuant to a Supermajority Vote, the Operating Committee concludes that such change is necessary for the adequate funding of the Company.” With such reviews, the Operating Committee will review the distribution of Industry Members and Execution Venues across tiers, and make any updates to the percentage of CAT Reporters allocated to each tier as may be necessary. In addition, the reviews will evaluate the estimated ongoing CAT costs and the level of the operating reserve. To the extent that the total CAT costs decrease, the fees would be adjusted downward, and to the extent

that the total CAT costs increase, the fees would be adjusted upward.⁵⁸ Furthermore, any surplus of the Company’s revenues over its expenses is to be included within the operational reserve to offset future fees. The limitations on more frequent changes to the fee, however, are intended to provide budgeting certainty for the CAT Reporters and the Company.⁵⁹ To the extent that the Operating Committee approves changes to the number of tiers in the funding model or the fees assigned to each tier, then the Operating Committee will file such changes with the SEC pursuant to Rule 608 of the Exchange Act, and the Participants will file such changes with the SEC pursuant to Section 19(b) of the Exchange Act and Rule 19b-4 thereunder, and any such changes will become effective in accordance with the requirements of those provisions.

(I) Initial and Periodic Tier Reassignments

The Operating Committee has determined to calculate fee tiers every three months based on market share or message traffic, as applicable, from the prior three months. For the initial tier assignments, the Company will calculate the relevant tier for each CAT Reporter using the three months of data prior to the commencement date. As with the initial tier assignment, for the tri-monthly reassignments, the Company will calculate the relevant tier using the three months of data prior to the relevant tri-monthly date. Any movement of CAT Reporters between tiers will not change the criteria for each tier or the fee amount corresponding to each tier.

In performing the tri-monthly reassignments, the assignment of CAT Reporters in each assigned tier is relative. Therefore, a CAT Reporter’s assigned tier will depend, not only on its own message traffic or market share, but also on the message traffic/market share across all CAT Reporters. For example, the percentage of Industry Members (other than Execution Venue ATs) in each tier is relative such that such Industry Member’s assigned tier will depend on message traffic generated across all CAT Reporters as well as the total number of CAT Reporters. The Operating Committee will inform CAT Reporters of their assigned tier every three months following the periodic tiering process, as the funding model will compare an individual CAT Reporter’s activity to that of other CAT Reporters in the marketplace.

The following demonstrates a tier reassignment. In accordance with the funding model, the top 75% of Options Execution Venues in market share are categorized as Tier 1 while the bottom 25% of Options Execution Venues in market share are categorized as Tier 2. In the sample scenario below, Options Execution Venue L is initially categorized as a Tier 2 Options Execution Venue in Period A due to its market share. When market share is recalculated for Period B, the market share of Execution Venue L increases, and it is therefore subsequently reranked and reassigned to Tier 1 in Period B. Correspondingly, Options Execution Venue K, initially a Tier 1 Options Execution Venue in Period A, is reassigned to Tier 2 in Period B due to decreases in its market share.

Period A			Period B		
Options Execution Venue	Market share rank	Tier	Options Execution Venue	Market share rank	Tier
Options Execution Venue A	1	1	Options Execution Venue A	1	1
Options Execution Venue B	2	1	Options Execution Venue B	2	1
Options Execution Venue C	3	1	Options Execution Venue C	3	1
Options Execution Venue D	4	1	Options Execution Venue D	4	1
Options Execution Venue E	5	1	Options Execution Venue E	5	1
Options Execution Venue F	6	1	Options Execution Venue F	6	1
Options Execution Venue G	7	1	Options Execution Venue I	7	1
Options Execution Venue H	8	1	Options Execution Venue H	8	1
Options Execution Venue I	9	1	Options Execution Venue G	9	1
Options Execution Venue J	10	1	Options Execution Venue J	10	1
Options Execution Venue K	11	1	Options Execution Venue L	11	1
Options Execution Venue L	12	2	Options Execution Venue K	12	2
Options Execution Venue M	13	2	Options Execution Venue N	13	2
Options Execution Venue N	14	2	Options Execution Venue M	14	2
Options Execution Venue O	15	2	Options Execution Venue O	15	2

⁵⁸The CAT Fees are designed to recover the costs associated with the CAT. Accordingly, CAT Fees would not be affected by increases or decreases in other non-CAT expenses incurred by the

Participants, such as any changes in costs related to the retirement of existing regulatory systems, such as OATS.

⁵⁹Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85006.

For each periodic tier reassignment, the Operating Committee will review the new tier assignments, particularly those assignments for CAT Reporters that shift from the lowest tier to a higher tier. This review is intended to evaluate whether potential changes to the market or CAT Reporters (e.g., dissolution of a large CAT Reporter) adversely affect the tier reassignments.

(J) Sunset Provision

The Operating Committee developed the proposed funding model by analyzing currently available historical data. Such historical data, however, is not as comprehensive as data that will be submitted to the CAT. Accordingly, the Operating Committee believes that it will be appropriate to revisit the funding model once CAT Reporters have actual experience with the funding model. Accordingly, the Operating Committee determined to include an automatic sunset provision for the proposed fees. Specifically, the Operating Committee determined that the CAT Fees should automatically expire two years after the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. The Operating Committee intends to monitor the operation of the funding model during this two year period and to evaluate its effectiveness during that period. Such a process will inform the Operating Committee's approach to funding the CAT after the two year period.

(3) Proposed CAT Fee Schedule

The Exchange proposes the Consolidated Audit Trail Funding Fees to impose the CAT Fees determined by the Operating Committee on the Exchange's members. The proposed fee schedule has four sections, covering definitions, the fee schedule for CAT Fees, the timing and manner of payments, and the automatic sunset of the CAT Fees. Each of these sections is discussed in detail below.

(A) Definitions

Paragraph (a) of the proposed fee schedule sets forth the definitions for the proposed fee schedule. Paragraph (a)(1) states that, for purposes of the Consolidated Audit Trail Funding Fees, the terms "CAT", "CAT NMS Plan," "Industry Member," "NMS Stock," "OTC Equity Security", "Options Market Maker", and "Participant" are defined as set forth in Rule 6810 and Chapter IX, Section 8(a) (Consolidated Audit Trail—Definitions).

The proposed fee schedule imposes different fees on Equity ATSs and Industry Members that are not Equity

ATSs. Accordingly, the proposed fee schedule defines the term "Equity ATS." First, paragraph (a)(2) defines an "ATS" to mean an alternative trading system as defined in Rule 300(a) of Regulation ATS under the Securities Exchange Act of 1934, as amended, that operates pursuant to Rule 301 of Regulation ATS. This is the same definition of an ATS as set forth in Section 1.1 of the CAT NMS Plan in the definition of an "Execution Venue." Then, paragraph (a)(4) defines an "Equity ATS" as an ATS that executes transactions in NMS Stocks and/or OTC Equity Securities.

Paragraph (a)(3) of the proposed fee schedule defines the term "CAT Fee" to mean the Consolidated Audit Trail Funding Fee(s) to be paid by Industry Members as set forth in paragraph (b) in the proposed fee schedule.

Finally, Paragraph (a)(6) defines an "Execution Venue" as a Participant or an ATS (excluding any such ATS that does not execute orders). This definition is the same substantive definition as set forth in Section 1.1 of the CAT NMS Plan. Paragraph (a)(5) defines an "Equity Execution Venue" as an Execution Venue that trades NMS Stocks and/or OTC Equity Securities.

(B) Fee Schedule

The Exchange proposes to impose the CAT Fees applicable to its Industry Members through paragraph (b) of the proposed fee schedule. Paragraph (b)(1) of the proposed fee schedule sets forth the CAT Fees applicable to Industry Members other than Equity ATSs. Specifically, paragraph (b)(1) states that the Company will assign each Industry Member (other than an Equity ATS) to a fee tier once every quarter, where such tier assignment is calculated by ranking each Industry Member based on its total message traffic (with discounts for equity market maker quotes and Options Market Maker quotes based on the trade to quote ratio for equities and options, respectively) for the three months prior to the quarterly tier calculation day and assigning each Industry Member to a tier based on that ranking and predefined Industry Member percentages. The Industry Members with the highest total quarterly message traffic will be ranked in Tier 1, and the Industry Members with lowest quarterly message traffic will be ranked in Tier 7. Each quarter, each Industry Member (other than an Equity ATS) shall pay the following CAT Fee corresponding to the tier assigned by the Company for such Industry Member for that quarter:

Tier	Percentage of Industry Members	Quarterly CAT Fee
1	0.900	\$81,483
2	2.150	59,055
3	2.800	40,899
4	7.750	25,566
5	8.300	7,428
6	18.800	1,968
7	59.300	105

Paragraph (b)(2) of the proposed fee schedule sets forth the CAT Fees applicable to Equity ATSs.⁶⁰ These are the same fees that Participants that trade NMS Stocks and/or OTC Equity Securities will pay. Specifically, paragraph (b)(2) states that the Company will assign each Equity ATS to a fee tier once every quarter, where such tier assignment is calculated by ranking each Equity Execution Venue based on its total market share of NMS Stocks and OTC Equity Securities (with a discount for the OTC Equity Securities market share of Equity ATSs trading OTC Equity Securities based on the average shares per trade ratio between NMS Stocks and OTC Equity Securities) for the three months prior to the quarterly tier calculation day and assigning each Equity ATS to a tier based on that ranking and predefined Equity Execution Venue percentages. The Equity ATSs with the higher total quarterly market share will be ranked in Tier 1, and the Equity ATSs with the lowest quarterly market share will be ranked in Tier 4. Specifically, paragraph (b)(2) states that, each quarter, each Equity ATS shall pay the following CAT Fee corresponding to the tier assigned by the Company for such Equity ATS for that quarter:

Tier	Percentage of Equity Execution Venues	Quarterly CAT Fee
1	25.00	\$81,048
2	42.00	37,062
3	23.00	21,126
4	10.00	129

(C) Timing and Manner of Payment

Section 11.4 of the CAT NMS Plan states that the Operating Committee shall establish a system for the collection of fees authorized under the CAT NMS Plan. The Operating Committee may include such collection responsibility as a function of the Plan Processor or another administrator. To

⁶⁰ Note that no fee schedule is provided for Execution Venue ATSs that execute transactions in Listed Options, as no such Execution Venue ATSs currently exist due to trading restrictions related to Listed Options.

implement the payment process to be adopted by the Operating Committee, paragraph (c)(1) of the proposed fee schedule states that the Company will provide each Industry Member with one invoice each quarter for its CAT Fees as determined pursuant to paragraph (b) of the proposed fee schedule, regardless of whether the Industry Member is a member of multiple self-regulatory organizations. Paragraph (c)(1) further states that each Industry Member will pay its CAT Fees to the Company via the centralized system for the collection of CAT Fees established by the Company in the manner prescribed by the Company. The Exchange will provide Industry Members with details regarding the manner of payment of CAT Fees by *Regulatory Notice*.

All CAT fees will be billed and collected centrally through the Company via the Plan Processor. Although each Participant will adopt its own fee schedule regarding CAT Fees, no CAT Fees or portion thereof will be collected by the individual Participants. Each Industry Member will receive from the Company one invoice for its applicable CAT fees, not separate invoices from each Participant of which it is a member. The Industry Members will pay the CAT Fees to the Company via the centralized system for the collection of CAT fees established by the Company.⁶¹

Section 11.4 of the CAT NMS Plan also states that Participants shall require each Industry Member to pay all applicable authorized CAT Fees within thirty days after receipt of an invoice or other notice indicating payment is due (unless a longer payment period is otherwise indicated). Section 11.4 further states that, if an Industry Member fails to pay any such fee when due, such Industry Member shall pay interest on the outstanding balance from such due date until such fee is paid at a per annum rate equal to the lesser of: (i) The Prime Rate plus 300 basis points; or (ii) the maximum rate permitted by applicable law. Therefore, in accordance with Section 11.4 of the CAT NMS Plan, the Exchange proposed to adopt paragraph (c)(2) of the proposed fee schedule. Paragraph (c)(2) of the proposed fee schedule states that each Industry Member shall pay CAT Fees within thirty days after receipt of an invoice or other notice indicating payment is due (unless a longer payment period is otherwise indicated). If an Industry Member fails to pay any such fee when due, such Industry Member shall pay interest on the outstanding balance from such due date

until such fee is paid at a per annum rate equal to the lesser of: (i) The Prime Rate plus 300 basis points; or (ii) the maximum rate permitted by applicable law.

(D) Sunset Provision

The Operating Committee has determined to require that the CAT Fees automatically sunset two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. Accordingly, the Exchange proposes paragraph (d) of the fee schedule, which states that “[t]hese Consolidated Audit Trailing Funding Fees will automatically expire two years after the operative date of the amendment of the CAT NMS Plan that adopts CAT fees for the Participants.”

(4) Changes to Prior CAT Fee Plan Amendment

The proposed funding model set forth in this Amendment is a revised version of the Original Proposal. The Commission received a number of comment letters in response to the Original Proposal.⁶² The SEC suspended the Original Proposal and instituted proceedings to determine whether to approve or disapprove it.⁶³ Pursuant to those proceedings, additional comment letters were submitted regarding the proposed funding model.⁶⁴ In developing this Amendment, the Operating Committee carefully considered these comments and made a number of changes to the Original Proposal to address these comments where appropriate.

This Amendment makes the following changes to the Original Proposal: (1) Adds two additional CAT Fee tiers for Equity Execution Venues; (2) discounts the OTC Equity Securities market share of Execution Venue ATSs trading OTC Equity Securities as well as the market share of the FINRA ORF by the average shares per trade ratio between NMS Stocks and OTC Equity Securities (calculated as 0.17% based on available data from the second quarter of 2017) when calculating the market share of Execution Venue ATSs trading OTC Equity Securities and FINRA; (3) discounts the Options Market Maker quotes by the trade to quote ratio for options (calculated as 0.01% based on available data for June 2016 through June 2017) when calculating message traffic for Options Market Makers; (4)

discounts equity market maker quotes by the trade to quote ratio for equities (calculated as 5.43% based on available data for June 2016 through June 2017) when calculating message traffic for equity market makers; (5) decreases the number of tiers for Industry Members (other than the Execution Venue ATSs) from nine to seven; (6) changes the allocation of CAT costs between Equity Execution Venues and Options Execution Venues from 75%/25% to 67%/33%; (7) adjusts tier percentages and recovery allocations for Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSs); (8) focuses the comparability of CAT Fees on the individual entity level, rather than primarily on the comparability of affiliated entities; (9) commences invoicing of CAT Reporters as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Participants and the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants; and (10) requires the proposed fees to automatically expire two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for the Participants.

(A) Equity Execution Venues

(i) Small Equity Execution Venues

In the Original Proposal, the Operating Committee proposed to establish two fee tiers for Equity Execution Venues. The Commission and commenters raised the concern that, by establishing only two tiers, smaller Equity Execution Venues (*e.g.*, those Equity ATSs representing less than 1% of NMS market share) would be placed in the same fee tier as larger Equity Execution Venues, thereby imposing an undue or inappropriate burden on competition.⁶⁵ To address this concern, the Operating Committee proposes to add two additional tiers for Equity Execution Venues, a third tier for smaller Equity Execution Venues and a fourth tier for the smallest Equity Execution Venues.

Specifically, the Original Proposal had two tiers of Equity Execution Venues. Tier 1 required the largest Equity Execution Venues to pay a quarterly fee of \$63,375. Based on available data, these largest Equity Execution Venues were those that had equity market share of share volume greater than or equal to 1%.⁶⁶ Tier 2

⁶² For a description of the comments submitted in response to the Original Proposal, see Suspension Order.

⁶³ Suspension Order.

⁶⁴ See MFA Letter; SIFMA Letter; FIA Principal Traders Group Letter; Belvedere Letter; Sidley Letter; Group One Letter; and Virtu Financial Letter.

⁶⁵ See Suspension Order at 31664; SIFMA Letter at 3.

⁶⁶ Note that while these equity market share thresholds were referenced as data points to help

⁶¹ Section 11.4 of the CAT NMS Plan.

required the remaining smaller Equity Execution Venues to pay a quarterly fee of \$38,820.

To address concerns about the potential for the \$38,820 quarterly fee to impose an undue burden on smaller Equity Execution Venues, the Operating Committee determined to move to a four tier structure for Equity Execution Venues. Tier 1 would continue to include the largest Equity Execution Venues by share volume (that is, based on currently available data, those with market share of equity share volume greater than or equal to one percent), and these Equity Execution Venues would be required to pay a quarterly fee of \$81,048. The Operating Committee determined to divide the original Tier 2 into three tiers. The new Tier 2 Equity Execution Venues, which would include the next largest Equity Execution Venues by equity share volume, would be required to pay a quarterly fee of \$37,062. The new Tier 3 Equity Execution Venues would be required to pay a quarterly fee of \$21,126. The new Tier 4 Equity Execution Venues, which would include the smallest Equity Execution Venues by share volume, would be required to pay a quarterly fee of \$129.

In developing the proposed four tier structure, the Operating Committee considered keeping the existing two tiers, as well as shifting to three, four or five Equity Execution Venue tiers (the maximum number of tiers permitted under the Plan), to address the concerns regarding small Equity Execution Venues. For each of the two, three, four and five tier alternatives, the Operating Committee considered the assignment of various percentages of Equity Execution Venues to each tier as well as various percentage of Equity Execution Venue recovery allocations for each alternative. As discussed below in more detail, each of these options was considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined that the four tier alternative addressed the spectrum of different Equity Execution Venues. The Operating Committee determined that neither a two tier structure nor a three tier structure sufficiently accounted for

differentiate between Equity Execution Venue tiers, the proposed funding model is directly driven not by market share thresholds, but rather by fixed percentages of Equity Execution Venues across tiers to account for fluctuating levels of market share across time. Actual market share in any tier will vary based on the actual market activity in a given measurement period, as well as the number of Equity Execution Venues included in the measurement period.

the range of market shares of smaller Equity Execution Venues. The Operating Committee also determined that, given the limited number of Equity Execution Venues, that a fifth tier was unnecessary to address the range of market shares of the Equity Execution Venues.

By increasing the number of tiers for Equity Execution Venues and reducing the proposed CAT Fees for the smaller Equity Execution Venues, the Operating Committee believes that the proposed fees for Equity Execution Venues would not impose an undue or inappropriate burden on competition under Section 6 or Section 15A of the Exchange Act. Moreover, the Operating Committee believes that the proposed fees appropriately take into account the distinctions in the securities trading operations of different Equity Execution Venues, as required under the funding principles of the CAT NMS Plan.⁶⁷ The larger number of tiers more closely tracks the variety of sizes of equity share volume of Equity Execution Venues. In addition, the reduction in the fees for the smaller Equity Execution Venues recognizes the potential burden of larger fees on smaller entities. In particular, the very small quarterly fee of \$129 for Tier 4 Equity Execution Venues reflects the fact that certain Equity Execution Venues have a very small share volume due to their typically more focused business models.

Accordingly, with this Amendment, the Exchange proposes to amend paragraph (b)(2) of the proposed fee schedule to add the two additional tiers for Equity Execution Venues, to establish the percentages and fees for Tiers 3 and 4 as described, and to revise the percentages and fees for Tiers 1 and 2 as described.

(ii) Execution Venues for OTC Equity Securities

In the Original Proposal, the Operating Committee proposed to group Execution Venues for OTC Equity Securities and Execution Venues for NMS Stocks in the same tier structure. The Commission and commenters raised concerns as to whether this determination to place Execution Venues for OTC Equity Securities in the same tier structure as Execution Venues for NMS Stocks would result in an undue or inappropriate burden on competition, recognizing that the application of share volume may lead to different outcomes as applied to OTC Equity Securities and NMS Stocks.⁶⁸ To address this concern, the Operating

Committee proposes to discount the OTC Equity Securities market share of Execution Venue ATSs trading OTC Equity Securities as well as the market share of the FINRA ORF by the average shares per trade ratio between NMS Stocks and OTC Equity Securities (0.17% for the second quarter of 2017) in order to adjust for the greater number of shares being traded in the OTC Equity Securities market, which is generally a function of a lower per share price for OTC Equity Securities when compared to NMS Stocks.

As commenters noted, many OTC Equity Securities are priced at less than one dollar—and a significant number at less than one penny—and low-priced shares tend to trade in larger quantities. Accordingly, a disproportionately large number of shares are involved in transactions involving OTC Equity Securities versus NMS Stocks, which has the effect of overstating an Execution Venue's true market share when the Execution Venue is involved in the trading of OTC Equity Securities. Because the proposed fee tiers are based on market share calculated by share volume, Execution Venue ATSs trading OTC Equity Securities and FINRA may be subject to higher tiers than their operations may warrant.⁶⁹ The Operating Committee proposes to address this concern in two ways. First, the Operating Committee proposes to increase the number of Equity Execution Venue tiers, as discussed above. Second, the Operating Committee determined to discount the OTC Equity Securities market share of Execution Venue ATSs trading OTC Equity Securities as well as the market share of the FINRA ORF when calculating their tier placement. Because the disparity in share volume between Execution Venues trading in OTC Equity Securities and NMS Stocks is based on the different number of shares per trade for OTC Equity Securities and NMS Stocks, the Operating Committee believes that discounting the OTC Equity Securities share volume of such Execution Venue ATSs as well as the market share of the FINRA ORF would address the difference in shares per trade for OTC Equity Securities and NMS Stocks. Specifically, the Operating Committee proposes to impose a discount based on the objective measure of the average shares per trade ratio between NMS Stocks and OTC Equity Securities. Based on available data from the second quarter of 2017, the average shares per trade ratio between NMS Stocks and OTC Equity Securities is 0.17%.

⁶⁷ Section 11.2(b) of the CAT NMS Plan.

⁶⁸ See Suspension Order at 31664–5.

⁶⁹ Suspension Order at 31664–5.

The practical effect of applying such a discount for trading in OTC Equity Securities is to shift Execution Venue ATSs trading OTC Equity Securities to tiers for smaller Execution Venues and with lower fees. For example, under the Original Proposal, one Execution Venue ATS trading OTC Equity Securities was placed in the first CAT Fee tier, which had a quarterly fee of \$63,375. With the imposition of the proposed tier changes and the discount, this ATS would be ranked in Tier 3 and would owe a quarterly fee of \$21,126.

In developing the proposed discount for Equity Execution Venue ATSs trading OTC Equity Securities and FINRA, the Operating Committee evaluated different alternatives to address the concerns related to OTC Equity Securities, including creating a separate tier structure for Execution Venues trading OTC Equity Securities (like the separate tier for Options Execution Venues) as well as the proposed discounting method for Execution Venue ATSs trading OTC Equity Securities and FINRA. For these alternatives, the Operating Committee considered how each alternative would affect the recovery allocations. In addition, each of these options was considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee did not adopt a separate tier structure for Equity Execution Venues trading OTC Equity Securities as they determined that the proposed discount approach appropriately addresses the concern. The Operating Committee determined to adopt the proposed discount because it directly relates to the concern regarding the trading patterns and operations in the OTC Equity Securities markets, and is an objective discounting method.

By increasing the number of tiers for Equity Execution Venues and imposing a discount on the market share of share volume calculation for trading in OTC Equity Securities, the Operating Committee believes that the proposed fees for Equity Execution Venues would not impose an undue or inappropriate burden on competition under Section 6 or Section 15A of the Exchange Act. Moreover, the Operating Committee believes that the proposed fees appropriately take into account the distinctions in the securities trading operations of different Equity Execution Venues, as required under the funding principles of the CAT NMS Plan.⁷⁰ As discussed above, the larger number of

tiers more closely tracks the variety of sizes of equity share volume of Equity Execution Venues. In addition, the proposed discount recognizes the different types of trading operations at Equity Execution Venues trading OTC Equity Securities versus those trading NMS Stocks, thereby more closely matching the relative revenue generation by Equity Execution Venues trading OTC Equity Securities to their CAT Fees.

Accordingly, with this Amendment, the Exchange proposes to amend paragraph (b)(2) of the proposed fee schedule to indicate that the OTC Equity Securities market share for Equity ATSs trading OTC Equity Securities as well as the market share of the FINRA ORF would be discounted. In addition, as discussed above, to address concerns related to smaller ATSs, including those that trade OTC Equity Securities, the Exchange proposes to amend paragraph (b)(2) of the proposed fee schedule to add two additional tiers for Equity Execution Venues, to establish the percentages and fees for Tiers 3 and 4 as described, and to revise the percentages and fees for Tiers 1 and 2 as described.

(B) Market Makers

In the Original Proposal, the Operating Committee proposed to include both Options Market Maker quotes and equities market maker quotes in the calculation of total message traffic for such market makers for purposes of tiering for Industry Members (other than Execution Venue ATSs). The Commission and commenters raised questions as to whether the proposed treatment of Options Market Maker quotes may result in an undue or inappropriate burden on competition or may lead to a reduction in market quality.⁷¹ To address this concern, the Operating Committee determined to discount the Options Market Maker quotes by the trade to quote ratio for options when calculating message traffic for Options Market Makers. Similarly, to avoid disincentives to quoting behavior on the equities side as well, the Operating Committee determined to discount equity market maker quotes by the trade to quote ratio for equities when calculating message traffic for equities market makers.

In the Original Proposal, market maker quotes were treated the same as other message traffic for purposes of

tiering for Industry Members (other than Execution Venue ATSs). Commenters noted, however, that charging Industry Members on the basis of message traffic will impact market makers disproportionately because of their continuous quoting obligations. Moreover, in the context of options market makers, message traffic would include bids and offers for every listed options strikes and series, which are not an issue for equities.⁷² The Operating Committee proposes to address this concern in two ways. First, the Operating Committee proposes to discount Options Market Maker quotes when calculating the Options Market Makers' tier placement. Specifically, the Operating Committee proposes to impose a discount based on the objective measure of the trade to quote ratio for options. Based on available data from June 2016 through June 2017, the trade to quote ratio for options is 0.01%. Second, the Operating Committee proposes to discount equities market maker quotes when calculating the equities market makers' tier placement. Specifically, the Operating Committee proposes to impose a discount based on the objective measure of the trade to quote ratio for equities. Based on available data for June 2016 through June 2017, this trade to quote ratio for equities is 5.43%.

The practical effect of applying such discounts for quoting activity is to shift market makers' calculated message traffic lower, leading to the potential shift to tiers for lower message traffic and reduced fees. Such an approach would move sixteen Industry Member CAT Reporters that are market makers to a lower tier than in the Original Proposal. For example, under the Original Proposal, Broker-Dealer Firm ABC was placed in the first CAT Fee tier, which had a quarterly fee of \$101,004. With the imposition of the proposed tier changes and the discount, Broker-Dealer Firm ABC, an options market maker, would be ranked in Tier 3 and would owe a quarterly fee of \$40,899.

In developing the proposed market maker discounts, the Operating Committee considered various discounts for Options Market Makers and equity market makers, including discounts of 50%, 25%, 0.00002%, as well as the 5.43% for option market makers and 0.01% for equity market makers. Each of these options were considered in the context of the full model, as changes in each variable in the model affect other variables in the

⁷¹ See Suspension Order at 31663-4; SIFMA Letter at 4-6; FIA Principal Traders Group Letter at 3; Sidley Letter at 2-6; Group One Letter at 2-6; and Belvedere Letter at 2.

⁷² Suspension Order at 31664.

⁷⁰ Section 11.2(b) of the CAT NMS Plan.

model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined to adopt the proposed discount because it directly relates to the concern regarding the quoting requirement, is an objective discounting method, and has the desired potential to shift market makers to lower fee tiers.

By imposing a discount on Options Market Makers and equities market makers' quoting traffic for the calculation of message traffic, the Operating Committee believes that the proposed fees for market makers would not impose an undue or inappropriate burden on competition under Section 6 or Section 15A of the Exchange Act. Moreover, the Operating Committee believes that the proposed fees appropriately take into account the distinctions in the securities trading operations of different Industry Members, and avoid disincentives, such as a reduction in market quality, as required under the funding principles of the CAT NMS Plan.⁷³ The proposed discounts recognize the different types of trading operations presented by Options Market Makers and equities market makers, as well as the value of the market makers' quoting activity to the market as a whole. Accordingly, the Operating Committee believes that the proposed discounts will not impact the ability of small Options Market Makers or equities market makers to provide liquidity.

Accordingly, with this Amendment, the Exchange proposes to amend paragraph (b)(1) of the proposed fee schedule to indicate that the message traffic related to equity market maker quotes and Options Market Maker quotes would be discounted. In addition, the Exchange proposes to define the term "Options Market Maker" in paragraph (a)(1) of the proposed fee schedule.

(C) Comparability/Allocation of Costs

Under the Original Proposal, 75% of CAT costs were allocated to Industry Members (other than Execution Venue ATs) and 25% of CAT costs were allocated to Execution Venues. This cost allocation sought to maintain the greatest level of comparability across the funding model, where comparability considered affiliations among or between CAT Reporters. The Commission and commenters expressed concerns regarding whether the proposed 75%/25% allocation of CAT costs is consistent with the Plan's funding principles and the Exchange Act, including whether the allocation

places a burden on competition or reduces market quality. The Commission and commenters also questioned whether the approach of accounting for affiliations among CAT Reporters in setting CAT Fees disadvantages non-affiliated CAT Reporters or otherwise burdens competition in the market for trading services.⁷⁴

In response to these concerns, the Operating Committee determined to revise the proposed funding model to focus the comparability of CAT Fees on the individual entity level, rather than primarily on the comparability of affiliated entities. In light of the interconnected nature of the various aspects of the funding model, the Operating Committee determined to revise various aspects of the model to enhance comparability at the individual entity level. Specifically, to achieve such comparability, the Operating Committee determined to (1) decrease the number of tiers for Industry Members (other than Execution Venue ATs) from nine to seven; (2) change the allocation of CAT costs between Equity Execution Venues and Options Execution Venues from 75%/25% to 67%/33%; and (3) adjust tier percentages and recovery allocations for Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATs). With these changes, the proposed funding model provides fee comparability for the largest individual entities, with the largest Industry Members (other than Execution Venue ATs), Equity Execution Venues and Options Execution Venues each paying a CAT Fee of approximately \$81,000 each quarter.

(i) Number of Industry Member Tiers

In the Original Proposal, the proposed funding model had nine tiers for Industry Members (other than Execution Venue ATs). The Operating Committee determined that reducing the number of tiers from nine tiers to seven tiers (and adjusting the predefined Industry Member Percentages as well) continues to provide a fair allocation of fees among Industry Members and appropriately distinguishes between Industry Members with differing levels of message traffic. In reaching this conclusion, the Operating Committee considered historical message traffic generated by Industry Members across all exchanges and as submitted to FINRA's OATS, and considered the

distribution of firms with similar levels of message traffic, grouping together firms with similar levels of message traffic. Based on this, the Operating Committee determined that seven tiers would group firms with similar levels of message traffic, while also achieving greater comparability in the model for the individual CAT Reporters with the greatest market share or message traffic.

In developing the proposed seven tier structure, the Operating Committee considered remaining at nine tiers, as well as reducing the number of tiers down to seven when considering how to address the concerns raised regarding comparability. For each of the alternatives, the Operating Committee considered the assignment of various percentages of Industry Members to each tier as well as various percentages of Industry Member recovery allocations for each alternative. Each of these options was considered in the context of its effects on the full funding model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined that the seven tier alternative provided the most fee comparability at the individual entity level for the largest CAT Reporters, while both providing logical breaks in tiering for Industry Members with different levels of message traffic and a sufficient number of tiers to provide for the full spectrum of different levels of message traffic for all Industry Members.

(ii) Allocation of CAT Costs Between Equity and Options Execution Venues

The Operating Committee also determined to adjust the allocation of CAT costs between Equity Execution Venues and Options Execution Venues to enhance comparability at the individual entity level. In the Original Proposal, 75% of Execution Venue CAT costs were allocated to Equity Execution Venues, and 25% of Execution Venue CAT costs were allocated to Options Execution Venues. To achieve the goal of increased comparability at the individual entity level, the Operating Committee analyzed a range of alternative splits for revenue recovery between Equity and Options Execution Venues, along with other changes in the proposed funding model. Based on this analysis, the Operating Committee determined to allocate 67 percent of Execution Venue costs recovered to Equity Execution Venues and 33 percent to Options Execution Venues. The Operating Committee determined that a 67/33 allocation between Equity and Options Execution Venues enhances the

⁷⁴ See Suspension Order at 31662-3; SIFMA Letter at 3; Sidley Letter at 6-7; Group One Letter at 2; and Belvedere Letter at 2.

⁷³ Section 11.2(b) of the CAT NMS Plan.

level of fee comparability for the largest CAT Reporters. Specifically, the largest Equity and Options Execution Venues would pay a quarterly CAT Fee of approximately \$81,000.

In developing the proposed allocation of CAT costs between Equity and Options Execution Venues, the Operating Committee considered various different options for such allocation, including keeping the original 75%/25% allocation, as well as shifting to a 70%/30%, 67%/33%, or 57.75%/42.25% allocation. For each of the alternatives, the Operating Committee considered the effect each allocation would have on the assignment of various percentages of Equity Execution Venues to each tier as well as various percentages of Equity Execution Venue recovery allocations for each alternative. Moreover, each of these options was considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined that the 67%/33% allocation between Equity and Options Execution Venues provided the greatest level of fee comparability at the individual entity level for the largest CAT Reporters, while still providing for appropriate fee levels across all tiers for all CAT Reporters.

(iii) Allocation of Costs Between Execution Venues and Industry Members

The Operating Committee determined to allocate 25% of CAT costs to Execution Venues and 75% to Industry Members (other than Execution Venue ATSSs), as it had in the Original Proposal. The Operating Committee determined that this 75%/25% allocation, along with the other changes proposed above, led to the most comparable fees for the largest Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSSs). The largest Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSSs) would each pay a quarterly CAT Fee of approximately \$81,000.

As a preliminary matter, the Operating Committee determined that it is appropriate to allocate most of the costs to create, implement and maintain the CAT to Industry Members for several reasons. First, there are many more broker-dealers expected to report to the CAT than Participants (*i.e.*, 1,541 broker-dealer CAT Reporters versus 22 Participants). Second, since most of the costs to process CAT reportable data is

generated by Industry Members, Industry Members could be expected to contribute toward such costs. Finally, as noted by the SEC, the CAT “substantially enhance[s] the ability of the SROs and the Commission to oversee today’s securities markets,”⁷⁵ thereby benefitting all market participants. After making this determination, the Operating Committee analyzed several different cost allocations, as discussed further below, and determined that an allocation where 75% of the CAT costs should be borne by the Industry Members (other than Execution Venue ATSSs) and 25% should be paid by Execution Venues was most appropriate and led to the greatest comparability of CAT Fees for the largest CAT Reporters.

In developing the proposed allocation of CAT costs between Execution Venues and Industry Members (other than Execution Venue ATSSs), the Operating Committee considered various different options for such allocation, including keeping the original 75%/25% allocation, as well as shifting to an 80%/20%, 70%/30%, or 65%/35% allocation. Each of these options was considered in the context of the full model, including the effect on each of the changes discussed above, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. In particular, for each of the alternatives, the Operating Committee considered the effect each allocation had on the assignment of various percentages of Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSSs) to each relevant tier as well as various percentages of recovery allocations for each tier. The Operating Committee determined that the 75%/25% allocation between Execution Venues and Industry Members (other than Execution Venue ATSSs) provided the greatest level of fee comparability at the individual entity level for the largest CAT Reporters, while still providing for appropriate fee levels across all tiers for all CAT Reporters.

(iv) Affiliations

The funding principles set forth in Section 11.2 of the Plan require that the fees charged to CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes

into consideration affiliations between or among CAT Reporters, whether Execution Venue and/or Industry Members). The proposed funding model satisfies this requirement. As discussed above, under the proposed funding model, the largest Equity Execution Venues, Options Execution Venues, and Industry Members (other than Execution Venue ATSSs) pay approximately the same fee. Moreover, the Operating Committee believes that the proposed funding model takes into consideration affiliations between or among CAT Reporters as complexes with multiple CAT Reporters will pay the appropriate fee based on the proposed fee schedule for each of the CAT Reporters in the complex. For example, a complex with a Tier 1 Equity Execution Venue and Tier 2 Industry Member will pay the same as another complex with a Tier 1 Equity Execution Venue and Tier 2 Industry Member.

(v) Fee Schedule Changes

Accordingly, with this Amendment, the Exchange proposes to amend paragraphs (b)(1) and (2) of the proposed fee schedule to reflect the changes discussed in this section. Specifically, the Exchange proposes to amend paragraph (b)(1) and (2) of the proposed fee schedule to update the number of tiers, and the fees and percentages assigned to each tier to reflect the described changes.

(D) Market Share/Message Traffic

In the Original Proposal, the Operating Committee proposed to charge Execution Venues based on market share and Industry Members (other than Execution Venue ATSSs) based on message traffic. Commenters questioned the use of the two different metrics for calculating CAT Fees.⁷⁶ The Operating Committee continues to believe that the proposed use of market share and message traffic satisfies the requirements of the Exchange Act and the funding principles set forth in the CAT NMS Plan. Accordingly, the proposed funding model continues to charge Execution Venues based on market share and Industry Members (other than Execution Venue ATSSs) based on message traffic.

In drafting the Plan and the Original Proposal, the Operating Committee expressed the view that the correlation between message traffic and size does not apply to Execution Venues, which they described as producing similar amounts of message traffic regardless of size. The Operating Committee believed

⁷⁵ Securities Exchange Act Release No. 67457 (July 18, 2012), 77 FR 45722, 45726 (August 1, 2012) (“Rule 613 Adopting Release”).

⁷⁶ Suspension Order at 31663; FIA Principal Traders Group Letter at 2.

that charging Execution Venues based on message traffic would result in both large and small Execution Venues paying comparable fees, which would be inequitable, so the Operating Committee determined that it would be more appropriate to treat Execution Venues differently from Industry Members in the funding model. Upon a more detailed analysis of available data, however, the Operating Committee noted that Execution Venues have varying levels of message traffic. Nevertheless, the Operating Committee continues to believe that a bifurcated funding model—where Industry Members (other than Execution Venue ATs) are charged fees based on message traffic and Execution Venues are charged based on market share—complies with the Plan and meets the standards of the Exchange Act for the reasons set forth below.

Charging Industry Members based on message traffic is the most equitable means for establishing fees for Industry Members (other than Execution Venue ATs). This approach will assess fees to Industry Members that create larger volumes of message traffic that are relatively higher than those fees charged to Industry Members that create smaller volumes of message traffic. Since message traffic, along with fixed costs of the Plan Processor, is a key component of the costs of operating the CAT, message traffic is an appropriate criterion for placing Industry Members in a particular fee tier.

The Operating Committee also believes that it is appropriate to charge Execution Venues CAT Fees based on their market share. In contrast to Industry Members (other than Execution Venue ATs), which determine the degree to which they produce the message traffic that constitutes CAT Reportable Events, the CAT Reportable Events of Execution Venues are largely derivative of quotations and orders received from Industry Members that the Execution Venues are required to display. The business model for Execution Venues, however, is focused on executions in their markets. As a result, the Operating Committee believes that it is more equitable to charge Execution Venues based on their market share rather than their message traffic.

Similarly, focusing on message traffic would make it more difficult to draw distinctions between large and small exchanges, including options exchanges in particular. For instance, the Operating Committee analyzed the message traffic of Execution Venues and Industry Members for the period of April 2017 to June 2017 and placed all

CAT Reporters into a nine-tier framework (*i.e.*, a single tier may include both Execution Venues and Industry Members). The Operating Committee's analysis found that the majority of exchanges (15 total) were grouped in Tiers 1 and 2. Moreover, virtually all of the options exchanges were in Tiers 1 and 2.⁷⁷ Given the concentration of options exchanges in Tiers 1 and 2, the Operating Committee believes that using a funding model based purely on message traffic would make it more difficult to distinguish between large and small options exchanges, as compared to the proposed bifurcated fee approach.

In addition, the Operating Committee also believes that it is appropriate to treat ATs as Execution Venues under the proposed funding model since ATs have business models that are similar to those of exchanges, and ATs also compete with exchanges. For these reasons, the Operating Committee believes that charging Execution Venues based on market share is more appropriate and equitable than charging Execution Venues based on message traffic.

(E) Time Limit

In the Original Proposal, the Operating Committee did not impose any time limit on the application of the proposed CAT Fees. As discussed above, the Operating Committee developed the proposed funding model by analyzing currently available historical data. Such historical data, however, is not as comprehensive as data that will be submitted to the CAT. Accordingly, the Operating Committee believes that it will be appropriate to revisit the funding model once CAT Reporters have actual experience with the funding model. Accordingly, the Operating Committee proposes to include a sunset provision in the proposed fee model. The proposed CAT Fees will sunset two years after the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. Specifically, the Exchange proposes to add paragraph (d) of the proposed fee schedule to include this sunset provision. Such a provision will provide the Operating Committee and other market participants with the opportunity to reevaluate the performance of the proposed funding model.

⁷⁷ The Participants note that this analysis did not place MIAx PEARL in Tier 1 or Tier 2 since the exchange commenced trading on February 6, 2017.

(F) Tier Structure/Decreasing Cost per Unit

In the Original Proposal, the Operating Committee determined to use a tiered fee structure. The Commission and commenters questioned whether the decreasing cost per additional unit (of message traffic in the case of Industry Members, or of share volume in the case of Execution Venues) in the proposed fee schedules burdens competition by disadvantaging small Industry Members and Execution Venues and/or by creating barriers to entry in the market for trading services and/or the market for broker-dealer services.⁷⁸

The Operating Committee does not believe that decreasing cost per additional unit in the proposed fee schedules places an unfair competitive burden on Small Industry Members and Execution Venues. While the cost per unit of message traffic or share volume necessarily will decrease as volume increases in any tiered fee model using fixed fee percentages and, as a result, Small Industry Members and small Execution Venues may pay a larger fee per message or share, this comment fails to take account of the substantial differences in the absolute fees paid by Small Industry Members and small Execution Venues as opposed to large Industry Members and large Execution Venues. For example, under the fee proposals, Tier 7 Industry Members would pay a quarterly fee of \$105, while Tier 1 Industry Members would pay a quarterly fee of \$81,483. Similarly, a Tier 4 Equity Execution Venue would pay a quarterly fee of \$129, while a Tier 1 Equity Execution Venue would pay a quarterly fee of \$81,048. Thus, Small Industry Members and small Execution Venues are not disadvantaged in terms of the total fees that they actually pay. In contrast to a tiered model using fixed fee percentages, the Operating Committee believes that strictly variable or metered funding models based on message traffic or share volume would be more likely to affect market behavior and may present administrative challenges (*e.g.*, the costs to calculate and monitor fees may exceed the fees charged to the smallest CAT Reporters).

(G) Other Alternatives Considered

In addition to the various funding model alternatives discussed above regarding discounts, number of tiers and allocation percentages, the Operating Committee also discussed other possible funding models. For example, the Operating Committee considered

⁷⁸ Suspension Order at 31667.

allocating the total CAT costs equally among each of the Participants, and then permitting each Participant to charge its own members as it deems appropriate.⁷⁹ The Operating Committee determined that such an approach raised a variety of issues, including the likely inconsistency of the ensuing charges, potential for lack of transparency, and the impracticality of multiple SROs submitting invoices for CAT charges. The Operating Committee therefore determined that the proposed funding model was preferable to this alternative.

(H) Industry Member Input

Commenters expressed concern regarding the level of Industry Member input into the development of the proposed funding model, and certain commenters have recommended a greater role in the governance of the CAT.⁸⁰ The Participants previously addressed this concern in its letters responding to comments on the Plan and the CAT Fees.⁸¹ As discussed in those letters, the Participants discussed the funding model with the Development Advisory Group (“DAG”), the advisory group formed to assist in the development of the Plan, during its original development.⁸² Moreover, Industry Members currently have a voice in the affairs of the Operating Committee and operation of the CAT generally through the Advisory Committee established pursuant to Rule 613(b)(7) and Section 4.13 of the Plan. The Advisory Committee attends all meetings of the Operating Committee, as well as meetings of various subcommittees and working groups, and provides valuable and critical input for the Participants’ and Operating Committee’s consideration. The Operating Committee continues to believe that Industry Members have an appropriate voice regarding the funding of the Company.

(I) Conflicts of Interest

Commenters also raised concerns regarding Participant conflicts of interest in setting the CAT Fees.⁸³ The Participants previously responded to this concern in both the Plan Response

Letter and the Fee Rule Response Letter.⁸⁴ As discussed in those letters, the Plan, as approved by the SEC, adopts various measures to protect against the potential conflicts issues raised by the Participants’ fee-setting authority. Such measures include the operation of the Company as a not for profit business league and on a break-even basis, and the requirement that the Participants file all CAT Fees under Section 19(b) of the Exchange Act. The Operating Committee continues to believe that these measures adequately protect against concerns regarding conflicts of interest in setting fees, and that additional measures, such as an independent third party to evaluate an appropriate CAT Fee, are unnecessary.

(J) Fee Transparency

Commenters also argued that they could not adequately assess whether the CAT Fees were fair and equitable because the Operating Committee has not provided details as to what the Participants are receiving in return for the CAT Fees.⁸⁵ The Operating Committee provided a detailed discussion of the proposed funding model in the Plan, including the expenses to be covered by the CAT Fees. In addition, the agreement between the Company and the Plan Processor sets forth a comprehensive set of services to be provided to the Company with regard to the CAT. Such services include, without limitation: user support services (e.g., a help desk); tools to allow each CAT Reporter to monitor and correct their submissions; a comprehensive compliance program to monitor CAT Reporters’ adherence to Rule 613; publication of detailed Technical Specifications for Industry Members and Participants; performing data linkage functions; creating comprehensive data security and confidentiality safeguards; creating query functionality for regulatory users (i.e., the Participants, and the SEC and SEC staff); and performing billing and collection functions. The Operating Committee further notes that the services provided by the Plan Processor and the costs related thereto were subject to a bidding process.

(K) Funding Authority

Commenters also questioned the authority of the Operating Committee to impose CAT Fees on Industry Members.⁸⁶ The Participants previously

responded to this same comment in the Plan Response Letter and the Fee Rule Response Letter.⁸⁷ As the Participants previously noted, SEC Rule 613 specifically contemplates broker-dealers contributing to the funding of the CAT. In addition, as noted by the SEC, the CAT “substantially enhance[s] the ability of the SROs and the Commission to oversee today’s securities markets,”⁸⁸ thereby benefitting all market participants. Therefore, the Operating Committee continues to believe that it is equitable for both Participants and Industry Members to contribute to funding the cost of the CAT.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁸⁹ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,⁹⁰ in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility, is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, and is 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 discussed above, the SEC approved the bifurcated, tiered, fixed fee funding model in the CAT NMS Plan, finding it was reasonable and that it equitably allocated fees among Participants and Industry Members. The Exchange believes that the proposed tiered fees adopted pursuant to the funding model approved by the SEC in the CAT NMS Plan are reasonable, equitably allocated and not unfairly discriminatory.

The Exchange believes that this proposal is consistent with the Act because it implements, interprets or clarifies the provisions of the Plan, and is designed to assist the Exchange and its Industry Members in meeting regulatory obligations pursuant to the Plan. In approving the Plan, the SEC noted that the Plan “is necessary and appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanism of a national market system, or is otherwise in furtherance of the purposes of the Act.”⁹¹ To the

⁷⁹ See FIA Principal Traders Group Letter at 2; Belvedere Letter at 4.

⁸⁰ See Suspension Order at 31662; MFA Letter at 1–2.

⁸¹ Letter from Participants to Brent J. Fields, Secretary, SEC (Sept. 23, 2016) (“Plan Response Letter”); Letter from CAT NMS Plan Participants to Brent J. Fields, Secretary, SEC (June 29, 2017) (“Fee Rule Response Letter”).

⁸² Fee Rule Response Letter at 2; Plan Response Letter at 18.

⁸³ See Suspension Order at 31662; FIA Principal Traders Group at 3.

⁸⁴ See Plan Response Letter at 16, 17; Fee Rule Response Letter at 10–12.

⁸⁵ See FIA Principal Traders Group at 3; SIFMA Letter at 3.

⁸⁶ See Suspension Order at 31661–2; SIFMA Letter at 2.

⁸⁷ See Plan Response Letter at 9–10; Fee Rule Response Letter at 3–4.

⁸⁸ Rule 613 Adopting Release at 45726.

⁸⁹ 15 U.S.C. 78f(b).

⁹⁰ 15 U.S.C. 78f(b)(4) and (5).

⁹¹ Approval Order at 84697.

extent that this proposal implements, interprets or clarifies the Plan and applies specific requirements to Industry Members, the Exchange believes that this proposal furthers the objectives of the Plan, as identified by the SEC, and is therefore consistent with the Act.

The Exchange believes that the proposed tiered fees are reasonable. First, the total CAT Fees to be collected would be directly associated with the costs of establishing and maintaining the CAT, where such costs include Plan Processor costs and costs related to insurance, third party services and the operational reserve. The CAT Fees would not cover Participant services unrelated to the CAT. In addition, any surplus CAT Fees cannot be distributed to the individual Participants; such surpluses must be used as a reserve to offset future fees. Given the direct relationship between the fees and the CAT costs, the Exchange believes that the total level of the CAT Fees is reasonable.

In addition, the Exchange believes that the proposed CAT Fees are reasonably designed to allocate the total costs of the CAT equitably between and among the Participants and Industry Members, and are therefore not unfairly discriminatory. As discussed in detail above, the proposed tiered fees impose comparable fees on similarly situated CAT Reporters. For example, those with a larger impact on the CAT (measured via message traffic or market share) pay higher fees, whereas CAT Reporters with a smaller impact pay lower fees. Correspondingly, the tiered structure lessens the impact on smaller CAT Reporters by imposing smaller fees on those CAT Reporters with less market share or message traffic. In addition, the fee structure takes into consideration distinctions in securities trading operations of CAT Reporters, including ATSS trading OTC Equity Securities, and equity and options market makers.

Moreover, the Exchange believes that the division of the total CAT costs between Industry Members and Execution Venues, and the division of the Execution Venue portion of total costs between Equity and Options Execution Venues, is reasonably designed to allocate CAT costs among CAT Reporters. The 75%/25% division between Industry Members (other than Execution Venue ATSS) and Execution Venues maintains the greatest level of comparability across the funding model. For example, the cost allocation establishes fees for the largest Industry Members (*i.e.*, those Industry Members in Tiers 1) that are comparable to the largest Equity Execution Venues and

Options Execution Venues (*i.e.*, those Execution Venues in Tier 1). Furthermore, the allocation of total CAT cost recovery recognizes the difference in the number of CAT Reporters that are Industry Members (other than Execution Venue ATSS) versus CAT Reporters that are Execution Venues. Similarly, the 67%/33% allocation between Equity and Options Execution Venues also helps to provide fee comparability for the largest CAT Reporters.

Finally, the Exchange believes that the proposed fees are reasonable because they would provide ease of calculation, ease of billing and other administrative functions, and predictability of a fixed fee. Such factors are crucial to estimating a reliable revenue stream for the Company and for permitting CAT Reporters to reasonably predict their payment obligations for budgeting purposes.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Exchange notes that the proposed rule change implements provisions of the CAT NMS Plan approved by the Commission, and is designed to assist the Exchange in meeting its regulatory obligations pursuant to the Plan. Similarly, all national securities exchanges and FINRA are proposing this proposed fee schedule to implement the requirements of the CAT NMS Plan. Therefore, this is not a competitive fee filing and, therefore, it does not raise competition issues between and among the exchanges and FINRA.

Moreover, as previously described, the Exchange believes that the proposed rule change fairly and equitably allocates costs among CAT Reporters. In particular, the proposed fee schedule is structured to impose comparable fees on similarly situated CAT Reporters, and lessen the impact on smaller CAT Reporters. CAT Reporters with similar levels of CAT activity will pay similar fees. For example, Industry Members (other than Execution Venue ATSS) with higher levels of message traffic will pay higher fees, and those with lower levels of message traffic will pay lower fees. Similarly, Execution Venue ATSS and other Execution Venues with larger market share will pay higher fees, and those with lower levels of market share will pay lower fees. Therefore, given that there is generally a relationship between message traffic and/or market share to the CAT Reporter's size, smaller

CAT Reporters generally pay less than larger CAT Reporters. Accordingly, the Exchange does not believe that the CAT Fees would have a disproportionate effect on smaller or larger CAT Reporters. In addition, ATSS and exchanges will pay the same fees based on market share. Therefore, the Exchange does not believe that the fees will impose any burden on the competition between ATSS and exchanges. Accordingly, the Exchange believes that the proposed fees will minimize the potential for adverse effects on competition between CAT Reporters in the market.

Furthermore, the tiered, fixed fee funding model limits the disincentives to providing liquidity to the market. Therefore, the proposed fees are structured to limit burdens on competitive quoting and other liquidity provision in the market.

In addition, the Operating Committee believes that the proposed changes to the Original Proposal, as discussed above in detail, address certain competitive concerns raised by commenters, including concerns related to, among other things, smaller ATSS, ATSS trading OTC Equity Securities, market making quoting and fee comparability. As discussed above, the Operating Committee believes that the proposals address the competitive concerns raised by commenters.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has set forth responses to comments received regarding the Original Proposal in Section 3(a)(4) above.

III. Solicitation of Comments on Amendment No. 2

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment No. 2 is consistent with the Act. In particular, the Commission seeks comment on the following:

Allocation of Costs

(1) Commenters' views as to whether the allocation of CAT costs is consistent with the funding principle expressed in the CAT NMS Plan that requires the Operating Committee to "avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality."⁹²

(2) Commenters' views as to whether the allocation of 25% of CAT costs to

⁹² Section 11.2(e) of the CAT NMS Plan.

the Execution Venues (including all the Participants) and 75% to Industry Members, will incentivize or disincentivize the Participants to effectively and efficiently manage the CAT costs incurred by the Participants since they will only bear 25% of such costs.

(3) Commenters' views on the determination to allocate 75% of all costs incurred by the Participants from November 21, 2016 to November 21, 2017 to Industry Members (other than Execution Venue ATSs), when such costs are development and build costs and when Industry Member reporting is scheduled to commence a year later, including views on whether such "fees, costs and expenses . . . [are] fairly and reasonably shared among the Participants and Industry Members" in accordance with the CAT NMS Plan.⁹³

(4) Commenters' views on whether an analysis of the ratio of the expected Industry Member-reported CAT messages to the expected SRO-reported CAT messages should be the basis for determining the allocation of costs between Industry Members and Execution Venues.⁹⁴

(5) Any additional data analysis on the allocation of CAT costs, including any existing supporting evidence.

Comparability

(6) Commenters' views on the shift in the standard used to assess the comparability of CAT Fees, with the emphasis now on comparability of individual entities instead of affiliated entities, including views as to whether this shift is consistent with the funding principle expressed in the CAT NMS Plan that requires the Operating Committee to establish a fee structure in which the fees charged to "CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether Execution Venues and/or Industry Members)."⁹⁵

(7) Commenters' views as to whether the reduction in the number of tiers for Industry Members (other than Execution Venue ATSs) from nine to seven, the

revised allocation of CAT costs between Equity Execution Venues and Options Execution Venues from a 75%/25% split to a 67%/33% split, and the adjustment of all tier percentages and recovery allocations achieves comparability across individual entities, and whether these changes should have resulted in a change to the allocation of 75% of total CAT costs to Industry Members (other than Execution Venue ATSs) and 25% of such costs to Execution Venues.

Discounts

(8) Commenters' views as to whether the discounts for options market-makers, equities market-makers, and Equity ATSs trading OTC Equity Securities are clear, reasonable, and consistent with the funding principle expressed in the CAT NMS Plan that requires the Operating Committee to "avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality,"⁹⁶ including views as to whether the discounts for market-makers limit any potential disincentives to act as a market-maker and/or to provide liquidity due to CAT fees.

Calculation of Costs and Imposition of CAT Fees

(9) Commenters' views as to whether the amendment provides sufficient information regarding the amount of costs incurred from November 21, 2016 to November 21, 2017, particularly, how those costs were calculated, how those costs relate to the proposed CAT Fees, and how costs incurred after November 21, 2017 will be assessed upon Industry Members and Execution Venues;

(10) Commenters' views as to whether the timing of the imposition and collection of CAT Fees on Execution Venues and Industry Members is reasonably related to the timing of when the Company expects to incur such development and implementation costs.⁹⁷

(11) Commenters' views on dividing CAT costs equally among each of the Participants, and then each Participant charging its own members as it deems appropriate, taking into consideration the possibility of inconsistency in charges, the potential for lack of transparency, and the impracticality of multiple SROs submitting invoices for CAT charges.

Burden on Competition and Barriers to Entry

(12) Commenters' views as to whether the allocation of 75% of CAT costs to Industry Members (other than Execution Venue ATSs) imposes any burdens on competition to Industry Members, including views on what baseline competitive landscape the Commission should consider when analyzing the proposed allocation of CAT costs.

(13) Commenters' views on the burdens on competition, including the relevant markets and services and the impact of such burdens on the baseline competitive landscape in those relevant markets and services.

(14) Commenters' views on any potential burdens imposed by the fees on competition between and among CAT Reporters, including views on which baseline markets and services the fees could have competitive effects on and whether the fees are designed to minimize such effects.

(15) Commenters' general views on the impact of the proposed fees on economies of scale and barriers to entry.

(16) Commenters' views on the baseline economies of scale and barriers to entry for Industry Members and Execution Venues and the relevant markets and services over which these economies of scale and barriers to entry exist.

(17) Commenters' views as to whether a tiered fee structure necessarily results in less active tiers paying more per unit than those in more active tiers, thus creating economies of scale, with supporting information if possible.

(18) Commenters' views as to how the level of the fees for the least active tiers would or would not affect barriers to entry.

(19) Commenters' views on whether the difference between the cost per unit (messages or market share) in less active tiers compared to the cost per unit in more active tiers creates regulatory economies of scale that favor larger competitors and, if so:

(a) How those economies of scale compare to operational economies of scale; and

(b) Whether those economies of scale reduce or increase the current advantages enjoyed by larger competitors or otherwise alter the competitive landscape.

(20) Commenters' views on whether the fees could affect competition between and among national securities exchanges and FINRA, in light of the fact that implementation of the fees does not require the unanimous consent of all such entities, and, specifically:

⁹³ Section 11.1(c) of the CAT NMS Plan.

⁹⁴ The Notice for the CAT NMS Plan did not provide a comprehensive count of audit trail message traffic from different regulatory data sources, but the Commission did estimate the ratio of all SRO audit trail messages to OATS audit trail messages to be 1.9431. See Securities Exchange Act Release No. 77724 (April 27, 2016), 81 FR 30613, 30721 n.919 and accompanying text (May 17, 2016).

⁹⁵ Section 11.2(c) of the CAT NMS Plan.

⁹⁶ Section 11.2(e) of the CAT NMS Plan.

⁹⁷ Section 11.1(c) of the CAT NMS Plan.

(a) Whether any of the national securities exchanges or FINRA are disadvantaged by the fees; and

(b) If so, whether any such disadvantages would be of a magnitude that would alter the competitive landscape.

(21) Commenters' views on any potential burden imposed by the fees on competitive quoting and other liquidity provision in the market, including, specifically:

(a) Commenters' views on the kinds of disincentives that discourage liquidity provision and/or disincentives that the Commission should consider in its analysis;

(b) Commenters' views as to whether the fees could disincentivize the provision of liquidity; and

(c) Commenters' views as to whether the fees limit any disincentives to provide liquidity.

(22) Commenters' views as to whether the amendment adequately responds to and/or addresses comments received on related filings.

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2017-046 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-NASDAQ-2017-046. 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 website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for

inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2017-046, and should be submitted on or before January 4, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁹⁸

Robert W. Errett,
Deputy Secretary.

[FR Doc. 2017-27007 Filed 12-13-17; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-82286; File No. SR-GEMX-2017-17]

Self-Regulatory Organizations; Nasdaq GEMX, LLC; Notice of Filing of Amendment No. 2 to a Proposed Rule Change To Adopt Rule 7004 and Chapter XV, Section 11

December 11, 2017.

On May 12, 2017, Nasdaq GEMX, LLC ("GEMX" 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 adopt a fee schedule to establish the fees for Industry Members related to the National Market System Plan Governing the Consolidated Audit Trail ("CAT NMS Plan"). The proposed rule change was published in the **Federal Register** for comment on May 24, 2017.³ The Commission received seven comment letters on the proposed rule change,⁴

⁹⁸ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 80713 (May 18, 2017), 82 FR 23956 (May 24, 2017) ("Original Proposal").

⁴ Since the CAT NMS Plan Participants' proposed rule changes to adopt fees to be charged to Industry Members to fund the consolidated audit trail are substantively identical, the Commission is considering all comments received on the proposed rule changes regardless of the comment file to which they were submitted. See text accompanying notes 13-16 *infra*, for a list of the CAT NMS Plan Participants. See Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, to Brent J. Fields, Secretary, Commission (dated June 6, 2017), available at: <https://www.sec.gov/comments/sr-batsbzx-2017-38/batsbzx201738-1788188-153228.pdf>; Letter from

and a response to comments from the Participants.⁵ On June 30, 2017, the Commission temporarily suspended and initiated proceedings to determine whether to approve or disapprove the proposed rule change.⁶ The Commission thereafter received seven comment letters,⁷ and a response to comments

Patricia L. Cerny and Steven O'Malley, Compliance Consultants, to Brent J. Fields, Secretary, Commission (dated June 12, 2017), available at: <https://www.sec.gov/comments/sr-cboe-2017-040/cboe2017040-1799253-153675.pdf>; Letter from Daniel Zimm, General Counsel, OTC Markets Group Inc., to Eduardo A. Aleman, Assistant Secretary, Commission (dated June 13, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-1801717-153703.pdf>; Letter from Joanna Mallers, Secretary, FIA Principal Traders Group, to Brent J. Fields, Secretary, Commission (dated June 22, 2017), available at: <https://www.sec.gov/comments/sr-cboe-2017-040/cboe2017040-1819670-154195.pdf>; Letter from Stuart J. Kaswell, Executive Vice President and Managing Director, General Counsel, Managed Funds Association, to Brent J. Fields, Secretary, Commission (dated June 23, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-1822454-154283.pdf>; and Letter from Suzanne H. Shatto, Investor, to Commission (dated June 27, 2017), available at: <https://www.sec.gov/comments/sr-batsedgx-2017-22/batsedgx201722-154443.pdf>. The Commission also received a comment letter which is not pertinent to these proposed rule changes. See Letter from Christina Crouch, Smart Ltd., to Brent J. Fields, Secretary, Commission (dated June 5, 2017), available at: <https://www.sec.gov/comments/sr-batsbzx-2017-38/batsbzx201738-1785545-153152.htm>.

⁵ See Letter from CAT NMS Plan Participants to Brent J. Fields, Secretary, Commission (dated June 29, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-1832632-154584.pdf>.

⁶ See Securities Exchange Act Release No. 81067 (June 30, 2017), 82 FR 31656 (July 7, 2017).

⁷ See Letter from W. Hardy Callcott, Partner, Sidley Austin LLP, to Brent J. Fields, Secretary, Commission (dated July 27, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2148338-157737.pdf>; Letter from Kevin Coleman, General Counsel and Chief Compliance Officer, Belvedere Trading LLC, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2148360-157740.pdf>; Letter from Joanna Mallers, Secretary, FIA Principal Traders Group, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2151228-157745.pdf>; Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2150977-157744.pdf>; Letter from Stuart J. Kaswell, Executive Vice President and Managing Director, General Counsel, Managed Funds Association, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2150818-157743.pdf>; Letter from John Kinahan, Chief Executive Officer, Group One Trading, L.P., to Brent J. Fields, Secretary, Commission (dated August 10, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-2214568-160619.pdf>; Letter from Joseph Molluso, Executive Vice President and CFO, Virtu Financial, to Brent J. Fields, Commission (dated August 18, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-38/batsbzx201738-1788188-153228.pdf>; Letter from

Continued

from the Participants.⁸ On November 6, 2017, the Exchange filed Amendment No. 1 to the proposed rule change.⁹ On November 9, 2017, the Commission extended the time period within which to approve the proposed rule change or disapprove the proposed rule change to January 14, 2018.¹⁰ On December 6, 2017, the Exchange filed Amendment No. 2 to the proposed rule change, as described in Items I and II below, which Items have been prepared by the Exchange.¹¹ The Commission is publishing this notice to solicit comments from interested persons on Amendment No. 2.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

On May 12, 2017, Nasdaq GEMX, LLC ("GEMX" or "Exchange"), filed with the Securities and Exchange Commission ("Commission" or "SEC") proposed rule change SR-GEMX-2017-17 (the "Original Proposal"), pursuant to which the Exchange proposed to adopt a fee schedule to establish the fees for Industry Members related to the National Market System Plan Governing the Consolidated Audit Trail (the "CAT NMS Plan" or "Plan").¹² On November 6, 2017, the Exchange filed an amendment to the Original Proposal ("Amendment No. 1"), which replaced the Original Proposal in its entirety. The Exchange is now filing this Amendment No. 2 to replace Amendment No. 1 in its entirety. This Amendment No. 2 describes the changes from the Original Proposal.

With this Amendment, the Exchange is including *Exhibit 4*, which reflects the changes to the text of the proposed rule change as set forth in the Original Proposal, and *Exhibit 5*, which reflects all proposed changes to the Exchange's current rule text.

www.sec.gov/comments/sr-finra-2017-011/finra2017011-2238648-160830.pdf.

⁸ See Letter from Michael Simon, Chair, CAT NMS Plan Operating Committee, to Brent J. Fields, Commission, Secretary (dated November 2, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2674608-161412.pdf>.

⁹ Amendment No. 1 to the proposed rule change replaced and superseded the Original Proposal in its entirety. Amendment No. 1 is available on the Commission's website for GEMX at: <https://www.sec.gov/comments/sr-gemx-2017-17/gemx201717-2673139-161452.pdf>.

¹⁰ See Securities Exchange Act Release No. 82049 (November 9, 2017), 82 FR 53549 (November 16, 2017).

¹¹ Amendment No. 2 replaces and supersedes Amendment No. 1 in its entirety.

¹² Unless otherwise specified, capitalized terms used in this fee filing are defined as set forth herein, the CAT Compliance Rule Series, in the CAT NMS Plan, or the Original Proposal.

The text of the proposed rule change is available on the Exchange's website at <http://nasdaqgemx.cchwallstreet.com/>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

BOX Options Exchange LLC, Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe C2 Exchange, Inc., Cboe Exchange, Inc.,¹³ Chicago Stock Exchange, Inc., Financial Industry Regulatory Authority, Inc. ("FINRA"), Investors' Exchange LLC, Miami International Securities Exchange, LLC, MIAx PEARL, LLC, Nasdaq BX, Inc., Nasdaq GEMX, LLC, Nasdaq ISE, LLC, Nasdaq MRX, LLC,¹⁴ Nasdaq PHLX LLC, The Nasdaq Stock Market LLC, New York Stock Exchange LLC, NYSE American LLC,¹⁵ NYSE Arca, Inc. and NYSE National, Inc.¹⁶ (collectively, the

¹³ Note that Bats BYX Exchange, Inc., Bats BZX Exchange, Inc., Bats EDGA Exchange, Inc., Bats EDGX Exchange, Inc., LLC, C2 Options Exchange, Incorporated, and Chicago Board Options Exchange, Incorporated, have been renamed Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe C2 Exchange, Inc., Cboe Exchange, Inc., respectively.

¹⁴ ISE Gemini, LLC, ISE Mercury, LLC and International Securities Exchange, LLC have been renamed Nasdaq GEMX, LLC, Nasdaq MRX, LLC, and Nasdaq ISE, LLC, respectively. See Securities Exchange Act Release No. 80248 (March 15, 2017), 82 FR 14547 (March 21, 2017); Securities Exchange Act Release No. 80326 (March 29, 2017), 82 FR 16460 (April 4, 2017); and Securities Exchange Act Release No. 80325 (March 29, 2017), 82 FR 16445 (April 4, 2017).

¹⁵ NYSE MKT LLC has been renamed NYSE American LLC. See Securities Exchange Act Release No. 80283 (March 21, 2017), 82 FR 15244 (March 27, 2017).

¹⁶ National Stock Exchange, Inc. has been renamed NYSE National, Inc. See Securities Exchange Act Release No. 79902 (January 30, 2017), 82 FR 9258 (February 3, 2017).

"Participants") filed with the Commission, pursuant to Section 11A of the Exchange Act¹⁷ and Rule 608 of Regulation NMS thereunder,¹⁸ the CAT NMS Plan.¹⁹ The Participants filed the Plan to comply with Rule 613 of Regulation NMS under the Exchange Act. The Plan was published for comment in the **Federal Register** on May 17, 2016,²⁰ and approved by the Commission, as modified, on November 15, 2016.²¹ The Plan is designed to create, implement and maintain a consolidated audit trail ("CAT") that would capture customer and order event information for orders in NMS Securities and OTC Equity Securities, across all markets, from the time of order inception through routing, cancellation, modification, or execution in a single consolidated data source. The Plan accomplishes this by creating CAT NMS, LLC (the "Company"), of which each Participant is a member, to operate the CAT.²² Under the CAT NMS Plan, the Operating Committee of the Company ("Operating Committee") has discretion to establish funding for the Company to operate the CAT, including establishing fees that the Participants will pay, and establishing fees for Industry Members that will be implemented by the Participants ("CAT Fees").²³ The Participants are required to file with the SEC under Section 19(b) of the Exchange Act any such CAT Fees applicable to Industry Members that the Operating Committee approves.²⁴ Accordingly, the Exchange submitted the Original Proposal to propose the Consolidated Audit Trail Funding Fees, which would require Industry Members that are SRO members to pay the CAT Fees determined by the Operating Committee.

The Commission published the Original Proposal for public comment in the **Federal Register** on May 24, 2017,²⁵ and received comments in response to

¹⁷ 15 U.S.C. 78k-1.

¹⁸ 17 CFR 242.608.

¹⁹ See Letter from the Participants to Brent J. Fields, Secretary, Commission, dated September 30, 2014; and Letter from Participants to Brent J. Fields, Secretary, Commission, dated February 27, 2015. On December 24, 2015, the Participants submitted an amendment to the CAT NMS Plan. See Letter from Participants to Brent J. Fields, Secretary, Commission, dated December 23, 2015.

²⁰ Securities Exchange Act Release No. 77724 (April 27, 2016), 81 FR 30614 (May 17, 2016).

²¹ Securities Exchange Act Release No. 79318 (November 15, 2016), 81 FR 84696 (November 23, 2016) ("Approval Order").

²² The Plan also serves as the limited liability company agreement for the Company.

²³ Section 11.1(b) of the CAT NMS Plan.

²⁴ *Id.*

²⁵ See Securities Exchange Act Release No. 80713 (May 18, 2017), 82 FR 23956 (May 24, 2017) (SR-GEMX-2017-17).

the Original Proposal or similar fee filings by other Participants.²⁶ On June 30, 2017, the Commission suspended, and instituted proceedings to determine whether to approve or disapprove, the Original Proposal.²⁷ The Commission received seven comment letters in response to those proceedings.²⁸

In response to the comments on the Original Proposal, the Operating Committee determined to make the following changes to the funding model: (1) Adds two additional CAT Fee tiers for Equity Execution Venues; (2) discounts the OTC Equity Securities market share of Execution Venue ATSs trading OTC Equity Securities as well as the market share of the FINRA over-the-counter reporting facility (“ORF”) by the average shares per trade ratio between NMS Stocks and OTC Equity Securities (calculated as 0.17% based on available data from the second quarter of 2017) when calculating the market share of Execution Venue ATS trading OTC Equity Securities and FINRA; (3) discounts the Options Market Maker quotes by the trade to quote ratio for options (calculated as 0.01% based on available data for June 2016 through June 2017) when calculating message traffic for Options Market Makers; (4) discounts equity market maker quotes by the trade to quote ratio for equities (calculated as 5.43% based on available data for June 2016 through June 2017) when calculating message traffic for equity market makers; (5) decreases the number of tiers for Industry Members (other than the Execution Venue ATSs) from nine to seven; (6) changes the allocation of CAT costs between Equity Execution Venues and Options Execution Venues from 75%/25% to 67%/33%; (7) adjusts tier percentages

and recovery allocations for Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSs); (8) focuses the comparability of CAT Fees on the individual entity level, rather than primarily on the comparability of affiliated entities; (9) commences invoicing of CAT Reporters as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Participants and the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants; and (10) requires the proposed fees to automatically expire two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. As discussed in detail below, the Exchange proposes to amend the Original Proposal to reflect these changes.

(1) Executive Summary

The following provides an executive summary of the CAT funding model approved by the Operating Committee, as well as Industry Members’ rights and obligations related to the payment of CAT Fees calculated pursuant to the CAT funding model, as amended by this Amendment. A detailed description of the CAT funding model and the CAT Fees, as amended by this Amendment, as well as the changes made to the Original Proposal follows this executive summary.

(A) CAT Funding Model

- *CAT Costs.* The CAT funding model is designed to establish CAT-specific fees to collectively recover the costs of building and operating the CAT from all CAT Reporters, including Industry Members and Participants. The overall CAT costs used in calculating the CAT Fees in this fee filing are comprised of Plan Processor CAT costs and non-Plan Processor CAT costs incurred, and estimated to be incurred, from November 21, 2016 through November 21, 2017. Although the CAT costs from November 21, 2016 through November 21, 2017 were used in calculating the CAT Fees, the CAT Fees set forth in this fee filing would be in effect until the automatic sunset date, as discussed below. (See Section 3(a)(2)(E) below)

- *Bifurcated Funding Model.* The CAT NMS Plan requires a bifurcated funding model, where costs associated with building and operating the CAT would be borne by (1) Participants and Industry Members that are Execution Venues for Eligible Securities through fixed tier fees based on market share, and (2) Industry Members (other than alternative trading systems (“ATSs”)

that execute transactions in Eligible Securities (“Execution Venue ATSs”) through fixed tier fees based on message traffic for Eligible Securities. (See Section 3(a)(2) below)

- *Industry Member Fees.* Each Industry Member (other than Execution Venue ATSs) will be placed into one of seven tiers of fixed fees, based on “message traffic” in Eligible Securities for a defined period (as discussed below). Prior to the start of CAT reporting, “message traffic” will be comprised of historical equity and equity options orders, cancels, quotes and executions provided by each exchange and FINRA over the previous three months. After an Industry Member begins reporting to the CAT, “message traffic” will be calculated based on the Industry Member’s Reportable Events reported to the CAT. Industry Members with lower levels of message traffic will pay a lower fee and Industry Members with higher levels of message traffic will pay a higher fee. To avoid disincentives to quoting behavior, Options Market Maker and equity market maker quotes will be discounted when calculating message traffic. (See Section 3(a)(2)(B) below)

- *Execution Venue Fees.* Each Equity Execution Venue will be placed in one of four tiers of fixed fees based on market share, and each Options Execution Venue will be placed in one of two tiers of fixed fees based on market share. Equity Execution Venue market share will be determined by calculating each Equity Execution Venue’s proportion of the total volume of NMS Stock and OTC Equity shares reported by all Equity Execution Venues during the relevant time period. For purposes of calculating market share, the OTC Equity Securities market share of Execution Venue ATSs trading OTC Equity Securities as well as the market share of the FINRA ORF will be discounted. Similarly, market share for Options Execution Venues will be determined by calculating each Options Execution Venue’s proportion of the total volume of Listed Options contracts reported by all Options Execution Venues during the relevant time period. Equity Execution Venues with a larger market share will pay a larger CAT Fee than Equity Execution Venues with a smaller market share. Similarly, Options Execution Venues with a larger market share will pay a larger CAT Fee than Options Execution Venues with a smaller market share. (See Section 3(a)(2)(C) below)

- *Cost Allocation.* For the reasons discussed below, in designing the model, the Operating Committee determined that 75 percent of total costs

²⁶ For a summary of comments, see generally Securities Exchange Act Release No. 81067 (June 30, 2017), 82 FR 31656 (July 7, 2017) (“Suspension Order”).

²⁷ Suspension Order.

²⁸ See Letter from Stuart J. Kaswell, Executive Vice President, Managing Director and General Counsel, Managed Funds Association, to Brent J. Fields, Secretary, SEC (July 28, 2017) (“MFA Letter”); Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA, to Brent J. Fields, Secretary, SEC (July 28, 2017) (“SIFMA Letter”); Joanna Mallers, Secretary, FIA Principal Traders Group, to Brent J. Fields, Secretary, SEC (July 28, 2017) (“FIA Principal Traders Group Letter”); Letter from Kevin Coleman, General Counsel & Chief Compliance Officer, Belvedere Trading LLC, to Brent J. Fields, Secretary, SEC (July 28, 2017) (“Belvedere Letter”); Letter from W. Hardy Callcott, Sidley Austin LLP, to Brent J. Fields, Secretary, SEC (July 27, 2017) (“Sidley Letter”); Letter from John Kinahan, Chief Executive Officer, Group One Trading, L.P., to Brent J. Fields, Secretary, SEC (Aug. 10, 2017) (“Group One Letter”); and Letter from Joseph Molluso, Executive Vice President, Virtu Financial, to Brent J. Fields, Secretary, SEC (Aug. 18, 2017) (“Virtu Financial Letter”).

recovered would be allocated to Industry Members (other than Execution Venue ATs) and 25 percent would be allocated to Execution Venues. In addition, the Operating Committee determined to allocate 67 percent of Execution Venue costs recovered to Equity Execution Venues and 33 percent to Options Execution Venues. (See Section 3(a)(2)(D) below)

- *Comparability of Fees.* The CAT funding model charges CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) comparable CAT Fees. (See Section 3(a)(2)(F) below)

(B) CAT Fees for Industry Members

- *Fee Schedule.* The quarterly CAT Fees for each tier for Industry Members are set forth in the two fee schedules in the Consolidated Audit Trail Funding Fees, one for Equity ATs and one for Industry Members other than Equity ATs. (See Section 3(a)(3)(B) below)

- *Quarterly Invoices.* Industry Members will be billed quarterly for CAT Fees, with the invoices payable within 30 days. The quarterly invoices will identify within which tier the Industry Member falls. (See Section 3(a)(3)(C) below)

- *Centralized Payment.* Each Industry Member will receive from the Company one invoice for its applicable CAT Fees, not separate invoices from each Participant of which it is a member. Each Industry Member will pay its CAT Fees to the Company via the centralized system for the collection of CAT Fees established by the Operating Committee. (See Section 3(a)(3)(C) below)

- *Billing Commencement.* Industry Members will begin to receive invoices for CAT Fees as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Participants and the operative date of the Plan amendment adopting CAT Fees for Participants. (See Section 3(a)(2)(G) below)

- *Sunset Provision.* The Consolidated Audit Trail Funding Fees will sunset automatically two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. (See Section 3(a)(2)(I) below)

(2) Description of the CAT Funding Model

Article XI of the CAT NMS Plan requires the Operating Committee to approve the operating budget, including projected costs of developing and operating the CAT for the upcoming year. In addition to a budget, Article XI of the CAT NMS Plan provides that the

Operating Committee has discretion to establish funding for the Company, consistent with a bifurcated funding model, where costs associated with building and operating the Central Repository would be borne by (1) Participants and Industry Members that are Execution Venues through fixed tier fees based on market share, and (2) Industry Members (other than Execution Venue ATs) through fixed tier fees based on message traffic. In its order approving the CAT NMS Plan, the Commission determined that the proposed funding model was “reasonable”²⁹ and “reflects a reasonable exercise of the Participants’ funding authority to recover the Participants’ costs related to the CAT.”³⁰

More specifically, the Commission stated in approving the CAT NMS Plan that “[t]he Commission believes that the proposed funding model is reasonably designed to allocate the costs of the CAT between the Participants and Industry Members.”³¹ The Commission further noted the following:

The Commission believes that the proposed funding model reflects a reasonable exercise of the Participants’ funding authority to recover the Participants’ costs related to the CAT. The CAT is a regulatory facility jointly owned by the Participants and . . . the Exchange Act specifically permits the Participants to charge their members fees to fund their self-regulatory obligations. The Commission further believes that the proposed funding model is designed to impose fees reasonably related to the Participants’ self-regulatory obligations because the fees would be directly associated with the costs of establishing and maintaining the CAT, and not unrelated SRO services.³²

Accordingly, the funding model approved by the Operating Committee imposes fees on both Participants and Industry Members.

As discussed in Appendix C of the CAT NMS Plan, in developing and approving the approved funding model, the Operating Committee considered the advantages and disadvantages of a variety of alternative funding and cost allocation models before selecting the proposed model.³³ After analyzing the various alternatives, the Operating Committee determined that the proposed tiered, fixed fee funding model provides a variety of advantages in comparison to the alternatives.

In particular, the fixed fee model, as opposed to a variable fee model,

provides transparency, ease of calculation, ease of billing and other administrative functions, and predictability of a fixed fee. Such factors are crucial to estimating a reliable revenue stream for the Company and for permitting CAT Reporters to reasonably predict their payment obligations for budgeting purposes. Additionally, a strictly variable or metered funding model based on message volume would be far more likely to affect market behavior and place an inappropriate burden on competition.

In addition, reviews from varying time periods of current broker-dealer order and trading data submitted under existing reporting requirements showed a wide range in activity among broker-dealers, with a number of broker-dealers submitting fewer than 1,000 orders per month and other broker-dealers submitting millions and even billions of orders in the same period. Accordingly, the CAT NMS Plan includes a tiered approach to fees. The tiered approach helps ensure that fees are equitably allocated among similarly situated CAT Reporters and furthers the goal of lessening the impact on smaller firms.³⁴ In addition, in choosing a tiered fee structure, the Operating Committee concluded that the variety of benefits offered by a tiered fee structure, discussed above, outweighed the fact that CAT Reporters in any particular tier would pay different rates per message traffic order event or per market share (e.g., an Industry Member with the largest amount of message traffic in one tier would pay a smaller amount per order event than an Industry Member in the same tier with the least amount of message traffic). Such variation is the natural result of a tiered fee structure.³⁵ The Operating Committee considered several approaches to developing a tiered model, including defining fee tiers based on such factors as size of firm, message traffic or trading dollar volume. After analyzing the alternatives, it was concluded that the tiering should be based on message traffic which will reflect the relative impact of CAT Reporters on the CAT System.

Accordingly, the CAT NMS Plan contemplates that costs will be allocated across the CAT Reporters on a tiered basis in order to allocate higher costs to those CAT Reporters that contribute more to the costs of creating, implementing and maintaining the CAT

²⁹ Approval Order at 84796.

³⁰ *Id.* at 84794.

³¹ *Id.* at 84795.

³² *Id.* at 84794.

³³ Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85006.

³⁴ Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85006.

³⁵ Moreover, as the SEC noted in approving the CAT NMS Plan, “[t]he Participants also have offered a reasonable basis for establishing a funding model based on broad tiers, in that it may be easier to implement.” Approval Order at 84796.

and lower costs to those that contribute less.³⁶ The fees to be assessed at each tier are calculated so as to recoup a proportion of costs appropriate to the message traffic or market share (as applicable) from CAT Reporters in each tier. Therefore, Industry Members generating the most message traffic will be in the higher tiers, and will be charged a higher fee. Industry Members with lower levels of message traffic will be in lower tiers and will be assessed a smaller fee for the CAT.³⁷

Correspondingly, Execution Venues with the highest market shares will be in the top tier, and will be charged higher fees. Execution Venues with the lowest market shares will be in the lowest tier and will be assessed smaller fees for the CAT.³⁸

The CAT NMS Plan states that Industry Members (other than Execution Venue ATSS) will be charged based on message traffic, and that Execution Venues will be charged based on market share.³⁹ While there are multiple factors that contribute to the cost of building, maintaining and using the CAT, processing and storage of incoming message traffic is one of the most significant cost drivers for the CAT.⁴⁰ Thus, the CAT NMS Plan provides that the fees payable by Industry Members (other than Execution Venue ATSS) will be based on the message traffic generated by such Industry Member.⁴¹

In contrast to Industry Members, which determine the degree to which they produce message traffic that constitute CAT Reportable Events, the CAT Reportable Events of the Execution Venues are largely derivative of quotations and orders received from Industry Members that they are required to display. The business model for Execution Venues (other than FINRA), however, is focused on executions in their markets. As a result, the Operating Committee believes that it is more equitable to charge Execution Venues based on their market share rather than their message traffic.

Focusing on message traffic would make it more difficult to draw distinctions between large and small Execution Venues and, in particular, between large and small options exchanges. For instance, the Operating Committee analyzed the message traffic of Execution Venues and Industry Members for the period of April 2017 to

June 2017 and placed all CAT Reporters into a nine-tier framework (*i.e.*, a single tier may include both Execution Venues and Industry Members). The Operating Committee's analysis found that the majority of exchanges (15 total) were grouped in Tiers 1 and 2. Moreover, virtually all of the options exchanges were in Tiers 1 and 2.⁴² Given the resulting concentration of options exchanges in Tiers 1 and 2 under this approach, the analysis shows that a funding model for Execution Venues based on message traffic would make it more difficult to distinguish between large and small options exchanges, as compared to the proposed fee approach that bases fees for Execution Venues on market share.

The CAT NMS Plan's funding model also is structured to avoid a "reduction in market quality."⁴³ The tiered, fixed fee funding model is designed to limit the disincentives to providing liquidity to the market. For example, the Operating Committee expects that a firm that has a large volume of quotes would likely be categorized in one of the upper tiers, and would not be assessed a fee for this traffic directly as they would under a more directly metered model. In contrast, strictly variable or metered funding models based on message volume are far more likely to affect market behavior. In approving the CAT NMS Plan, the SEC stated that "[t]he Participants also offered a reasonable basis for establishing a funding model based on broad tiers, in that it may be . . . less likely to have an incremental deterrent effect on liquidity provision."⁴⁴

The funding model also is structured to avoid a reduction market quality because it discounts Options Market Maker and equity market maker quotes when calculating message traffic for Options Market Makers and equity market makers, respectively. As discussed in more detail below, the Operating Committee determined to discount the Options Market Maker quotes by the trade to quote ratio for options when calculating message traffic for Options Market Makers. Similarly, to avoid disincentives to quoting behavior on the equities side as well, the Operating Committee determined to discount equity market maker quotes by the trade to quote ratio for equities when calculating message traffic for equity market makers. The proposed discounts recognize the value of the

market makers' quoting activity to the market as a whole.

The CAT NMS Plan is further structured to avoid potential conflicts raised by the Operating Committee determining fees applicable to its own members—the Participants. First, the Company will operate on a "break-even" basis, with fees imposed to cover costs and an appropriate reserve. Any surpluses will be treated as an operational reserve to offset future fees and will not be distributed to the Participants as profits.⁴⁵ To ensure that the Participants' operation of the CAT will not contribute to the funding of their other operations, Section 11.1(c) of the CAT NMS Plan specifically states that "[a]ny surplus of the Company's revenues over its expenses shall be treated as an operational reserve to offset future fees." In addition, as set forth in Article VIII of the CAT NMS Plan, the Company "intends to operate in a manner such that it qualifies as a 'business league' within the meaning of Section 501(c)(6) of the [Internal Revenue] Code." To qualify as a business league, an organization must "not [be] organized for profit and no part of the net earnings of [the organization can] inure[] to the benefit of any private shareholder or individual."⁴⁶ As the SEC stated when approving the CAT NMS Plan, "the Commission believes that the Company's application for Section 501(c)(6) business league status addresses issues raised by commenters about the Plan's proposed allocation of profit and loss by mitigating concerns that the Company's earnings could be used to benefit individual Participants."⁴⁷ The Internal Revenue Service recently has determined that the Company is exempt from federal income tax under Section 501(c)(6) of the Internal Revenue Code.

The funding model also is structured to take into account distinctions in the securities trading operations of Participants and Industry Members. For example, the Operating Committee designed the model to address the different trading characteristics in the OTC Equity Securities market. Specifically, the Operating Committee proposes to discount the OTC Equity Securities market share of Execution Venue ATSS trading OTC Equity Securities as well as the market share of the FINRA ORF by the average shares per trade ratio between NMS Stocks and OTC Equity Securities to adjust for the greater number of shares being traded in

³⁶ Approval Order at 85005.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Section 11.3(a) and (b) of the CAT NMS Plan.

⁴⁰ Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85005.

⁴¹ Section 11.3(b) of the CAT NMS Plan.

⁴² The Operating Committee notes that this analysis did not place MIAx PEARL in Tier 1 or Tier 2 since the exchange commenced trading on February 6, 2017.

⁴³ Section 11.2(e) of the CAT NMS Plan.

⁴⁴ Approval Order at 84796.

⁴⁵ *Id.* at 84792.

⁴⁶ 26 U.S.C. 501(c)(6).

⁴⁷ Approval Order at 84793.

the OTC Equity Securities market, which is generally a function of a lower per share price for OTC Equity Securities when compared to NMS Stocks. In addition, the Operating Committee also proposes to discount Options Market Maker and equity market maker message traffic in recognition of their role in the securities markets. Furthermore, the funding model creates separate tiers for Equity and Options Execution Venues due to the different trading characteristics of those markets.

Finally, by adopting a CAT-specific fee, the Operating Committee will be fully transparent regarding the costs of the CAT. Charging a general regulatory fee, which would be used to cover CAT costs as well as other regulatory costs, would be less transparent than the selected approach of charging a fee designated to cover CAT costs only.

A full description of the funding model is set forth below. This description includes the framework for the funding model as set forth in the CAT NMS Plan, as well as the details as to how the funding model will be applied in practice, including the number of fee tiers and the applicable fees for each tier. The complete funding model is described below, including those fees that are to be paid by the Participants. The proposed Consolidated Audit Trail Funding Fees, however, do not apply to the Participants; the proposed Consolidated Audit Trail Funding Fees only apply to Industry Members. The CAT Fees for Participants will be imposed separately by the Operating Committee pursuant to the CAT NMS Plan.

(A) Funding Principles

Section 11.2 of the CAT NMS Plan sets forth the principles that the Operating Committee applied in establishing the funding for the Company. The Operating Committee has considered these funding principles as well as the other funding requirements set forth in the CAT NMS Plan and in Rule 613 in developing the proposed funding model. The following are the funding principles in Section 11.2 of the CAT NMS Plan:

- To create transparent, predictable revenue streams for the Company that are aligned with the anticipated costs to build, operate and administer the CAT and other costs of the Company;
- To establish an allocation of the Company's related costs among Participants and Industry Members that is consistent with the Exchange Act, taking into account the timeline for implementation of the CAT and distinctions in the securities trading

operations of Participants and Industry Members and their relative impact upon the Company's resources and operations;

- To establish a tiered fee structure in which the fees charged to: (i) CAT Reporters that are Execution Venues, including ATSS, are based upon the level of market share; (ii) Industry Members' non-ATS activities are based upon message traffic; (iii) the CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether Execution Venue and/or Industry Members);
- To provide for ease of billing and other administrative functions;
- To avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality; and
- To build financial stability to support the Company as a going concern.

(B) Industry Member Tiering

Under Section 11.3(b) of the CAT NMS Plan, the Operating Committee is required to establish fixed fees to be payable by Industry Members, based on message traffic generated by such Industry Member, with the Operating Committee establishing at least five and no more than nine tiers.

The CAT NMS Plan clarifies that the fixed fees payable by Industry Members pursuant to Section 11.3(b) shall, in addition to any other applicable message traffic, include message traffic generated by: (i) An ATS that does not execute orders that is sponsored by such Industry Member; and (ii) routing orders to and from any ATS sponsored by such Industry Member. In addition, the Industry Member fees will apply to Industry Members that act as routing broker-dealers for exchanges. The Industry Member fees will not be applicable, however, to an ATS that qualifies as an Execution Venue, as discussed in more detail in the section on Execution Venue tiering.

In accordance with Section 11.3(b), the Operating Committee approved a tiered fee structure for Industry Members (other than Execution Venue ATSS) as described in this section. In determining the tiers, the Operating Committee considered the funding principles set forth in Section 11.2 of the CAT NMS Plan, seeking to create funding tiers that take into account the relative impact on CAT System resources of different Industry Members,

and that establish comparable fees among the CAT Reporters with the most Reportable Events. The Operating Committee has determined that establishing seven tiers results in an allocation of fees that distinguishes between Industry Members with differing levels of message traffic. Thus, each such Industry Member will be placed into one of seven tiers of fixed fees, based on "message traffic" for a defined period (as discussed below).

A seven tier structure was selected to provide a wide range of levels for tiering Industry Members such that Industry Members submitting significantly less message traffic to the CAT would be adequately differentiated from Industry Members submitting substantially more message traffic. The Operating Committee considered historical message traffic from multiple time periods, generated by Industry Members across all exchanges and as submitted to FINRA's Order Audit Trail System ("OATS"), and considered the distribution of firms with similar levels of message traffic, grouping together firms with similar levels of message traffic. Based on this, the Operating Committee determined that seven tiers would group firms with similar levels of message traffic, charging those firms with higher impact on the CAT more, while lowering the burden on Industry Members that have less CAT-related activity. Furthermore, the selection of seven tiers establishes comparable fees among the largest CAT Reporters.

Each Industry Member (other than Execution Venue ATSS) will be ranked by message traffic and tiered by predefined Industry Member percentages (the "Industry Member Percentages"). The Operating Committee determined to use predefined percentages rather than fixed volume thresholds to ensure that the total CAT Fees collected recover the expected CAT costs regardless of changes in the total level of message traffic. To determine the fixed percentage of Industry Members in each tier, the Operating Committee analyzed historical message traffic generated by Industry Members across all exchanges and as submitted to OATS, and considered the distribution of firms with similar levels of message traffic, grouping together firms with similar levels of message traffic. Based on this, the Operating Committee identified seven tiers that would group firms with similar levels of message traffic.

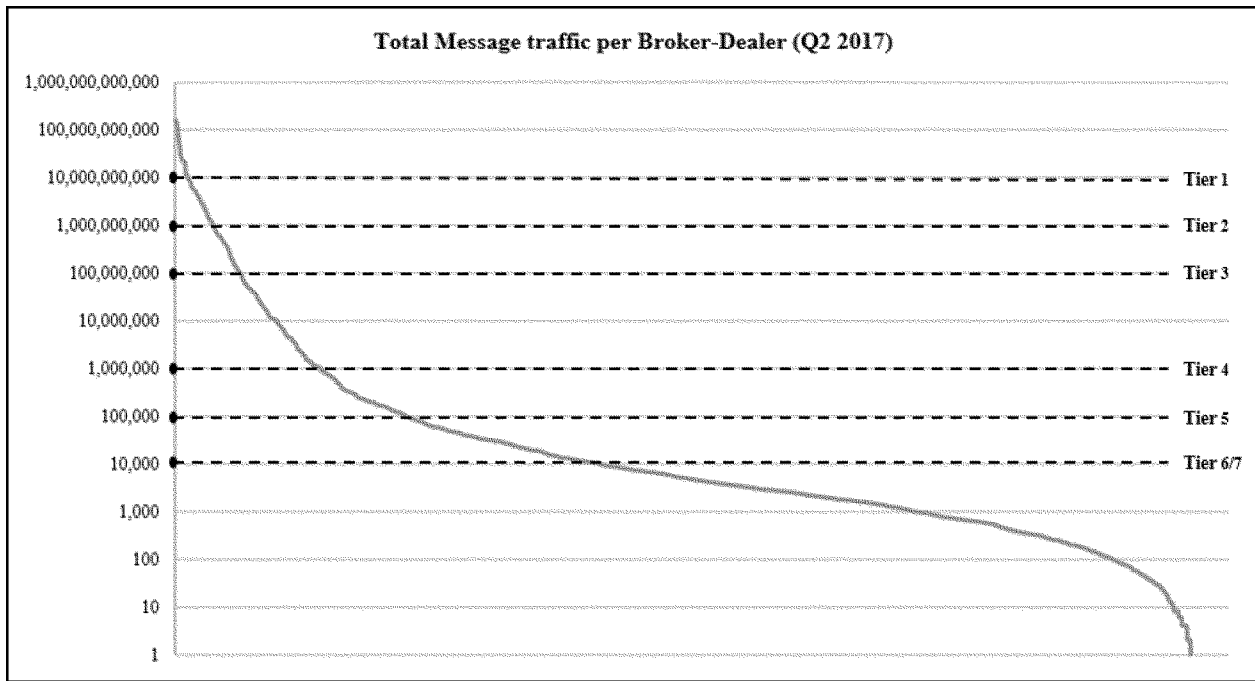
The percentage of costs recovered by each Industry Member tier will be determined by predefined percentage allocations (the "Industry Member Recovery Allocation"). In determining

the fixed percentage allocation of costs recovered for each tier, the Operating Committee considered the impact of CAT Reporter message traffic on the CAT System as well as the distribution of total message volume across Industry Members while seeking to maintain comparable fees among the largest CAT Reporters. Accordingly, following the determination of the percentage of Industry Members in each tier, the Operating Committee identified the percentage of total market volume for each tier based on the historical message traffic upon which Industry Members had been initially ranked. Taking this into account along with the resulting percentage of total recovery, the percentage allocation of costs recovered for each tier were assigned, allocating higher percentages of recovery to tiers with higher levels of message traffic while avoiding any inappropriate burden on competition. Furthermore, by using percentages of Industry Members

and costs recovered per tier, the Operating Committee sought to include elasticity within the funding model, allowing the funding model to respond to changes in either the total number of Industry Members or the total level of message traffic.

The following chart illustrates the breakdown of seven Industry Member tiers across the monthly average of total equity and equity options orders, cancels, quotes and executions in the second quarter of 2017 as well as message traffic thresholds between the largest of Industry Member message traffic gaps. The Operating Committee referenced similar distribution illustrations to determine the appropriate division of Industry Member percentages in each tier by considering the grouping of firms with similar levels of message traffic and seeking to identify relative breakpoints in the message traffic between such groupings. In reviewing the chart and its

corresponding table, note that while these distribution illustrations were referenced to help differentiate between Industry Member tiers, the proposed funding model is driven by fixed percentages of Industry Members across tiers to account for fluctuating levels of message traffic over time. This approach also provides financial stability for the CAT by ensuring that the funding model will recover the required amounts regardless of changes in the number of Industry Members or the amount of message traffic. Actual messages in any tier will vary based on the actual traffic in a given measurement period, as well as the number of firms included in the measurement period. The Industry Member Percentages and Industry Member Recovery Allocation for each tier will remain fixed with each Industry Member's tier to be reassigned periodically, as described below in Section 3(a)(2)(I).



Industry Member tier	Approximate message traffic per Industry Member (Q2 2017) (orders, quotes, cancels and executions)
Tier 1	>10,000,000,000
Tier 2	1,000,000,000–10,000,000,000
Tier 3	100,000,000–1,000,000,000
Tier 4	1,000,000–100,000,000
Tier 5	100,000–1,000,000
Tier 6	10,000–100,000
Tier 7	<10,000

Based on the above analysis, the Operating Committee approved the following Industry Member Percentages

and Industry Member Recovery Allocations:

Industry Member tier	Percentage of Industry Members	Percentage of Industry Member Recovery	Percentage of total recovery
Tier 1	0.900	12.00	9.00
Tier 2	2.150	20.50	15.38
Tier 3	2.800	18.50	13.88
Tier 4	7.750	32.00	24.00
Tier 5	8.300	10.00	7.50
Tier 6	18.800	6.00	4.50
Tier 7	59.300	1.00	0.75
Total	100	100	75

For the purposes of creating these tiers based on message traffic, the Operating Committee determined to define the term “message traffic” separately for the period before the commencement of CAT reporting and for the period after the start of CAT reporting. The different definition for message traffic is necessary as there will be no Reportable Events as defined in the Plan, prior to the commencement of CAT reporting. Accordingly, prior to the start of CAT reporting, “message traffic” will be comprised of historical equity and equity options orders, cancels, quotes and executions provided by each exchange and FINRA over the previous three months. Prior to the start of CAT reporting, orders would be comprised of the total number of equity and equity options orders received and originated by a member of an exchange or FINRA over the previous three-month period, including principal orders, cancel/replace orders, market maker orders originated by a member of an exchange, and reserve (iceberg) orders as well as executions originated by a member of FINRA, and excluding order rejects, system-modified orders, order routes and implied orders.⁴⁸ In addition, prior to the start of CAT reporting, cancels would be comprised of the total number of equity and equity option cancels received and originated by a member of an exchange or FINRA over a three-month period, excluding order modifications (e.g., order updates, order splits, partial cancels) and multiple cancels of a complex order. Furthermore, prior to the start of CAT reporting, quotes would be comprised of information readily available to the exchanges and FINRA, such as the total number of historical equity and equity

⁴⁸ Consequently, firms that do not have “message traffic” reported to an exchange or OATS before they are reporting to the CAT would not be subject to a fee until they begin to report information to CAT.

options quotes received and originated by a member of an exchange or FINRA over the prior three-month period. Additionally, prior to the start of CAT reporting, executions would be comprised of the total number of equity and equity option executions received or originated by a member of an exchange or FINRA over a three-month period.

After an Industry Member begins reporting to the CAT, “message traffic” will be calculated based on the Industry Member’s Reportable Events reported to the CAT as will be defined in the Technical Specifications.⁴⁹

Quotes of Options Market Makers and equity market makers will be included in the calculation of total message traffic for those market makers for purposes of tiering under the CAT funding model both prior to CAT reporting and once CAT reporting commences.⁵⁰ To address potential concerns regarding burdens on competition or market quality of including quotes in the calculation of message traffic, however, the Operating Committee determined to discount the Options Market Maker quotes by the trade to quote ratio for options when calculating message traffic

⁴⁹ If an Industry Member (other than an Execution Venue ATS) has no orders, cancels, quotes and executions prior to the commencement of CAT Reporting, or no Reportable Events after CAT reporting commences, then the Industry Member would not have a CAT Fee obligation.

⁵⁰ The SEC approved exemptive relief permitting Options Market Maker quotes to be reported to the Central Repository by the relevant Options Exchange in lieu of requiring that such reporting be done by both the Options Exchange and the Options Market Maker, as required by Rule 613 of Regulation NMS. See Securities Exchange Act Release No. 77265 (March 1, 2017), 81 FR 11856 (March 7, 2016). This exemption applies to Options Market Maker quotes for CAT reporting purposes only. Therefore, notwithstanding the reporting exemption provided for Options Market Maker quotes, Options Market Maker quotes will be included in the calculation of total message traffic for Options Market Makers for purposes of tiering under the CAT funding model both prior to CAT reporting and once CAT reporting commences.

for Options Market Makers. Based on available data for June 2016 through June 2017, the trade to quote ratio for options is 0.01%. Similarly, to avoid disincentives to quoting behavior on the equities side, the Operating Committee determined to discount equity market maker quotes by the trade to quote ratio for equities. Based on available data for June 2016 through June 2017, the trade to quote ratio for equities is 5.43%.⁵¹ The trade to quote ratio for options and the trade to quote ratio for equities will be calculated every three months when tiers are recalculated (as discussed below).

The Operating Committee has determined to calculate fee tiers every three months, on a calendar quarter basis, based on message traffic from the prior three months. Based on its analysis of historical data, the Operating Committee believes that calculating tiers based on three months of data will provide the best balance between reflecting changes in activity by Industry Members while still providing predictability in the tiering for Industry Members. Because fee tiers will be calculated based on message traffic from the prior three months, the Operating Committee will begin calculating message traffic based on an Industry Member’s Reportable Events reported to the CAT once the Industry Member has been reporting to the CAT for three months. Prior to that, fee tiers will be calculated as discussed above with regard to the period prior to CAT reporting.

(C) Execution Venue Tiering

Under Section 11.3(a) of the CAT NMS Plan, the Operating Committee is

⁵¹ The trade to quote ratios were calculated based on the inverse of the average of the monthly equity SIP and OPRA quote to trade ratios from June 2016–June 2017 that were compiled by the Financial Information Forum using data from Nasdaq and SIAC.

required to establish fixed fees payable by Execution Venues. Section 1.1 of the CAT NMS Plan defines an Execution Venue as “a Participant or an alternative trading system (“ATS”) (as defined in Rule 300 of Regulation ATS) that operates pursuant to Rule 301 of Regulation ATS (excluding any such ATS that does not execute orders).”⁵²

The Operating Committee determined that ATSs should be included within the definition of Execution Venue. The Operating Committee believes that it is appropriate to treat ATSs as Execution Venues under the proposed funding model since ATSs have business models that are similar to those of exchanges, and ATSs also compete with exchanges.

Given the differences between Execution Venues that trade NMS Stocks and/or OTC Equity Securities and Execution Venues that trade Listed Options, Section 11.3(a) addresses Execution Venues that trade NMS Stocks and/or OTC Equity Securities separately from Execution Venues that trade Listed Options. Equity and Options Execution Venues are treated separately for two reasons. First, the differing quoting behavior of Equity and Options Execution Venues makes comparison of activity between such Execution Venues difficult. Second, Execution Venue tiers are calculated based on market share of share volume, and it is therefore difficult to compare market share between asset classes (*i.e.*, equity shares versus options contracts). Discussed below is how the funding model treats the two types of Execution Venues.

(I) NMS Stocks and OTC Equity Securities

Section 11.3(a)(i) of the CAT NMS Plan states that each Execution Venue that (i) executes transactions or, (ii) in the case of a national securities association, has trades reported by its members to its trade reporting facility or facilities for reporting transactions effected otherwise than on an exchange, in NMS Stocks or OTC Equity Securities will pay a fixed fee depending on the market share of that Execution Venue in NMS Stocks and OTC Equity Securities, with the Operating Committee establishing at least two and not more than five tiers of fixed fees, based on an Execution Venue’s NMS Stocks and OTC Equity Securities market share. For these purposes, market share for Execution Venues that execute transactions will be calculated by share

volume, and market share for a national securities association that has trades reported by its members to its trade reporting facility or facilities for reporting transactions effected otherwise than on an exchange in NMS Stocks or OTC Equity Securities will be calculated based on share volume of trades reported, provided, however, that the share volume reported to such national securities association by an Execution Venue shall not be included in the calculation of such national security association’s market share.

In accordance with Section 11.3(a)(i) of the CAT NMS Plan, the Operating Committee approved a tiered fee structure for Equity Execution Venues and Option Execution Venues. In determining the Equity Execution Venue Tiers, the Operating Committee considered the funding principles set forth in Section 11.2 of the CAT NMS Plan, seeking to create funding tiers that take into account the relative impact on system resources of different Equity Execution Venues, and that establish comparable fees among the CAT Reporters with the most Reportable Events. Each Equity Execution Venue will be placed into one of four tiers of fixed fees, based on the Execution Venue’s NMS Stocks and OTC Equity Securities market share. In choosing four tiers, the Operating Committee performed an analysis similar to that discussed above with regard to the non-Execution Venue Industry Members to determine the number of tiers for Equity Execution Venues. The Operating Committee determined to establish four tiers for Equity Execution Venues, rather than a larger number of tiers as established for non-Execution Venue Industry Members, because the four tiers were sufficient to distinguish between the smaller number of Equity Execution Venues based on market share. Furthermore, the selection of four tiers serves to help establish comparability among the largest CAT Reporters.

Each Equity Execution Venue will be ranked by market share and tiered by predefined Execution Venue percentages, (the “Equity Execution Venue Percentages”). In determining the fixed percentage of Equity Execution Venues in each tier, the Operating Committee reviewed historical market share of share volume for Execution Venues. Equity Execution Venue market shares of share volume were sourced from market statistics made publicly-available by Bats Global Markets, Inc. (“Bats”). ATS market shares of share volume was sourced from market statistics made publicly-available by FINRA. FINRA trade reporting facility

(“TRF”) and ORF market share of share volume was sourced from market statistics made publicly available by FINRA. Based on data from FINRA and otcmrkt.com, ATSs accounted for 39.12% of the share volume across the TRFs and ORFs during the recent tiering period. A 39.12/60.88 split was applied to the ATS and non-ATS breakdown of FINRA market share, with FINRA tiered based only on the non-ATS portion of its market share of share volume.

The Operating Committee determined to discount the OTC Equity Securities market share of Execution Venue ATSs trading OTC Equity Securities as well as the market share of the FINRA ORF in recognition of the different trading characteristics of the OTC Equity Securities market as compared to the market in NMS Stocks. Many OTC Equity Securities are priced at less than one dollar—and a significant number at less than one penny—per share and low-priced shares tend to trade in larger quantities. Accordingly, a disproportionately large number of shares are involved in transactions involving OTC Equity Securities versus NMS Stocks. Because the proposed fee tiers are based on market share calculated by share volume, Execution Venue ATSs trading OTC Equity Securities and FINRA would likely be subject to higher tiers than their operations may warrant. To address this potential concern, the Operating Committee determined to discount the OTC Equity Securities market share of Execution Venue ATSs trading OTC Equity Securities and the market share of the FINRA ORF by multiplying such market share by the average shares per trade ratio between NMS Stocks and OTC Equity Securities in order to adjust for the greater number of shares being traded in the OTC Equity Securities market. Based on available data for the second quarter of 2017, the average shares per trade ratio between NMS Stocks and OTC Equity Securities is 0.17%.⁵³ The average shares per trade ratio between NMS Stocks and OTC Equity Securities will be recalculated every three months when tiers are recalculated.

Based on this, the Operating Committee considered the distribution of Execution Venues, and grouped together Execution Venues with similar levels of market share. The percentage of costs recovered by each Equity

⁵² Although FINRA does not operate an execution venue, because it is a Participant, it is considered an “Execution Venue” under the Plan for purposes of determining fees.

⁵³ The average shares per trade ratio for both NMS Stocks and OTC Equity Securities from the second quarter of 2017 was calculated using publicly available market volume data from Bats and OTC Markets Group, and the totals were divided to determine the average number of shares per trade between NMS Stocks and OTC Equity Securities.

Execution Venue tier will be determined by predefined percentage allocations (the “Equity Execution Venue Recovery Allocation”). In determining the fixed percentage allocation of costs to be recovered from each tier, the Operating Committee considered the impact of CAT Reporter market share activity on the CAT System as well as the distribution of total market volume across Equity Execution Venues while seeking to maintain comparable fees among the largest CAT Reporters. Accordingly, following the

determination of the percentage of Execution Venues in each tier, the Operating Committee identified the percentage of total market volume for each tier based on the historical market share upon which Execution Venues had been initially ranked. Taking this into account along with the resulting percentage of total recovery, the percentage allocation of cost recovery for each tier were assigned, allocating higher percentages of recovery to the tier with a higher level of market share while avoiding any inappropriate

burden on competition. Furthermore, by using percentages of Equity Execution Venues and cost recovery per tier, the Operating Committee sought to include elasticity within the funding model, allowing the funding model to respond to changes in either the total number of Equity Execution Venues or changes in market share.

Based on this analysis, the Operating Committee approved the following Equity Execution Venue Percentages and Recovery Allocations:

• Equity Execution Venue tier	• Percentage of Equity Execution Venues	• Percentage of Execution Venue Recovery	• Percentage of total recovery
• Tier 1	• 25.00	• 33.25	• 8.31
• Tier 2	• 42.00	• 25.73	• 6.43
• Tier 3	• 23.00	• 8.00	• 2.00
• Tier 4	• 10.00	• 0.02	• 0.01
• Total	• 100	• 67	• 16.75

(II) Listed Options

Section 11.3(a)(ii) of the CAT NMS Plan states that each Execution Venue that executes transactions in Listed Options will pay a fixed fee depending on the Listed Options market share of that Execution Venue, with the Operating Committee establishing at least two and no more than five tiers of fixed fees, based on an Execution Venue’s Listed Options market share. For these purposes, market share will be calculated by contract volume.

In accordance with Section 11.3(a)(ii) of the CAT NMS Plan, the Operating Committee approved a tiered fee structure for Options Execution Venues. In determining the tiers, the Operating Committee considered the funding principles set forth in Section 11.2 of the CAT NMS Plan, seeking to create funding tiers that take into account the relative impact on system resources of different Options Execution Venues, and that establish comparable fees among the CAT Reporters with the most Reportable Events. Each Options Execution Venue will be placed into one of two tiers of fixed fees, based on the Execution Venue’s Listed Options market share. In choosing two tiers, the Operating Committee performed an analysis similar to that discussed above with regard to Industry Members (other than Execution Venue ATSS) to

determine the number of tiers for Options Execution Venues. The Operating Committee determined to establish two tiers for Options Execution Venues, rather than a larger number, because the two tiers were sufficient to distinguish between the smaller number of Options Execution Venues based on market share. Furthermore, due to the smaller number of Options Execution Venues, the incorporation of additional Options Execution Venue tiers would result in significantly higher fees for Tier 1 Options Execution Venues and reduce comparability between Execution Venues and Industry Members. Furthermore, the selection of two tiers served to establish comparable fees among the largest CAT Reporters.

Each Options Execution Venue will be ranked by market share and tiered by predefined Execution Venue percentages, (the “Options Execution Venue Percentages”). To determine the fixed percentage of Options Execution Venues in each tier, the Operating Committee analyzed the historical and publicly available market share of Options Execution Venues to group Options Execution Venues with similar market shares across the tiers. Options Execution Venue market share of share volume were sourced from market statistics made publicly-available by

Bats. The process for developing the Options Execution Venue Percentages was the same as discussed above with regard to Equity Execution Venues.

The percentage of costs to be recovered from each Options Execution Venue tier will be determined by predefined percentage allocations (the “Options Execution Venue Recovery Allocation”). In determining the fixed percentage allocation of cost recovery for each tier, the Operating Committee considered the impact of CAT Reporter market share activity on the CAT System as well as the distribution of total market volume across Options Execution Venues while seeking to maintain comparable fees among the largest CAT Reporters. Furthermore, by using percentages of Options Execution Venues and cost recovery per tier, the Operating Committee sought to include elasticity within the funding model, allowing the funding model to respond to changes in either the total number of Options Execution Venues or changes in market share. The process for developing the Options Execution Venue Recovery Allocation was the same as discussed above with regard to Equity Execution Venues.

Based on this analysis, the Operating Committee approved the following Options Execution Venue Percentages and Recovery Allocations:

• Options Execution Venue tier	• Percentage of Options Execution Venues	• Percentage of Execution Venue Recovery	• Percentage of total recovery
Tier 1	75.00	28.25	7.06

	• Percentage of Options Execution Venues	• Percentage of Execution Venue Recovery	• Percentage of total recovery
Tier 2	25.00	4.75	1.19
Total	100	33	8.25

(III) Market Share/Tier Assignments

The Operating Committee determined that, prior to the start of CAT reporting, market share for Execution Venues would be sourced from publicly-available market data. Options and equity volumes for Participants will be sourced from market data made publicly available by Bats while Execution Venue ATS volumes will be sourced from market data made publicly available by FINRA and OTC Markets. Set forth in the Appendix are two charts, one listing the current Equity Execution Venues, each with its rank and tier, and one listing the current Options Execution Venues, each with its rank and tier.

After the commencement of CAT reporting, market share for Execution Venues will be sourced from data reported to the CAT. Equity Execution Venue market share will be determined by calculating each Equity Execution Venue's proportion of the total volume of NMS Stock and OTC Equity shares reported by all Equity Execution Venues during the relevant time period (with the discounting of OTC Equity Securities market share of Execution Venue ATSS trading OTC Equity Securities as well as the market share of the FINRA ORF, as described above). Similarly, market share for Options Execution Venues will be determined by calculating each Options Execution Venue's proportion of the total volume of Listed Options contracts reported by all Options Execution Venues during the relevant time period.

The Operating Committee has determined to calculate fee tiers for Execution Venues every three months based on market share from the prior three months. Based on its analysis of historical data, the Operating Committee believes calculating tiers based on three months of data will provide the best balance between reflecting changes in activity by Execution Venues while still providing predictability in the tiering for Execution Venues.

(D) Allocation of Costs

In addition to the funding principles discussed above, including comparability of fees, Section 11.1(c) of the CAT NMS Plan also requires expenses to be fairly and reasonably

shared among the Participants and Industry Members. Accordingly, in developing the proposed fee schedules pursuant to the funding model, the Operating Committee calculated how the CAT costs would be allocated between Industry Members and Execution Venues, and how the portion of CAT costs allocated to Execution Venues would be allocated between Equity Execution Venues and Options Execution Venues. These determinations are described below.

(I) Allocation Between Industry Members and Execution Venues

In determining the cost allocation between Industry Members (other than Execution Venue ATSSs) and Execution Venues, the Operating Committee analyzed a range of possible splits for revenue recovery from such Industry Members and Execution Venues, including 80%/20%, 75%/25%, 70%/30% and 65%/35% allocations. Based on this analysis, the Operating Committee determined that 75 percent of total costs recovered would be allocated to Industry Members (other than Execution Venue ATSSs) and 25 percent would be allocated to Execution Venues. The Operating Committee determined that this 75%/25% division maintained the greatest level of comparability across the funding model. For example, the cost allocation establishes fees for the largest Industry Members (*i.e.*, those Industry Members in Tiers 1) that are comparable to the largest Equity Execution Venues and Options Execution Venues (*i.e.*, those Execution Venues in Tier 1).

Furthermore, the allocation of total CAT cost recovery recognizes the difference in the number of CAT Reporters that are Industry Members versus CAT Reporters that are Execution Venues. Specifically, the cost allocation takes into consideration that there are approximately 23 times more Industry Members expected to report to the CAT than Execution Venues (*e.g.*, an estimated 1541 Industry Members versus 67 Execution Venues as of June 2017).

(II) Allocation Between Equity Execution Venues and Options Execution Venues

The Operating Committee also analyzed how the portion of CAT costs allocated to Execution Venues would be allocated between Equity Execution Venues and Options Execution Venues. In considering this allocation of costs, the Operating Committee analyzed a range of alternative splits for revenue recovered between Equity and Options Execution Venues, including a 70%/30%, 67%/33%, 65%/35%, 50%/50% and 25%/75% split. Based on this analysis, the Operating Committee determined to allocate 67 percent of Execution Venue costs recovered to Equity Execution Venues and 33 percent to Options Execution Venues. The Operating Committee determined that a 67%/33% allocation between Equity and Options Execution Venues maintained the greatest level of fee equitability and comparability based on the current number of Equity and Options Execution Venues. For example, the allocation establishes fees for the larger Equity Execution Venues that are comparable to the larger Options Execution Venues. Specifically, Tier 1 Equity Execution Venues would pay a quarterly fee of \$81,047 and Tier 1 Options Execution Venues would pay a quarterly fee of \$81,379. In addition to fee comparability between Equity Execution Venues and Options Execution Venues, the allocation also establishes equitability between larger (Tier 1) and smaller (Tier 2) Execution Venues based upon the level of market share. Furthermore, the allocation is intended to reflect the relative levels of current equity and options order events.

(E) Fee Levels

The Operating Committee determined to establish a CAT-specific fee to collectively recover the costs of building and operating the CAT. Accordingly, under the funding model, the sum of the CAT Fees is designed to recover the total cost of the CAT. The Operating Committee has determined overall CAT costs to be comprised of Plan Processor costs and non-Plan Processor costs, which are estimated to be \$50,700,000

in total for the year beginning November 21, 2016.⁵⁴

The Plan Processor costs relate to costs incurred and to be incurred through November 21, 2017 by the Plan Processor and consist of the Plan Processor's current estimates of average yearly ongoing costs, including development costs, which total \$37,500,000. This amount is based upon the fees due to the Plan Processor pursuant to the Company's agreement with the Plan Processor.

The non-Plan Processor estimated costs incurred and to be incurred by the Company through November 21, 2017 consist of three categories of costs. The first category of such costs are third party support costs, which include legal

fees, consulting fees and audit fees from November 21, 2016 until the date of filing as well as estimated third party support costs for the rest of the year. These amount to an estimated \$5,200,000. The second category of non-Plan Processor costs are estimated cyber-insurance costs for the year. Based on discussions with potential cyber-insurance providers, assuming \$2-5 million cyber-insurance premium on \$100 million coverage, the Company has estimated \$3,000,000 for the annual cost. The final cost figures will be determined following receipt of final underwriter quotes. The third category of non-Plan Processor costs is the CAT operational reserve, which is comprised of three months of ongoing Plan

Processor costs (\$9,375,000), third party support costs (\$1,300,000) and cyber-insurance costs (\$750,000). The Operating Committee aims to accumulate the necessary funds to establish the three-month operating reserve for the Company through the CAT Fees charged to CAT Reporters for the year. On an ongoing basis, the Operating Committee will account for any potential need to replenish the operating reserve or other changes to total cost during its annual budgeting process. The following table summarizes the Plan Processor and non-Plan Processor cost components which comprise the total estimated CAT costs of \$50,700,000 for the covered period.

Cost category	Cost component	Amount
Plan Processor	Operational Costs	\$37,500,000
	Third Party Support Costs	5,200,000
Non-Plan Processor	Operational Reserve	⁵⁵ 5,000,000
	Cyber-insurance Costs	3,000,000
	Estimated Total	50,700,000

Based on these estimated costs and the calculations for the funding model described above, the Operating Committee determined to impose the following fees:⁵⁶

For Industry Members (other than Execution Venue ATSS):

Tier	Percentage of Industry Members	Quarterly CAT fee
1	0.900	\$81,483
2	2.150	59,055
3	2.800	40,899
4	7.750	25,566
5	8.300	7,428
6	18.800	1,968
7	59.300	105

For Execution Venues for NMS Stocks and OTC Equity Securities:

Tier	Percentage of Equity Execution Venues	Quarterly CAT fee
1	25.00	\$81,048
2	42.00	37,062
3	23.00	21,126
4	10.00	129

For Execution Venues for Listed Options:

Tier	Percentage of Options Execution Venues	Quarterly CAT fee
1	75.00	\$81,381
2	25.00	37,629

The Operating Committee has calculated the schedule of effective fees for Industry Members (other than Execution Venue ATSS) and Execution Venues in the following manner. Note that the calculation of CAT Fees assumes 52 Equity Execution Venues, 15 Options Execution Venues and 1,541 Industry Members (other than Execution Venue ATSS) as of June 2017.

CALCULATION OF ANNUAL TIER FEES FOR INDUSTRY MEMBERS
["IM"]

Industry Member tier	Percentage of Industry Members	Percentage of Industry Member recovery	Percentage of total recovery
Tier 1	0.900	12.00	9.00
Tier 2	2.150	20.50	15.38
Tier 3	2.800	18.50	13.88
Tier 4	7.750	32.00	24.00
Tier 5	8.300	10.00	7.50
Tier 6	18.800	6.00	4.50
Tier 7	59.300	1.00	0.75
Total	100	100	75

⁵⁴ It is anticipated that CAT-related costs incurred prior to November 21, 2016 will be addressed via a separate filing.

⁵⁵ This \$5,000,000 represents the gradual accumulation of the funds for a target operating reserve of \$11,425,000.

⁵⁶ Note that all monthly, quarterly and annual CAT Fees have been rounded to the nearest dollar.

Industry Member tier	Estimated number of Industry Members
Tier 1	14
Tier 2	33
Tier 3	43
Tier 4	119
Tier 5	128
Tier 6	290
Tier 7	914
Total	1,541

Calculation 1.1 (Calculation of a Tier 1 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 0.9\% \text{ [% of Tier 1 IMs]} = 14 \text{ [Estimated Tier 1 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 12\% \text{ [% of Tier 1 IM Recovery]}}{14 \text{ [Estimated Tier 1 IMs]}} \right) \div 12 \text{ [Months per year]} =$$

\$27,161

Calculation 1.2 (Calculation of a Tier 2 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 2.15\% \text{ [% of Tier 2 IMs]} = 33 \text{ [Estimated Tier 2 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 20.5\% \text{ [% of Tier 2 IM Recovery]}}{33 \text{ [Estimated Tier 2 IMs]}} \right) \div 12 \text{ [Months per year]} =$$

\$19,685

Calculation 1.3 (Calculation of a Tier 3 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 2.125\% \text{ [% of Tier 3 IMs]} = 43 \text{ [Estimated Tier 3 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 18.5\% \text{ [% of Tier 3 IM Recovery]}}{43 \text{ [Estimated Tier 3 IMs]}} \right) \div 12 \text{ [Months per year]} =$$

\$13,633

Calculation 1.4 (Calculation of a Tier 4 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 7.75\% \text{ [% of Tier 4 IMs]} = 119 \text{ [Estimated Tier 4 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 32\% \text{ [% of Tier 4 IM Recovery]}}{119 \text{ [Estimated Tier 4 IMs]}} \right) \div 12 \text{ [Months per year]} =$$

\$8522

Calculation 1.5 (Calculation of a Tier 5 Industry Member Annual Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 8.3\% \text{ [% of Tier 5 IMs]} = 128 \text{ [Estimated Tier 5 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 7.75\% \text{ [% of Tier 5 IM Recovery]}}{128 \text{ [Estimated Tier 5 IMs]}} \right) \div 12 \text{ [Months per year]} =$$

\$2476

Calculation 1.6 (Calculation of a Tier 6 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 18.8\% \text{ [% of Tier 6 IMs]} = 290 \text{ [Estimated Tier 6 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 6\% \text{ [% of Tier 6 IM Recovery]}}{290 \text{ [Estimated Tier 6 IMs]}} \right) \div 12 \text{ [Months per year]} =$$

\$656

Calculation 1.7 (Calculation of a Tier 7 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 59.3\% \text{ [% of Tier 7 IMs]} = 914 \text{ [Estimated Tier 7 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 1\% \text{ [% of Tier 7 IM Recovery]}}{914 \text{ [Estimated Tier 7 IMs]}} \right) \div 12 \text{ [Months per year]} =$$

\$35

Calculation of Annual Tier Fees for Equity Execution Venues
["EV"]

• Equity Execution Venue tier	• Percentage of Equity Execution Venues	• Percentage of Execution Venue Recovery	• Percentage of total recovery
• Tier 1	• 25.00	• 33.25	• 8.31
• Tier 2	• 42.00	• 25.73	• 6.43
• Tier 3	• 23.00	• 8.00	• 2.00
• Tier 4	• 10.00	• 49.00	• 0.01
• Total	• 100	• 67	• 16.75

Equity Execution Venue tier	Estimated number of Equity Execution Venues
Tier 1	13
Tier 2	22
Tier 3	12
Tier 4	5
Total	52

Calculation 2.1 (Calculation of a Tier 1 Equity Execution Venue Monthly Fee)

$$52 \text{ [Estimated Tot. Equity EVs]} \times 25\% \text{ [% of Tier 1 Equity EVs]} = 13 \text{ [Estimated Tier 1 Equity EVs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 25\% \text{ [EV \% of Tot. Ann. CAT Costs]} \times 26\% \text{ [% of Tier 1 Equity EV Recovery]}}{13 \text{ [Estimated Tier 1 Equity EVs]}} \right) \div 12 \text{ [Months per year]} = \$27,016$$

Calculation 2.2 (Calculation of a Tier 2 Equity Execution Venue Monthly Fee)

$$52 \text{ [Estimated Tot. Equity EVs]} \times 42\% \text{ [% of Tier 2 Equity EVs]} = 22 \text{ [Estimated Tier 2 Equity EVs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 25\% \text{ [EV \% of Tot. Ann. CAT Costs]} \times 25.73\% \text{ [% of Tier 2 Equity EV Recovery]}}{22 \text{ [Estimated Tier 2 Equity EVs]}} \right) \div 12 \text{ [Months per year]} = \$12,353$$

Calculation 2.3 (Calculation of a Tier 3 Equity Execution Venue Monthly Fee)

$$52 \text{ [Estimated Tot. Equity EVs]} \times 23\% \text{ [% of Tier 2 Equity EVs]} = 12 \text{ [Estimated Tier 2 Equity EVs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 25\% \text{ [EV \% of Tot. Ann. CAT Costs]} \times 8\% \text{ [% of Tier 2 Equity EV Recovery]}}{12 \text{ [Estimated Tier 2 Equity EVs]}} \right) \div 12 \text{ [Months per year]} = \$7,042$$

Calculation 2.4 (Calculation of a Tier 4 Equity Execution Venue Monthly Fee)

$$52 \text{ [Estimated Tot. Equity EVs]} \times 10\% \text{ [% of Tier 2 Equity EVs]} = 5 \text{ [Estimated Tier 2 Equity EVs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 25\% \text{ [EV \% of Tot. Ann. CAT Costs]} \times 0.02\% \text{ [% of Tier 2 Equity EV Recovery]}}{5 \text{ [Estimated Tier 2 Equity EVs]}} \right) \div 12 \text{ [Months per year]} = \$42$$

Calculation of Annual Tier Fees for Options Execution Venues
["EV"]

Options Execution Venue tier	Percentage of Options Execution Venues	Percentage of Execution Venue Recovery	Percentage of total recovery
Tier 1	75.00	28.25	7.06
Tier 2	25.00	4.75	1.19

Calculation of Annual Tier Fees for Options Execution Venues—Continued
 ["EV"]

Options Execution Venue tier		Percentage of Options Execution Venues	Percentage of Execution Venue Recovery	Percentage of total recovery
Total		100	33	8.25

Options Execution Venue tier	Estimated number of Options Execution Venues	Options Execution Venue tier	Estimated number of Options Execution Venues	Options Execution Venue tier	Estimated number of Options Execution Venues
Tier 1	11	Tier 2	4	Total	15

Calculation 3.1 (Calculation of a Tier 1 Options Execution Venue Monthly Fee)

$$15 \text{ [Estimated Tot.Options EVs]} \times 75\% \text{ [% of Tier 1 Options EVs]} = 11 \text{ [Estimated Tier 1 Options EVs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot.Ann.CAT Costs]} \times 25\% \text{ [EV \% of Tot.Ann.CAT Costs]} \times 28.25\% \text{ [% of Tier 1 Options EV Recovery]}}{11 \text{ [Estimated Tier 1 Options EVs]}} \right) \div 12 \text{ [Months per year]} = \$27,127$$

Calculation 3.2 (Calculation of a Tier 2 Options Execution Venue Annual Fee)

$$15 \text{ [Estimated Tot.Options EVs]} \times 25\% \text{ [% of Tier 2 Options EVs]} = 4 \text{ [Estimated Tier 2 Options EVs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot.Ann.CAT Costs]} \times 25\% \text{ [EV \% of Tot.Ann.CAT Costs]} \times 4.75\% \text{ [% of Tier 2 Options EV Recovery]}}{4 \text{ [Estimated Tier 2 Options EVs]}} \right) \div 12 \text{ [Months per year]} = \$12,543$$

TRACEABILITY OF TOTAL CAT FEES

Type	Industry Member tier	Estimated number of Members	CAT fees paid annually	Total recovery
Industry Members	Tier 1	14	\$325,932	\$4,563,048
	Tier 2	33	236,220	7,795,260
	Tier 3	43	163,596	7,034,628
	Tier 4	119	102,264	12,169,416
	Tier 5	128	29,712	3,803,136
	Tier 6	290	7,872	2,282,880
	Tier 7	914	420	383,880
Total		1,541		38,032,248
Equity Execution Venues	Tier 1	13	324,192	4,214,496
	Tier 2	22	148,248	3,261,456
	Tier 3	12	84,504	1,014,048
	Tier 4	5	516	2,580
Total		52		8,492,580
Options Execution Venues	Tier 1	11	325,524	3,580,764
	Tier 2	4	150,516	602,064
Total		15		4,182,828
Total				50,700,000
Excess ⁵⁷				7,656

(F) Comparability of Fees

The funding principles require a funding model in which the fees charged to the CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether Execution Venue and/or Industry Members). Accordingly, in creating the model, the Operating Committee sought to establish comparable fees for the top tier of Industry Members (other than Execution Venue ATs), Equity Execution Venues and Options Execution Venues. Specifically, each Tier 1 CAT Reporter would be required to pay a quarterly fee of approximately \$81,000.

(G) Billing Onset

Under Section 11.1(c) of the CAT NMS Plan, to fund the development and implementation of the CAT, the Company shall time the imposition and collection of all fees on Participants and Industry Members in a manner reasonably related to the timing when the Company expects to incur such development and implementation costs. The Company is currently incurring such development and implementation costs and will continue to do so prior to the commencement of CAT reporting and thereafter. In accordance with the CAT NMS Plan, all CAT Reporters, including both Industry Members and Execution Venues (including Participants), will be invoiced as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Participants and the operative date of the Plan amendment adopting CAT Fees for Participants.

(H) Changes to Fee Levels and Tiers

Section 11.3(d) of the CAT NMS Plan states that “[t]he Operating Committee shall review such fee schedule on at least an annual basis and shall make any changes to such fee schedule that it

deems appropriate. The Operating Committee is authorized to review such fee schedule on a more regular basis, but shall not make any changes on more than a semi-annual basis unless, pursuant to a Supermajority Vote, the Operating Committee concludes that such change is necessary for the adequate funding of the Company.” With such reviews, the Operating Committee will review the distribution of Industry Members and Execution Venues across tiers, and make any updates to the percentage of CAT Reporters allocated to each tier as may be necessary. In addition, the reviews will evaluate the estimated ongoing CAT costs and the level of the operating reserve. To the extent that the total CAT costs decrease, the fees would be adjusted downward, and to the extent that the total CAT costs increase, the fees would be adjusted upward.⁵⁸ Furthermore, any surplus of the Company’s revenues over its expenses is to be included within the operational reserve to offset future fees. The limitations on more frequent changes to the fee, however, are intended to provide budgeting certainty for the CAT Reporters and the Company.⁵⁹ To the extent that the Operating Committee approves changes to the number of tiers in the funding model or the fees assigned to each tier, then the Operating Committee will file such changes with the SEC pursuant to Rule 608 of the Exchange Act, and the Participants will file such changes with the SEC pursuant to Section 19(b) of the Exchange Act and Rule 19b-4 thereunder, and any such changes will become effective in accordance with the requirements of those provisions.

(I) Initial and Periodic Tier Reassignments

The Operating Committee has determined to calculate fee tiers every three months based on market share or message traffic, as applicable, from the prior three months. For the initial tier assignments, the Company will calculate the relevant tier for each CAT Reporter using the three months of data

prior to the commencement date. As with the initial tier assignment, for the tri-monthly reassignments, the Company will calculate the relevant tier using the three months of data prior to the relevant tri-monthly date. Any movement of CAT Reporters between tiers will not change the criteria for each tier or the fee amount corresponding to each tier.

In performing the tri-monthly reassignments, the assignment of CAT Reporters in each assigned tier is relative. Therefore, a CAT Reporter’s assigned tier will depend, not only on its own message traffic or market share, but also on the message traffic/market share across all CAT Reporters. For example, the percentage of Industry Members (other than Execution Venue ATs) in each tier is relative such that such Industry Member’s assigned tier will depend on message traffic generated across all CAT Reporters as well as the total number of CAT Reporters. The Operating Committee will inform CAT Reporters of their assigned tier every three months following the periodic tiering process, as the funding model will compare an individual CAT Reporter’s activity to that of other CAT Reporters in the marketplace.

The following demonstrates a tier reassignment. In accordance with the funding model, the top 75% of Options Execution Venues in market share are categorized as Tier 1 while the bottom 25% of Options Execution Venues in market share are categorized as Tier 2. In the sample scenario below, Options Execution Venue L is initially categorized as a Tier 2 Options Execution Venue in Period A due to its market share. When market share is recalculated for Period B, the market share of Execution Venue L increases, and it is therefore subsequently reranked and reassigned to Tier 1 in Period B. Correspondingly, Options Execution Venue K, initially a Tier 1 Options Execution Venue in Period A, is reassigned to Tier 2 in Period B due to decreases in its market share.

Period A			Period B		
Options Execution Venue	Market share rank	Tier	Options Execution Venue	Market share rank	Tier
Options Execution Venue A	1	1	Options Execution Venue A	1	1
Options Execution Venue B	2	1	Options Execution Venue B	2	1
Options Execution Venue C	3	1	Options Execution Venue C	3	1

⁵⁷ The amount in excess of the total CAT costs will contribute to the gradual accumulation of the target operating reserve of \$11.425 million.

⁵⁸ The CAT Fees are designed to recover the costs associated with the CAT. Accordingly, CAT Fees would not be affected by increases or decreases in other non-CAT expenses incurred by the Participants, such as any changes in costs related

to the retirement of existing regulatory systems, such as OATS.

⁵⁹ Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85006.

Period A			Period B		
Options Execution Venue	Market share rank	Tier	Options Execution Venue	Market share rank	Tier
Options Execution Venue D	4	1	Options Execution Venue D	4	1
Options Execution Venue E	5	1	Options Execution Venue E	5	1
Options Execution Venue F	6	1	Options Execution Venue F	6	1
Options Execution Venue G	7	1	Options Execution Venue I	7	1
Options Execution Venue H	8	1	Options Execution Venue H	8	1
Options Execution Venue I	9	1	Options Execution Venue G	9	1
Options Execution Venue J	10	1	Options Execution Venue J	10	1
Options Execution Venue K	11	1	Options Execution Venue L	11	1
Options Execution Venue L	12	2	Options Execution Venue K	12	2
Options Execution Venue M	13	2	Options Execution Venue N	13	2
Options Execution Venue N	14	2	Options Execution Venue M	14	2
Options Execution Venue O	15	2	Options Execution Venue O	15	2

For each periodic tier reassignment, the Operating Committee will review the new tier assignments, particularly those assignments for CAT Reporters that shift from the lowest tier to a higher tier. This review is intended to evaluate whether potential changes to the market or CAT Reporters (e.g., dissolution of a large CAT Reporter) adversely affect the tier reassignments.

(J) Sunset Provision

The Operating Committee developed the proposed funding model by analyzing currently available historical data. Such historical data, however, is not as comprehensive as data that will be submitted to the CAT. Accordingly, the Operating Committee believes that it will be appropriate to revisit the funding model once CAT Reporters have actual experience with the funding model. Accordingly, the Operating Committee determined to include an automatic sunset provision for the proposed fees. Specifically, the Operating Committee determined that the CAT Fees should automatically expire two years after the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. The Operating Committee intends to monitor the operation of the funding model during this two year period and to evaluate its effectiveness during that period. Such a process will inform the Operating Committee’s approach to funding the CAT after the two year period.

(3) Proposed CAT Fee Schedule

The Exchange proposes the Consolidated Audit Trail Funding Fees to impose the CAT Fees determined by the Operating Committee on the Exchange’s members. The proposed fee schedule has four sections, covering definitions, the fee schedule for CAT Fees, the timing and manner of payments, and the automatic sunset

of the CAT Fees. Each of these sections is discussed in detail below.

(A) Definitions

Paragraph (a) of the proposed fee schedule sets forth the definitions for the proposed fee schedule. Paragraph (a)(1) states that, for purposes of the Consolidated Audit Trail Funding Fees, the terms “CAT”, “CAT NMS Plan,” “Industry Member,” “NMS Stock,” “OTC Equity Security”, “Options Market Maker”, and “Participant” are defined as set forth in Rule 900 (Consolidated Audit Trail—Definitions).

The proposed fee schedule imposes different fees on Equity ATSS and Industry Members that are not Equity ATSS. Accordingly, the proposed fee schedule defines the term “Equity ATS.” First, paragraph (a)(2) defines an “ATS” to mean an alternative trading system as defined in Rule 300(a) of Regulation ATS under the Securities Exchange Act of 1934, as amended, that operates pursuant to Rule 301 of Regulation ATS. This is the same definition of an ATS as set forth in Section 1.1 of the CAT NMS Plan in the definition of an “Execution Venue.” Then, paragraph (a)(4) defines an “Equity ATS” as an ATS that executes transactions in NMS Stocks and/or OTC Equity Securities.

Paragraph (a)(3) of the proposed fee schedule defines the term “CAT Fee” to mean the Consolidated Audit Trail Funding Fee(s) to be paid by Industry Members as set forth in paragraph (b) in the proposed fee schedule.

Finally, Paragraph (a)(6) defines an “Execution Venue” as a Participant or an ATS (excluding any such ATS that does not execute orders). This definition is the same substantive definition as set forth in Section 1.1 of the CAT NMS Plan. Paragraph (a)(5) defines an “Equity Execution Venue” as an Execution Venue that trades NMS Stocks and/or OTC Equity Securities.

(B) Fee Schedule

The Exchange proposes to impose the CAT Fees applicable to its Industry Members through paragraph (b) of the proposed fee schedule. Paragraph (b)(1) of the proposed fee schedule sets forth the CAT Fees applicable to Industry Members other than Equity ATSS. Specifically, paragraph (b)(1) states that the Company will assign each Industry Member (other than an Equity ATS) to a fee tier once every quarter, where such tier assignment is calculated by ranking each Industry Member based on its total message traffic (with discounts for equity market maker quotes and Options Market Maker quotes based on the trade to quote ratio for equities and options, respectively) for the three months prior to the quarterly tier calculation day and assigning each Industry Member to a tier based on that ranking and predefined Industry Member percentages. The Industry Members with the highest total quarterly message traffic will be ranked in Tier 1, and the Industry Members with lowest quarterly message traffic will be ranked in Tier 7. Each quarter, each Industry Member (other than an Equity ATS) shall pay the following CAT Fee corresponding to the tier assigned by the Company for such Industry Member for that quarter:

Tier	Percentage of Industry Members	Quarterly CAT fee
1	0.900	\$81,483
2	2.150	59,055
3	2.800	40,899
4	7.750	25,566
5	8.300	7,428
6	18.800	1,968
7	59.300	105

Paragraph (b)(2) of the proposed fee schedule sets forth the CAT Fees applicable to Equity ATSS.⁶⁰ These are

⁶⁰ Note that no fee schedule is provided for Execution Venue ATSS that execute transactions in

the same fees that Participants that trade NMS Stocks and/or OTC Equity Securities will pay. Specifically, paragraph (b)(2) states that the Company will assign each Equity ATS to a fee tier once every quarter, where such tier assignment is calculated by ranking each Equity Execution Venue based on its total market share of NMS Stocks and OTC Equity Securities (with a discount for the OTC Equity Securities market share of Equity ATSs trading OTC Equity Securities based on the average shares per trade ratio between NMS Stocks and OTC Equity Securities) for the three months prior to the quarterly tier calculation day and assigning each Equity ATS to a tier based on that ranking and predefined Equity Execution Venue percentages. The Equity ATSs with the higher total quarterly market share will be ranked in Tier 1, and the Equity ATSs with the lowest quarterly market share will be ranked in Tier 4. Specifically, paragraph (b)(2) states that, each quarter, each Equity ATS shall pay the following CAT Fee corresponding to the tier assigned by the Company for such Equity ATS for that quarter:

Tier	Percentage of Equity Execution Venues	Quarterly CAT fee
1	25.00	81,048
2	42.00	37,062
3	23.00	21,126
4	10.00	129

(C) Timing and Manner of Payment

Section 11.4 of the CAT NMS Plan states that the Operating Committee shall establish a system for the collection of fees authorized under the CAT NMS Plan. The Operating Committee may include such collection responsibility as a function of the Plan Processor or another administrator. To implement the payment process to be adopted by the Operating Committee, paragraph (c)(1) of the proposed fee schedule states that the Company will provide each Industry Member with one invoice each quarter for its CAT Fees as determined pursuant to paragraph (b) of the proposed fee schedule, regardless of whether the Industry Member is a member of multiple self-regulatory organizations. Paragraph (c)(1) further states that each Industry Member will pay its CAT Fees to the Company via the centralized system for the collection of CAT Fees established by the Company in the manner prescribed by

Listed Options, as no such Execution Venue ATSs currently exist due to trading restrictions related to Listed Options.

the Company. The Exchange will provide Industry Members with details regarding the manner of payment of CAT Fees by *Regulatory Notice*.

All CAT fees will be billed and collected centrally through the Company via the Plan Processor. Although each Participant will adopt its own fee schedule regarding CAT Fees, no CAT Fees or portion thereof will be collected by the individual Participants. Each Industry Member will receive from the Company one invoice for its applicable CAT fees, not separate invoices from each Participant of which it is a member. The Industry Members will pay the CAT Fees to the Company via the centralized system for the collection of CAT fees established by the Company.⁶¹

Section 11.4 of the CAT NMS Plan also states that Participants shall require each Industry Member to pay all applicable authorized CAT Fees within thirty days after receipt of an invoice or other notice indicating payment is due (unless a longer payment period is otherwise indicated). Section 11.4 further states that, if an Industry Member fails to pay any such fee when due, such Industry Member shall pay interest on the outstanding balance from such due date until such fee is paid at a per annum rate equal to the lesser of: (i) The Prime Rate plus 300 basis points; or (ii) the maximum rate permitted by applicable law. Therefore, in accordance with Section 11.4 of the CAT NMS Plan, the Exchange proposed to adopt paragraph (c)(2) of the proposed fee schedule. Paragraph (c)(2) of the proposed fee schedule states that each Industry Member shall pay CAT Fees within thirty days after receipt of an invoice or other notice indicating payment is due (unless a longer payment period is otherwise indicated). If an Industry Member fails to pay any such fee when due, such Industry Member shall pay interest on the outstanding balance from such due date until such fee is paid at a per annum rate equal to the lesser of: (i) The Prime Rate plus 300 basis points; or (ii) the maximum rate permitted by applicable law.

(D) Sunset Provision

The Operating Committee has determined to require that the CAT Fees automatically sunset two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. Accordingly, the Exchange proposes paragraph (d) of the fee schedule, which states that “[t]hese Consolidated Audit Trailing Funding

Fees will automatically expire two years after the operative date of the amendment of the CAT NMS Plan that adopts CAT fees for the Participants.”

(4) Changes to Prior CAT Fee Plan Amendment

The proposed funding model set forth in this Amendment is a revised version of the Original Proposal. The Commission received a number of comment letters in response to the Original Proposal.⁶² The SEC suspended the Original Proposal and instituted proceedings to determine whether to approve or disapprove it.⁶³ Pursuant to those proceedings, additional comment letters were submitted regarding the proposed funding model.⁶⁴ In developing this Amendment, the Operating Committee carefully considered these comments and made a number of changes to the Original Proposal to address these comments where appropriate.

This Amendment makes the following changes to the Original Proposal: (1) Adds two additional CAT Fee tiers for Equity Execution Venues; (2) discounts the OTC Equity Securities market share of Execution Venue ATSs trading OTC Equity Securities as well as the market share of the FINRA ORF by the average shares per trade ratio between NMS Stocks and OTC Equity Securities (calculated as 0.17% based on available data from the second quarter of 2017) when calculating the market share of Execution Venue ATSs trading OTC Equity Securities and FINRA; (3) discounts the Options Market Maker quotes by the trade to quote ratio for options (calculated as 0.01% based on available data for June 2016 through June 2017) when calculating message traffic for Options Market Makers; (4) discounts equity market maker quotes by the trade to quote ratio for equities (calculated as 5.43% based on available data for June 2016 through June 2017) when calculating message traffic for equity market makers; (5) decreases the number of tiers for Industry Members (other than the Execution Venue ATSs) from nine to seven; (6) changes the allocation of CAT costs between Equity Execution Venues and Options Execution Venues from 75%/25% to 67%/33%; (7) adjusts tier percentages and recovery allocations for Equity Execution Venues, Options Execution Venues and Industry Members (other

⁶² For a description of the comments submitted in response to the Original Proposal, see Suspension Order.

⁶³ Suspension Order.

⁶⁴ See MFA Letter; SIFMA Letter; FIA Principal Traders Group Letter; Belvedere Letter; Sidley Letter; Group One Letter; and Virtu Financial Letter.

⁶¹ Section 11.4 of the CAT NMS Plan.

than Execution Venue ATs); (8) focuses the comparability of CAT Fees on the individual entity level, rather than primarily on the comparability of affiliated entities; (9) commences invoicing of CAT Reporters as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Participants and the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants; and (10) requires the proposed fees to automatically expire two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for the Participants.

(A) Equity Execution Venues

(i) Small Equity Execution Venues

In the Original Proposal, the Operating Committee proposed to establish two fee tiers for Equity Execution Venues. The Commission and commenters raised the concern that, by establishing only two tiers, smaller Equity Execution Venues (*e.g.*, those Equity ATs representing less than 1% of NMS market share) would be placed in the same fee tier as larger Equity Execution Venues, thereby imposing an undue or inappropriate burden on competition.⁶⁵ To address this concern, the Operating Committee proposes to add two additional tiers for Equity Execution Venues, a third tier for smaller Equity Execution Venues and a fourth tier for the smallest Equity Execution Venues.

Specifically, the Original Proposal had two tiers of Equity Execution Venues. Tier 1 required the largest Equity Execution Venues to pay a quarterly fee of \$63,375. Based on available data, these largest Equity Execution Venues were those that had equity market share of share volume greater than or equal to 1%.⁶⁶ Tier 2 required the remaining smaller Equity Execution Venues to pay a quarterly fee of \$38,820.

To address concerns about the potential for the \$38,820 quarterly fee to impose an undue burden on smaller Equity Execution Venues, the Operating Committee determined to move to a four

tier structure for Equity Execution Venues. Tier 1 would continue to include the largest Equity Execution Venues by share volume (that is, based on currently available data, those with market share of equity share volume greater than or equal to one percent), and these Equity Execution Venues would be required to pay a quarterly fee of \$81,048. The Operating Committee determined to divide the original Tier 2 into three tiers. The new Tier 2 Equity Execution Venues, which would include the next largest Equity Execution Venues by equity share volume, would be required to pay a quarterly fee of \$37,062. The new Tier 3 Equity Execution Venues would be required to pay a quarterly fee of \$21,126. The new Tier 4 Equity Execution Venues, which would include the smallest Equity Execution Venues by share volume, would be required to pay a quarterly fee of \$129.

In developing the proposed four tier structure, the Operating Committee considered keeping the existing two tiers, as well as shifting to three, four or five Equity Execution Venue tiers (the maximum number of tiers permitted under the Plan), to address the concerns regarding small Equity Execution Venues. For each of the two, three, four and five tier alternatives, the Operating Committee considered the assignment of various percentages of Equity Execution Venues to each tier as well as various percentage of Equity Execution Venue recovery allocations for each alternative. As discussed below in more detail, each of these options was considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined that the four tier alternative addressed the spectrum of different Equity Execution Venues. The Operating Committee determined that neither a two tier structure nor a three tier structure sufficiently accounted for the range of market shares of smaller Equity Execution Venues. The Operating Committee also determined that, given the limited number of Equity Execution Venues, that a fifth tier was unnecessary to address the range of market shares of the Equity Execution Venues.

By increasing the number of tiers for Equity Execution Venues and reducing the proposed CAT Fees for the smaller Equity Execution Venues, the Operating Committee believes that the proposed fees for Equity Execution Venues would not impose an undue or inappropriate burden on competition under Section 6 or Section 15A of the Exchange Act.

Moreover, the Operating Committee believes that the proposed fees appropriately take into account the distinctions in the securities trading operations of different Equity Execution Venues, as required under the funding principles of the CAT NMS Plan.⁶⁷ The larger number of tiers more closely tracks the variety of sizes of equity share volume of Equity Execution Venues. In addition, the reduction in the fees for the smaller Equity Execution Venues recognizes the potential burden of larger fees on smaller entities. In particular, the very small quarterly fee of \$129 for Tier 4 Equity Execution Venues reflects the fact that certain Equity Execution Venues have a very small share volume due to their typically more focused business models.

Accordingly, with this Amendment, the Exchange proposes to amend paragraph (b)(2) of the proposed fee schedule to add the two additional tiers for Equity Execution Venues, to establish the percentages and fees for Tiers 3 and 4 as described, and to revise the percentages and fees for Tiers 1 and 2 as described.

(ii) Execution Venues for OTC Equity Securities

In the Original Proposal, the Operating Committee proposed to group Execution Venues for OTC Equity Securities and Execution Venues for NMS Stocks in the same tier structure. The Commission and commenters raised concerns as to whether this determination to place Execution Venues for OTC Equity Securities in the same tier structure as Execution Venues for NMS Stocks would result in an undue or inappropriate burden on competition, recognizing that the application of share volume may lead to different outcomes as applied to OTC Equity Securities and NMS Stocks.⁶⁸ To address this concern, the Operating Committee proposes to discount the OTC Equity Securities market share of Execution Venue ATs trading OTC Equity Securities as well as the market share of the FINRA ORF by the average shares per trade ratio between NMS Stocks and OTC Equity Securities (0.17% for the second quarter of 2017) in order to adjust for the greater number of shares being traded in the OTC Equity Securities market, which is generally a function of a lower per share price for OTC Equity Securities when compared to NMS Stocks.

As commenters noted, many OTC Equity Securities are priced at less than one dollar—and a significant number at

⁶⁵ See Suspension Order at 31664; SIFMA Letter at 3.

⁶⁶ Note that while these equity market share thresholds were referenced as data points to help differentiate between Equity Execution Venue tiers, the proposed funding model is directly driven not by market share thresholds, but rather by fixed percentages of Equity Execution Venues across tiers to account for fluctuating levels of market share across time. Actual market share in any tier will vary based on the actual market activity in a given measurement period, as well as the number of Equity Execution Venues included in the measurement period.

⁶⁷ Section 11.2(b) of the CAT NMS Plan.

⁶⁸ See Suspension Order at 31664–5.

less than one penny—and low-priced shares tend to trade in larger quantities. Accordingly, a disproportionately large number of shares are involved in transactions involving OTC Equity Securities versus NMS Stocks, which has the effect of overstating an Execution Venue's true market share when the Execution Venue is involved in the trading of OTC Equity Securities. Because the proposed fee tiers are based on market share calculated by share volume, Execution Venue ATSs trading OTC Equity Securities and FINRA may be subject to higher tiers than their operations may warrant.⁶⁹ The Operating Committee proposes to address this concern in two ways. First, the Operating Committee proposes to increase the number of Equity Execution Venue tiers, as discussed above. Second, the Operating Committee determined to discount the OTC Equity Securities market share of Execution Venue ATSs trading OTC Equity Securities as well as the market share of the FINRA ORF when calculating their tier placement. Because the disparity in share volume between Execution Venues trading in OTC Equity Securities and NMS Stocks is based on the different number of shares per trade for OTC Equity Securities and NMS Stocks, the Operating Committee believes that discounting the OTC Equity Securities share volume of such Execution Venue ATSs as well as the market share of the FINRA ORF would address the difference in shares per trade for OTC Equity Securities and NMS Stocks. Specifically, the Operating Committee proposes to impose a discount based on the objective measure of the average shares per trade ratio between NMS Stocks and OTC Equity Securities. Based on available data from the second quarter of 2017, the average shares per trade ratio between NMS Stocks and OTC Equity Securities is 0.17%.

The practical effect of applying such a discount for trading in OTC Equity Securities is to shift Execution Venue ATSs trading OTC Equity Securities to tiers for smaller Execution Venues and with lower fees. For example, under the Original Proposal, one Execution Venue ATS trading OTC Equity Securities was placed in the first CAT Fee tier, which had a quarterly fee of \$63,375. With the imposition of the proposed tier changes and the discount, this ATS would be ranked in Tier 3 and would owe a quarterly fee of \$21,126.

In developing the proposed discount for Equity Execution Venue ATSs trading OTC Equity Securities and FINRA, the Operating Committee

evaluated different alternatives to address the concerns related to OTC Equity Securities, including creating a separate tier structure for Execution Venues trading OTC Equity Securities (like the separate tier for Options Execution Venues) as well as the proposed discounting method for Execution Venue ATSs trading OTC Equity Securities and FINRA. For these alternatives, the Operating Committee considered how each alternative would affect the recovery allocations. In addition, each of these options was considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee did not adopt a separate tier structure for Equity Execution Venues trading OTC Equity Securities as they determined that the proposed discount approach appropriately addresses the concern. The Operating Committee determined to adopt the proposed discount because it directly relates to the concern regarding the trading patterns and operations in the OTC Equity Securities markets, and is an objective discounting method.

By increasing the number of tiers for Equity Execution Venues and imposing a discount on the market share of share volume calculation for trading in OTC Equity Securities, the Operating Committee believes that the proposed fees for Equity Execution Venues would not impose an undue or inappropriate burden on competition under Section 6 or Section 15A of the Exchange Act. Moreover, the Operating Committee believes that the proposed fees appropriately take into account the distinctions in the securities trading operations of different Equity Execution Venues, as required under the funding principles of the CAT NMS Plan.⁷⁰ As discussed above, the larger number of tiers more closely tracks the variety of sizes of equity share volume of Equity Execution Venues. In addition, the proposed discount recognizes the different types of trading operations at Equity Execution Venues trading OTC Equity Securities versus those trading NMS Stocks, thereby more closely matching the relative revenue generation by Equity Execution Venues trading OTC Equity Securities to their CAT Fees.

Accordingly, with this Amendment, the Exchange proposes to amend paragraph (b)(2) of the proposed fee schedule to indicate that the OTC Equity Securities market share for Equity ATSs trading OTC Equity

Securities as well as the market share of the FINRA ORF would be discounted. In addition, as discussed above, to address concerns related to smaller ATSs, including those that trade OTC Equity Securities, the Exchange proposes to amend paragraph (b)(2) of the proposed fee schedule to add two additional tiers for Equity Execution Venues, to establish the percentages and fees for Tiers 3 and 4 as described, and to revise the percentages and fees for Tiers 1 and 2 as described.

(B) Market Makers

In the Original Proposal, the Operating Committee proposed to include both Options Market Maker quotes and equities market maker quotes in the calculation of total message traffic for such market makers for purposes of tiering for Industry Members (other than Execution Venue ATSs). The Commission and commenters raised questions as to whether the proposed treatment of Options Market Maker quotes may result in an undue or inappropriate burden on competition or may lead to a reduction in market quality.⁷¹ To address this concern, the Operating Committee determined to discount the Options Market Maker quotes by the trade to quote ratio for options when calculating message traffic for Options Market Makers. Similarly, to avoid disincentives to quoting behavior on the equities side as well, the Operating Committee determined to discount equity market maker quotes by the trade to quote ratio for equities when calculating message traffic for equities market makers.

In the Original Proposal, market maker quotes were treated the same as other message traffic for purposes of tiering for Industry Members (other than Execution Venue ATSs). Commenters noted, however, that charging Industry Members on the basis of message traffic will impact market makers disproportionately because of their continuous quoting obligations. Moreover, in the context of options market makers, message traffic would include bids and offers for every listed options strikes and series, which are not an issue for equities.⁷² The Operating Committee proposes to address this concern in two ways. First, the Operating Committee proposes to discount Options Market Maker quotes when calculating the Options Market Makers' tier placement. Specifically, the

⁷¹ See Suspension Order at 31663–4; SIFMA Letter at 4–6; FIA Principal Traders Group Letter at 3; Sidley Letter at 2–6; Group One Letter at 2–6; and Belvedere Letter at 2.

⁷² Suspension Order at 31664.

⁶⁹ Suspension Order at 31664–5.

⁷⁰ Section 11.2(b) of the CAT NMS Plan.

Operating Committee proposes to impose a discount based on the objective measure of the trade to quote ratio for options. Based on available data from June 2016 through June 2017, the trade to quote ratio for options is 0.01%. Second, the Operating Committee proposes to discount equities market maker quotes when calculating the equities market makers' tier placement. Specifically, the Operating Committee proposes to impose a discount based on the objective measure of the trade to quote ratio for equities. Based on available data for June 2016 through June 2017, this trade to quote ratio for equities is 5.43%.

The practical effect of applying such discounts for quoting activity is to shift market makers' calculated message traffic lower, leading to the potential shift to tiers for lower message traffic and reduced fees. Such an approach would move sixteen Industry Member CAT Reporters that are market makers to a lower tier than in the Original Proposal. For example, under the Original Proposal, Broker-Dealer Firm ABC was placed in the first CAT Fee tier, which had a quarterly fee of \$101,004. With the imposition of the proposed tier changes and the discount, Broker-Dealer Firm ABC, an options market maker, would be ranked in Tier 3 and would owe a quarterly fee of \$40,899.

In developing the proposed market maker discounts, the Operating Committee considered various discounts for Options Market Makers and equity market makers, including discounts of 50%, 25%, 0.00002%, as well as the 5.43% for option market makers and 0.01% for equity market makers. Each of these options were considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined to adopt the proposed discount because it directly relates to the concern regarding the quoting requirement, is an objective discounting method, and has the desired potential to shift market makers to lower fee tiers.

By imposing a discount on Options Market Makers and equities market makers' quoting traffic for the calculation of message traffic, the Operating Committee believes that the proposed fees for market makers would not impose an undue or inappropriate burden on competition under Section 6 or Section 15A of the Exchange Act. Moreover, the Operating Committee believes that the proposed fees

appropriately take into account the distinctions in the securities trading operations of different Industry Members, and avoid disincentives, such as a reduction in market quality, as required under the funding principles of the CAT NMS Plan.⁷³ The proposed discounts recognize the different types of trading operations presented by Options Market Makers and equities market makers, as well as the value of the market makers' quoting activity to the market as a whole. Accordingly, the Operating Committee believes that the proposed discounts will not impact the ability of small Options Market Makers or equities market makers to provide liquidity.

Accordingly, with this Amendment, the Exchange proposes to amend paragraph (b)(1) of the proposed fee schedule to indicate that the message traffic related to equity market maker quotes and Options Market Maker quotes would be discounted. In addition, the Exchange proposes to define the term "Options Market Maker" in paragraph (a)(1) of the proposed fee schedule.

(C) Comparability/Allocation of Costs

Under the Original Proposal, 75% of CAT costs were allocated to Industry Members (other than Execution Venue ATSS) and 25% of CAT costs were allocated to Execution Venues. This cost allocation sought to maintain the greatest level of comparability across the funding model, where comparability considered affiliations among or between CAT Reporters. The Commission and commenters expressed concerns regarding whether the proposed 75%/25% allocation of CAT costs is consistent with the Plan's funding principles and the Exchange Act, including whether the allocation places a burden on competition or reduces market quality. The Commission and commenters also questioned whether the approach of accounting for affiliations among CAT Reporters in setting CAT Fees disadvantages non-affiliated CAT Reporters or otherwise burdens competition in the market for trading services.⁷⁴

In response to these concerns, the Operating Committee determined to revise the proposed funding model to focus the comparability of CAT Fees on the individual entity level, rather than primarily on the comparability of affiliated entities. In light of the

interconnected nature of the various aspects of the funding model, the Operating Committee determined to revise various aspects of the model to enhance comparability at the individual entity level. Specifically, to achieve such comparability, the Operating Committee determined to (1) decrease the number of tiers for Industry Members (other than Execution Venue ATSS) from nine to seven; (2) change the allocation of CAT costs between Equity Execution Venues and Options Execution Venues from 75%/25% to 67%/33%; and (3) adjust tier percentages and recovery allocations for Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSS). With these changes, the proposed funding model provides fee comparability for the largest individual entities, with the largest Industry Members (other than Execution Venue ATSS), Equity Execution Venues and Options Execution Venues each paying a CAT Fee of approximately \$81,000 each quarter.

(i) Number of Industry Member Tiers

In the Original Proposal, the proposed funding model had nine tiers for Industry Members (other than Execution Venue ATSS). The Operating Committee determined that reducing the number of tiers from nine tiers to seven tiers (and adjusting the predefined Industry Member Percentages as well) continues to provide a fair allocation of fees among Industry Members and appropriately distinguishes between Industry Members with differing levels of message traffic. In reaching this conclusion, the Operating Committee considered historical message traffic generated by Industry Members across all exchanges and as submitted to FINRA's OATS, and considered the distribution of firms with similar levels of message traffic, grouping together firms with similar levels of message traffic. Based on this, the Operating Committee determined that seven tiers would group firms with similar levels of message traffic, while also achieving greater comparability in the model for the individual CAT Reporters with the greatest market share or message traffic.

In developing the proposed seven tier structure, the Operating Committee considered remaining at nine tiers, as well as reducing the number of tiers down to seven when considering how to address the concerns raised regarding comparability. For each of the alternatives, the Operating Committee considered the assignment of various percentages of Industry Members to each tier as well as various percentages

⁷³ Section 11.2(b) of the CAT NMS Plan.

⁷⁴ See Suspension Order at 31662-3; SIFMA Letter at 3; Sidley Letter at 6-7; Group One Letter at 2; and Belvedere Letter at 2.

of Industry Member recovery allocations for each alternative. Each of these options was considered in the context of its effects on the full funding model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined that the seven tier alternative provided the most fee comparability at the individual entity level for the largest CAT Reporters, while both providing logical breaks in tiering for Industry Members with different levels of message traffic and a sufficient number of tiers to provide for the full spectrum of different levels of message traffic for all Industry Members.

(ii) Allocation of CAT Costs Between Equity and Options Execution Venues

The Operating Committee also determined to adjust the allocation of CAT costs between Equity Execution Venues and Options Execution Venues to enhance comparability at the individual entity level. In the Original Proposal, 75% of Execution Venue CAT costs were allocated to Equity Execution Venues, and 25% of Execution Venue CAT costs were allocated to Options Execution Venues. To achieve the goal of increased comparability at the individual entity level, the Operating Committee analyzed a range of alternative splits for revenue recovery between Equity and Options Execution Venues, along with other changes in the proposed funding model. Based on this analysis, the Operating Committee determined to allocate 67 percent of Execution Venue costs recovered to Equity Execution Venues and 33 percent to Options Execution Venues. The Operating Committee determined that a 67/33 allocation between Equity and Options Execution Venues enhances the level of fee comparability for the largest CAT Reporters. Specifically, the largest Equity and Options Execution Venues would pay a quarterly CAT Fee of approximately \$81,000.

In developing the proposed allocation of CAT costs between Equity and Options Execution Venues, the Operating Committee considered various different options for such allocation, including keeping the original 75%/25% allocation, as well as shifting to a 70%/30%, 67%/33%, or 57.75%/42.25% allocation. For each of the alternatives, the Operating Committee considered the effect each allocation would have on the assignment of various percentages of Equity Execution Venues to each tier as well as various percentages of Equity Execution Venue recovery allocations

for each alternative. Moreover, each of these options was considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined that the 67%/33% allocation between Equity and Options Execution Venues provided the greatest level of fee comparability at the individual entity level for the largest CAT Reporters, while still providing for appropriate fee levels across all tiers for all CAT Reporters.

(iii) Allocation of Costs Between Execution Venues and Industry Members

The Operating Committee determined to allocate 25% of CAT costs to Execution Venues and 75% to Industry Members (other than Execution Venue ATSSs), as it had in the Original Proposal. The Operating Committee determined that this 75%/25% allocation, along with the other changes proposed above, led to the most comparable fees for the largest Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSSs). The largest Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSSs) would each pay a quarterly CAT Fee of approximately \$81,000.

As a preliminary matter, the Operating Committee determined that it is appropriate to allocate most of the costs to create, implement and maintain the CAT to Industry Members for several reasons. First, there are many more broker-dealers expected to report to the CAT than Participants (*i.e.*, 1,541 broker-dealer CAT Reporters versus 22 Participants). Second, since most of the costs to process CAT reportable data is generated by Industry Members, Industry Members could be expected to contribute toward such costs. Finally, as noted by the SEC, the CAT “substantially enhance[s] the ability of the SROs and the Commission to oversee today’s securities markets,”⁷⁵ thereby benefitting all market participants. After making this determination, the Operating Committee analyzed several different cost allocations, as discussed further below, and determined that an allocation where 75% of the CAT costs should be borne by the Industry Members (other than Execution Venue ATSSs) and 25% should be paid by Execution Venues

was most appropriate and led to the greatest comparability of CAT Fees for the largest CAT Reporters.

In developing the proposed allocation of CAT costs between Execution Venues and Industry Members (other than Execution Venue ATSSs), the Operating Committee considered various different options for such allocation, including keeping the original 75%/25% allocation, as well as shifting to an 80%/20%, 70%/30%, or 65%/35% allocation. Each of these options was considered in the context of the full model, including the effect on each of the changes discussed above, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. In particular, for each of the alternatives, the Operating Committee considered the effect each allocation had on the assignment of various percentages of Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSSs) to each relevant tier as well as various percentages of recovery allocations for each tier. The Operating Committee determined that the 75%/25% allocation between Execution Venues and Industry Members (other than Execution Venue ATSSs) provided the greatest level of fee comparability at the individual entity level for the largest CAT Reporters, while still providing for appropriate fee levels across all tiers for all CAT Reporters.

(iv) Affiliations

The funding principles set forth in Section 11.2 of the Plan require that the fees charged to CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether Execution Venue and/or Industry Members). The proposed funding model satisfies this requirement. As discussed above, under the proposed funding model, the largest Equity Execution Venues, Options Execution Venues, and Industry Members (other than Execution Venue ATSSs) pay approximately the same fee. Moreover, the Operating Committee believes that the proposed funding model takes into consideration affiliations between or among CAT Reporters as complexes with multiple CAT Reporters will pay the appropriate fee based on the proposed fee schedule for each of the CAT Reporters in the complex. For example, a complex with a Tier 1 Equity Execution Venue and Tier 2 Industry Member will pay the

⁷⁵ Securities Exchange Act Release No. 67457 (July 18, 2012), 77 FR 45722, 45726 (August 1, 2012) (“Rule 613 Adopting Release”).

same as another complex with a Tier 1 Equity Execution Venue and Tier 2 Industry Member.

(v) Fee Schedule Changes

Accordingly, with this Amendment, the Exchange proposes to amend paragraphs (b)(1) and (2) of the proposed fee schedule to reflect the changes discussed in this section. Specifically, the Exchange proposes to amend paragraph (b)(1) and (2) of the proposed fee schedule to update the number of tiers, and the fees and percentages assigned to each tier to reflect the described changes.

(D) Market Share/Message Traffic

In the Original Proposal, the Operating Committee proposed to charge Execution Venues based on market share and Industry Members (other than Execution Venue ATSs) based on message traffic. Commenters questioned the use of the two different metrics for calculating CAT Fees.⁷⁶ The Operating Committee continues to believe that the proposed use of market share and message traffic satisfies the requirements of the Exchange Act and the funding principles set forth in the CAT NMS Plan. Accordingly, the proposed funding model continues to charge Execution Venues based on market share and Industry Members (other than Execution Venue ATSs) based on message traffic.

In drafting the Plan and the Original Proposal, the Operating Committee expressed the view that the correlation between message traffic and size does not apply to Execution Venues, which they described as producing similar amounts of message traffic regardless of size. The Operating Committee believed that charging Execution Venues based on message traffic would result in both large and small Execution Venues paying comparable fees, which would be inequitable, so the Operating Committee determined that it would be more appropriate to treat Execution Venues differently from Industry Members in the funding model. Upon a more detailed analysis of available data, however, the Operating Committee noted that Execution Venues have varying levels of message traffic. Nevertheless, the Operating Committee continues to believe that a bifurcated funding model—where Industry Members (other than Execution Venue ATSs) are charged fees based on message traffic and Execution Venues are charged based on market share—complies with the Plan and meets the

standards of the Exchange Act for the reasons set forth below.

Charging Industry Members based on message traffic is the most equitable means for establishing fees for Industry Members (other than Execution Venue ATSs). This approach will assess fees to Industry Members that create larger volumes of message traffic that are relatively higher than those fees charged to Industry Members that create smaller volumes of message traffic. Since message traffic, along with fixed costs of the Plan Processor, is a key component of the costs of operating the CAT, message traffic is an appropriate criterion for placing Industry Members in a particular fee tier.

The Operating Committee also believes that it is appropriate to charge Execution Venues CAT Fees based on their market share. In contrast to Industry Members (other than Execution Venue ATSs), which determine the degree to which they produce the message traffic that constitutes CAT Reportable Events, the CAT Reportable Events of Execution Venues are largely derivative of quotations and orders received from Industry Members that the Execution Venues are required to display. The business model for Execution Venues, however, is focused on executions in their markets. As a result, the Operating Committee believes that it is more equitable to charge Execution Venues based on their market share rather than their message traffic.

Similarly, focusing on message traffic would make it more difficult to draw distinctions between large and small exchanges, including options exchanges in particular. For instance, the Operating Committee analyzed the message traffic of Execution Venues and Industry Members for the period of April 2017 to June 2017 and placed all CAT Reporters into a nine-tier framework (*i.e.*, a single tier may include both Execution Venues and Industry Members). The Operating Committee's analysis found that the majority of exchanges (15 total) were grouped in Tiers 1 and 2. Moreover, virtually all of the options exchanges were in Tiers 1 and 2.⁷⁷ Given the concentration of options exchanges in Tiers 1 and 2, the Operating Committee believes that using a funding model based purely on message traffic would make it more difficult to distinguish between large and small options

exchanges, as compared to the proposed bifurcated fee approach.

In addition, the Operating Committee also believes that it is appropriate to treat ATSs as Execution Venues under the proposed funding model since ATSs have business models that are similar to those of exchanges, and ATSs also compete with exchanges. For these reasons, the Operating Committee believes that charging Execution Venues based on market share is more appropriate and equitable than charging Execution Venues based on message traffic.

(E) Time Limit

In the Original Proposal, the Operating Committee did not impose any time limit on the application of the proposed CAT Fees. As discussed above, the Operating Committee developed the proposed funding model by analyzing currently available historical data. Such historical data, however, is not as comprehensive as data that will be submitted to the CAT. Accordingly, the Operating Committee believes that it will be appropriate to revisit the funding model once CAT Reporters have actual experience with the funding model. Accordingly, the Operating Committee proposes to include a sunset provision in the proposed fee model. The proposed CAT Fees will sunset two years after the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. Specifically, the Exchange proposes to add paragraph (d) of the proposed fee schedule to include this sunset provision. Such a provision will provide the Operating Committee and other market participants with the opportunity to reevaluate the performance of the proposed funding model.

(F) Tier Structure/Decreasing Cost per Unit

In the Original Proposal, the Operating Committee determined to use a tiered fee structure. The Commission and commenters questioned whether the decreasing cost per additional unit (of message traffic in the case of Industry Members, or of share volume in the case of Execution Venues) in the proposed fee schedules burdens competition by disadvantaging small Industry Members and Execution Venues and/or by creating barriers to entry in the market for trading services and/or the market for broker-dealer services.⁷⁸

The Operating Committee does not believe that decreasing cost per

⁷⁶ Suspension Order at 31663; FIA Principal Traders Group Letter at 2.

⁷⁷ The Participants note that this analysis did not place MIAX PEARL in Tier 1 or Tier 2 since the exchange commenced trading on February 6, 2017.

⁷⁸ Suspension Order at 31667.

additional unit in the proposed fee schedules places an unfair competitive burden on Small Industry Members and Execution Venues. While the cost per unit of message traffic or share volume necessarily will decrease as volume increases in any tiered fee model using fixed fee percentages and, as a result, Small Industry Members and small Execution Venues may pay a larger fee per message or share, this comment fails to take account of the substantial differences in the absolute fees paid by Small Industry Members and small Execution Venues as opposed to large Industry Members and large Execution Venues. For example, under the fee proposals, Tier 7 Industry Members would pay a quarterly fee of \$105, while Tier 1 Industry Members would pay a quarterly fee of \$81,483. Similarly, a Tier 4 Equity Execution Venue would pay a quarterly fee of \$129, while a Tier 1 Equity Execution Venue would pay a quarterly fee of \$81,048. Thus, Small Industry Members and small Execution Venues are not disadvantaged in terms of the total fees that they actually pay. In contrast to a tiered model using fixed fee percentages, the Operating Committee believes that strictly variable or metered funding models based on message traffic or share volume would be more likely to affect market behavior and may present administrative challenges (e.g., the costs to calculate and monitor fees may exceed the fees charged to the smallest CAT Reporters).

(G) Other Alternatives Considered

In addition to the various funding model alternatives discussed above regarding discounts, number of tiers and allocation percentages, the Operating Committee also discussed other possible funding models. For example, the Operating Committee considered allocating the total CAT costs equally among each of the Participants, and then permitting each Participant to charge its own members as it deems appropriate.⁷⁹ The Operating Committee determined that such an approach raised a variety of issues, including the likely inconsistency of the ensuing charges, potential for lack of transparency, and the impracticality of multiple SROs submitting invoices for CAT charges. The Operating Committee therefore determined that the proposed funding model was preferable to this alternative.

(H) Industry Member Input

Commenters expressed concern regarding the level of Industry Member

input into the development of the proposed funding model, and certain commenters have recommended a greater role in the governance of the CAT.⁸⁰ The Participants previously addressed this concern in its letters responding to comments on the Plan and the CAT Fees.⁸¹ As discussed in those letters, the Participants discussed the funding model with the Development Advisory Group (“DAG”), the advisory group formed to assist in the development of the Plan, during its original development.⁸² Moreover, Industry Members currently have a voice in the affairs of the Operating Committee and operation of the CAT generally through the Advisory Committee established pursuant to Rule 613(b)(7) and Section 4.13 of the Plan. The Advisory Committee attends all meetings of the Operating Committee, as well as meetings of various subcommittees and working groups, and provides valuable and critical input for the Participants’ and Operating Committee’s consideration. The Operating Committee continues to believe that Industry Members have an appropriate voice regarding the funding of the Company.

(I) Conflicts of Interest

Commenters also raised concerns regarding Participant conflicts of interest in setting the CAT Fees.⁸³ The Participants previously responded to this concern in both the Plan Response Letter and the Fee Rule Response Letter.⁸⁴ As discussed in those letters, the Plan, as approved by the SEC, adopts various measures to protect against the potential conflicts issues raised by the Participants’ fee-setting authority. Such measures include the operation of the Company as a not for profit business league and on a break-even basis, and the requirement that the Participants file all CAT Fees under Section 19(b) of the Exchange Act. The Operating Committee continues to believe that these measures adequately protect against concerns regarding conflicts of interest in setting fees, and that additional measures, such as an

independent third party to evaluate an appropriate CAT Fee, are unnecessary.

(J) Fee Transparency

Commenters also argued that they could not adequately assess whether the CAT Fees were fair and equitable because the Operating Committee has not provided details as to what the Participants are receiving in return for the CAT Fees.⁸⁵ The Operating Committee provided a detailed discussion of the proposed funding model in the Plan, including the expenses to be covered by the CAT Fees. In addition, the agreement between the Company and the Plan Processor sets forth a comprehensive set of services to be provided to the Company with regard to the CAT. Such services include, without limitation: user support services (e.g., a help desk); tools to allow each CAT Reporter to monitor and correct their submissions; a comprehensive compliance program to monitor CAT Reporters’ adherence to Rule 613; publication of detailed Technical Specifications for Industry Members and Participants; performing data linkage functions; creating comprehensive data security and confidentiality safeguards; creating query functionality for regulatory users (i.e., the Participants, and the SEC and SEC staff); and performing billing and collection functions. The Operating Committee further notes that the services provided by the Plan Processor and the costs related thereto were subject to a bidding process.

(K) Funding Authority

Commenters also questioned the authority of the Operating Committee to impose CAT Fees on Industry Members.⁸⁶ The Participants previously responded to this same comment in the Plan Response Letter and the Fee Rule Response Letter.⁸⁷ As the Participants previously noted, SEC Rule 613 specifically contemplates broker-dealers contributing to the funding of the CAT. In addition, as noted by the SEC, the CAT “substantially enhance[s] the ability of the SROs and the Commission to oversee today’s securities markets,”⁸⁸ thereby benefitting all market participants. Therefore, the Operating Committee continues to believe that it is equitable for both Participants and

⁸⁰ See Suspension Order at 31662; MFA Letter at 1–2.

⁸¹ Letter from Participants to Brent J. Fields, Secretary, SEC (Sept. 23, 2016) (“Plan Response Letter”); Letter from CAT NMS Plan Participants to Brent J. Fields, Secretary, SEC (June 29, 2017) (“Fee Rule Response Letter”).

⁸² Fee Rule Response Letter at 2; Plan Response Letter at 18.

⁸³ See Suspension Order at 31662; FIA Principal Traders Group at 3.

⁸⁴ See Plan Response Letter at 16, 17; Fee Rule Response Letter at 10–12.

⁸⁵ See FIA Principal Traders Group at 3; SIFMA Letter at 3.

⁸⁶ See Suspension Order at 31661–2; SIFMA Letter at 2.

⁸⁷ See Plan Response Letter at 9–10; Fee Rule Response Letter at 3–4.

⁸⁸ Rule 613 Adopting Release at 45726.

⁷⁹ See FIA Principal Traders Group Letter at 2; Belvedere Letter at 4.

Industry Members to contribute to funding the cost of the CAT.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁸⁹ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,⁹⁰ in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility, is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, and is 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 discussed above, the SEC approved the bifurcated, tiered, fixed fee funding model in the CAT NMS Plan, finding it was reasonable and that it equitably allocated fees among Participants and Industry Members. The Exchange believes that the proposed tiered fees adopted pursuant to the funding model approved by the SEC in the CAT NMS Plan are reasonable, equitably allocated and not unfairly discriminatory.

The Exchange believes that this proposal is consistent with the Act because it implements, interprets or clarifies the provisions of the Plan, and is designed to assist the Exchange and its Industry Members in meeting regulatory obligations pursuant to the Plan. In approving the Plan, the SEC noted that the Plan “is necessary and appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanism of a national market system, or is otherwise in furtherance of the purposes of the Act.”⁹¹ To the extent that this proposal implements, interprets or clarifies the Plan and applies specific requirements to Industry Members, the Exchange believes that this proposal furthers the objectives of the Plan, as identified by the SEC, and is therefore consistent with the Act.

The Exchange believes that the proposed tiered fees are reasonable. First, the total CAT Fees to be collected would be directly associated with the costs of establishing and maintaining the CAT, where such costs include Plan Processor costs and costs related to insurance, third party services and the operational reserve. The CAT Fees

would not cover Participant services unrelated to the CAT. In addition, any surplus CAT Fees cannot be distributed to the individual Participants; such surpluses must be used as a reserve to offset future fees. Given the direct relationship between the fees and the CAT costs, the Exchange believes that the total level of the CAT Fees is reasonable.

In addition, the Exchange believes that the proposed CAT Fees are reasonably designed to allocate the total costs of the CAT equitably between and among the Participants and Industry Members, and are therefore not unfairly discriminatory. As discussed in detail above, the proposed tiered fees impose comparable fees on similarly situated CAT Reporters. For example, those with a larger impact on the CAT (measured via message traffic or market share) pay higher fees, whereas CAT Reporters with a smaller impact pay lower fees. Correspondingly, the tiered structure lessens the impact on smaller CAT Reporters by imposing smaller fees on those CAT Reporters with less market share or message traffic. In addition, the fee structure takes into consideration distinctions in securities trading operations of CAT Reporters, including ATSS trading OTC Equity Securities, and equity and options market makers.

Moreover, the Exchange believes that the division of the total CAT costs between Industry Members and Execution Venues, and the division of the Execution Venue portion of total costs between Equity and Options Execution Venues, is reasonably designed to allocate CAT costs among CAT Reporters. The 75%/25% division between Industry Members (other than Execution Venue ATSS) and Execution Venues maintains the greatest level of comparability across the funding model. For example, the cost allocation establishes fees for the largest Industry Members (*i.e.*, those Industry Members in Tiers 1) that are comparable to the largest Equity Execution Venues and Options Execution Venues (*i.e.*, those Execution Venues in Tier 1). Furthermore, the allocation of total CAT cost recovery recognizes the difference in the number of CAT Reporters that are Industry Members (other than Execution Venue ATSS) versus CAT Reporters that are Execution Venues. Similarly, the 67%/33% allocation between Equity and Options Execution Venues also helps to provide fee comparability for the largest CAT Reporters.

Finally, the Exchange believes that the proposed fees are reasonable because they would provide ease of calculation, ease of billing and other administrative functions, and

predictability of a fixed fee. Such factors are crucial to estimating a reliable revenue stream for the Company and for permitting CAT Reporters to reasonably predict their payment obligations for budgeting purposes.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Exchange notes that the proposed rule change implements provisions of the CAT NMS Plan approved by the Commission, and is designed to assist the Exchange in meeting its regulatory obligations pursuant to the Plan. Similarly, all national securities exchanges and FINRA are proposing this proposed fee schedule to implement the requirements of the CAT NMS Plan. Therefore, this is not a competitive fee filing and, therefore, it does not raise competition issues between and among the exchanges and FINRA.

Moreover, as previously described, the Exchange believes that the proposed rule change fairly and equitably allocates costs among CAT Reporters. In particular, the proposed fee schedule is structured to impose comparable fees on similarly situated CAT Reporters, and lessen the impact on smaller CAT Reporters. CAT Reporters with similar levels of CAT activity will pay similar fees. For example, Industry Members (other than Execution Venue ATSS) with higher levels of message traffic will pay higher fees, and those with lower levels of message traffic will pay lower fees. Similarly, Execution Venue ATSS and other Execution Venues with larger market share will pay higher fees, and those with lower levels of market share will pay lower fees. Therefore, given that there is generally a relationship between message traffic and/or market share to the CAT Reporter's size, smaller CAT Reporters generally pay less than larger CAT Reporters. Accordingly, the Exchange does not believe that the CAT Fees would have a disproportionate effect on smaller or larger CAT Reporters. In addition, ATSS and exchanges will pay the same fees based on market share. Therefore, the Exchange does not believe that the fees will impose any burden on the competition between ATSS and exchanges. Accordingly, the Exchange believes that the proposed fees will minimize the potential for adverse effects on competition between CAT Reporters in the market.

⁸⁹ 15 U.S.C. 78f(b).

⁹⁰ 15 U.S.C. 78f(b)(4) and (5).

⁹¹ Approval Order at 84697.

Furthermore, the tiered, fixed fee funding model limits the disincentives to providing liquidity to the market. Therefore, the proposed fees are structured to limit burdens on competitive quoting and other liquidity provision in the market.

In addition, the Operating Committee believes that the proposed changes to the Original Proposal, as discussed above in detail, address certain competitive concerns raised by commenters, including concerns related to, among other things, smaller ATSS, ATSS trading OTC Equity Securities, market making quoting and fee comparability. As discussed above, the Operating Committee believes that the proposals address the competitive concerns raised by commenters.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The Exchange has set forth responses to comments received regarding the Original Proposal in Section 3(a)(4) above.

III. Solicitation of Comments on Amendment No. 2

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment No. 2 is consistent with the Act. In particular, the Commission seeks comment on the following:

Allocation of Costs

(1) Commenters' views as to whether the allocation of CAT costs is consistent with the funding principle expressed in the CAT NMS Plan that requires the Operating Committee to "avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality."⁹²

(2) Commenters' views as to whether the allocation of 25% of CAT costs to the Execution Venues (including all the Participants) and 75% to Industry Members, will incentivize or disincentivize the Participants to effectively and efficiently manage the CAT costs incurred by the Participants since they will only bear 25% of such costs.

(3) Commenters' views on the determination to allocate 75% of all costs incurred by the Participants from November 21, 2016 to November 21, 2017 to Industry Members (other than Execution Venue ATSS), when such costs are development and build costs and when Industry Member reporting is

scheduled to commence a year later, including views on whether such "fees, costs and expenses . . . [are] fairly and reasonably shared among the Participants and Industry Members" in accordance with the CAT NMS Plan.⁹³

(4) Commenters' views on whether an analysis of the ratio of the expected Industry Member-reported CAT messages to the expected SRO-reported CAT messages should be the basis for determining the allocation of costs between Industry Members and Execution Venues.⁹⁴

(5) Any additional data analysis on the allocation of CAT costs, including any existing supporting evidence.

Comparability

(6) Commenters' views on the shift in the standard used to assess the comparability of CAT Fees, with the emphasis now on comparability of individual entities instead of affiliated entities, including views as to whether this shift is consistent with the funding principle expressed in the CAT NMS Plan that requires the Operating Committee to establish a fee structure in which the fees charged to "CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether Execution Venues and/or Industry Members)."⁹⁵

(7) Commenters' views as to whether the reduction in the number of tiers for Industry Members (other than Execution Venue ATSS) from nine to seven, the revised allocation of CAT costs between Equity Execution Venues and Options Execution Venues from a 75%/25% split to a 67%/33% split, and the adjustment of all tier percentages and recovery allocations achieves comparability across individual entities, and whether these changes should have resulted in a change to the allocation of 75% of total CAT costs to Industry Members (other than Execution Venue ATSS) and 25% of such costs to Execution Venues.

Discounts

(8) Commenters' views as to whether the discounts for options market-

makers, equities market-makers, and Equity ATSS trading OTC Equity Securities are clear, reasonable, and consistent with the funding principle expressed in the CAT NMS Plan that requires the Operating Committee to "avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality,"⁹⁶ including views as to whether the discounts for market-makers limit any potential disincentives to act as a market-maker and/or to provide liquidity due to CAT fees.

Calculation of Costs and Imposition of CAT Fees

(9) Commenters' views as to whether the amendment provides sufficient information regarding the amount of costs incurred from November 21, 2016 to November 21, 2017, particularly, how those costs were calculated, how those costs relate to the proposed CAT Fees, and how costs incurred after November 21, 2017 will be assessed upon Industry Members and Execution Venues;

(10) Commenters' views as to whether the timing of the imposition and collection of CAT Fees on Execution Venues and Industry Members is reasonably related to the timing of when the Company expects to incur such development and implementation costs.⁹⁷

(11) Commenters' views on dividing CAT costs equally among each of the Participants, and then each Participant charging its own members as it deems appropriate, taking into consideration the possibility of inconsistency in charges, the potential for lack of transparency, and the impracticality of multiple SROs submitting invoices for CAT charges.

Burden on Competition and Barriers to Entry

(12) Commenters' views as to whether the allocation of 75% of CAT costs to Industry Members (other than Execution Venue ATSS) imposes any burdens on competition to Industry Members, including views on what baseline competitive landscape the Commission should consider when analyzing the proposed allocation of CAT costs.

(13) Commenters' views on the burdens on competition, including the relevant markets and services and the impact of such burdens on the baseline competitive landscape in those relevant markets and services.

(14) Commenters' views on any potential burdens imposed by the fees on competition between and among

⁹³ Section 11.1(c) of the CAT NMS Plan.

⁹⁴ The Notice for the CAT NMS Plan did not provide a comprehensive count of audit trail message traffic from different regulatory data sources, but the Commission did estimate the ratio of all SRO audit trail messages to OATS audit trail messages to be 1.9431. See Securities Exchange Act Release No. 77724 (April 27, 2016), 81 FR 30613, 30721 n.919 and accompanying text (May 17, 2016).

⁹⁵ Section 11.2(c) of the CAT NMS Plan.

⁹⁶ Section 11.2(e) of the CAT NMS Plan.

⁹⁷ Section 11.1(c) of the CAT NMS Plan.

⁹² Section 11.2(e) of the CAT NMS Plan.

CAT Reporters, including views on which baseline markets and services the fees could have competitive effects on and whether the fees are designed to minimize such effects.

(15) Commenters' general views on the impact of the proposed fees on economies of scale and barriers to entry.

(16) Commenters' views on the baseline economies of scale and barriers to entry for Industry Members and Execution Venues and the relevant markets and services over which these economies of scale and barriers to entry exist.

(17) Commenters' views as to whether a tiered fee structure necessarily results in less active tiers paying more per unit than those in more active tiers, thus creating economies of scale, with supporting information if possible.

(18) Commenters' views as to how the level of the fees for the least active tiers would or would not affect barriers to entry.

(19) Commenters' views on whether the difference between the cost per unit (messages or market share) in less active tiers compared to the cost per unit in more active tiers creates regulatory economies of scale that favor larger competitors and, if so:

(a) How those economies of scale compare to operational economies of scale; and

(b) Whether those economies of scale reduce or increase the current advantages enjoyed by larger competitors or otherwise alter the competitive landscape.

(20) Commenters' views on whether the fees could affect competition between and among national securities exchanges and FINRA, in light of the fact that implementation of the fees does not require the unanimous consent of all such entities, and, specifically:

(a) Whether any of the national securities exchanges or FINRA are disadvantaged by the fees; and

(b) If so, whether any such disadvantages would be of a magnitude that would alter the competitive landscape.

(21) Commenters' views on any potential burden imposed by the fees on competitive quoting and other liquidity provision in the market, including, specifically:

(a) Commenters' views on the kinds of disincentives that discourage liquidity provision and/or disincentives that the Commission should consider in its analysis;

(b) Commenters' views as to whether the fees could disincentivize the provision of liquidity; and

(c) Commenters' views as to whether the fees limit any disincentives to provide liquidity.

(22) Commenters' views as to whether the amendment adequately responds to and/or addresses comments received on related filings.

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or

- Send an email to rule-comments@sec.gov. Please include File Number SR-GEMX-2017-17 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-GEMX-2017-17. 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 website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-GEMX-2017-17, and should be submitted on or before January 4, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁹⁸

Robert W. Errett,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-82254; File No. SR-PEARL-2017-20]

Self-Regulatory Organizations; MIAX PEARL, LLC; Notice of Filing of Amendment No. 1 to a Proposed Rule Change To Amend the Fee Schedule

December 11, 2017.

On May 1, 2017, MIAX PEARL, LLC ("MIAX PEARL" 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 adopt a fee schedule to establish the fees for Industry Members related to the National Market System Plan Governing the Consolidated Audit Trail ("CAT NMS Plan"). The proposed rule change was published in the **Federal Register** for comment on May 19, 2017.³ The Commission received seven comment letters on the proposed rule change,⁴ and a response to

⁹⁸ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 80676 (May 15, 2017), 82 FR 23083 (May 19, 2017) ("Original Proposal").

⁴ Since the CAT NMS Plan Participants' proposed rule changes to adopt fees to be charged to Industry Members to fund the consolidated audit trail are substantively identical, the Commission is considering all comments received on the proposed rule changes regardless of the comment file to which they were submitted. See text accompanying notes 14-17 *infra*, for a list of the CAT NMS Plan Participants. See Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, to Brent J. Fields, Secretary, Commission (dated June 6, 2017), available at: <https://www.sec.gov/comments/sr-batsbzx-2017-38/batsbzx201738-1788188-153228.pdf>; Letter from Patricia L. Cerny and Steven O'Malley, Compliance Consultants, to Brent J. Fields, Secretary, Commission (dated June 12, 2017), available at: <https://www.sec.gov/comments/sr-cboe-2017-040/cboe2017040-1799253-153675.pdf>; Letter from Daniel Zinn, General Counsel, OTC Markets Group Inc., to Eduardo A. Aleman, Assistant Secretary, Commission (dated June 13, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-1801717-153703.pdf>; Letter from Joanna Mallers, Secretary, FIA Principal Traders Group, to Brent J. Fields, Secretary, Commission (dated June 22, 2017), available at: <https://www.sec.gov/comments/sr-cboe-2017-040/cboe2017040-1819670-154195.pdf>; Letter from Stuart J. Kaswell, Executive Vice President and Managing Director, General Counsel, Managed

comments from the Participants.⁵ On June 30, 2017, the Commission temporarily suspended and initiated proceedings to determine whether to approve or disapprove the proposed rule change.⁶ The Commission thereafter received seven comment letters,⁷ and a response to comments from the Participants.⁸ On November 7, 2017, the Exchange filed Amendment No. 1 to the proposed rule change, as described in Items I and II below, which Items have been prepared by the Exchange.⁹ On November 9, 2017, the

Funds Association, to Brent J. Fields, Secretary, Commission (dated June 23, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-1822454-154283.pdf>; and Letter from Suzanne H. Shatto, Investor, to Commission (dated June 27, 2017), available at: <https://www.sec.gov/comments/sr-batsedgx-2017-22/batsedgx201722-154443.pdf>. The Commission also received a comment letter which is not pertinent to these proposed rule changes. See Letter from Christina Crouch, Smart Ltd., to Brent J. Fields, Secretary, Commission (dated June 5, 2017), available at: <https://www.sec.gov/comments/sr-batsbx-2017-38/batsbx201738-1785545-153152.htm>.

⁵ See Letter from CAT NMS Plan Participants to Brent J. Fields, Secretary, Commission (dated June 29, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-1832632-154584.pdf>.

⁶ See Securities Exchange Act Release No. 81067 (June 30, 2017), 82 FR 31656 (July 7, 2017).

⁷ See Letter from W. Hardy Callcott, Partner, Sidley Austin LLP, to Brent J. Fields, Secretary, Commission (dated July 27, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2148338-157737.pdf>; Letter from Kevin Coleman, General Counsel and Chief Compliance Officer, Belvedere Trading LLC, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2148360-157740.pdf>; Letter from Joanna Mallers, Secretary, FIA Principal Traders Group, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2151228-157745.pdf>; Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2150977-157744.pdf>; Letter from Stuart J. Kaswell, Executive Vice President and Managing Director, General Counsel, Managed Funds Association, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2150818-157743.pdf>; Letter from John Kinahan, Chief Executive Officer, Group One Trading, L.P., to Brent J. Fields, Secretary, Commission (dated August 10, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-2214568-160619.pdf>; Letter from Joseph Molluso, Executive Vice President and CFO, Virtu Financial, to Brent J. Fields, Commission (dated August 18, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-2238648-160830.pdf>.

⁸ See Letter from Michael Simon, Chair, CAT NMS Plan Operating Committee, to Brent J. Fields, Secretary, Commission (dated November 2, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2674608-161412.pdf>.

⁹ Amendment No. 1 to the proposed rule change replaces and supersedes the Original Proposal in its entirety.

Commission extended the time period within which to approve the proposed rule change or disapprove the proposed rule change to January 14, 2018.¹⁰ The Commission is publishing this notice to solicit comments from interested persons on Amendment No. 1.¹¹

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

On May 1, 2017, MIA X PEARL, LLC ("MIA X PEARL" or "Exchange") filed with the Securities and Exchange Commission ("Commission" or "SEC") a proposed rule change SR-PEARL-2017-20 (the "Original Proposal"),¹² to amend the MIA X PEARL Fee Schedule (the "Fee Schedule") to adopt a fee schedule to establish the fees for Industry Members related to the National Market System Plan Governing the Consolidated Audit Trail (the "CAT NMS Plan" or "Plan").¹³ MIA X PEARL files this proposed rule change (the "Amendment") to amend the Original Proposal. This Amendment replaces the Original Proposal in its entirety, and also describes the changes from the Original Proposal.

The text of the proposed rule change is available on the Exchange's website at <http://www.miaoptions.com/rule-filings/pearl>, at MIA X's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the

¹⁰ See Securities Exchange Act Release No. 82049 (November 9, 2017), 82 FR 53549 (November 16, 2017).

¹¹ The Commission notes that on December 1, 2017, the Exchange filed Amendment No. 2 to the proposed rule change. Amendment No. 2 is a partial amendment to the proposed rule change, as amended by Amendment No. 1. Amendment No. 2 proposes to change the parenthetical regarding the OTC Equity Securities discount in paragraph (b)(2) of the proposed fee schedule from "with a discount for Equity ATSS exclusively trading OTC Equity Securities based on the average shares per trade ratio between NMS Stocks and OTC Equity Securities" to "with a discount for OTC Equity Securities market share of Equity ATSS trading OTC Equity Securities based on the average shares per trade ratio between NMS Stocks and OTC Equity Securities." See Securities Exchange Act Release No. 82255 (December 11, 2017).

¹² See Securities Exchange Act Release No. 80676 (May 15, 2017), 82 FR 23083 (May 19, 2017) (SR-PEARL-2017-20).

¹³ Unless otherwise specified, capitalized terms used in this fee filing are defined as set forth herein, in the CAT Compliance Rule Series, the CAT NMS Plan, or the Original Proposal.

proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

BOX Options Exchange LLC, Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe C2 Exchange, Inc., Cboe Exchange, Inc.,¹⁴ Chicago Stock Exchange, Inc., Financial Industry Regulatory Authority, Inc. ("FINRA"), Investors' Exchange LLC, Miami International Securities Exchange, LLC, MIA X PEARL, LLC, NASDAQ BX, Inc., Nasdaq GEMX, LLC, Nasdaq ISE, LLC, Nasdaq MRX, LLC,¹⁵ NASDAQ PHLX LLC, The NASDAQ Stock Market LLC, New York Stock Exchange LLC, NYSE American LLC,¹⁶ NYSE Arca, Inc. and NYSE National, Inc.¹⁷ (collectively, the "Participants") filed with the Commission, pursuant to Section 11A of the Exchange Act¹⁸ and Rule 608 of Regulation NMS thereunder,¹⁹ the CAT NMS Plan.²⁰ The Participants filed the Plan to comply with Rule 613 of Regulation NMS under the Exchange Act. The Plan was published for

¹⁴ Note that Bats BYX Exchange, Inc., Bats BZX Exchange, Inc., Bats EDGA Exchange, Inc., Bats EDGX Exchange, Inc., C2 Options Exchange, Incorporated and Chicago Board Options Exchange, Incorporated, have been renamed Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe C2 Exchange, Inc. and Cboe Exchange, Inc., respectively.

¹⁵ ISE Gemini, LLC, ISE Mercury, LLC and International Securities Exchange, LLC have been renamed Nasdaq GEMX, LLC, Nasdaq MRX, LLC, and Nasdaq ISE, LLC, respectively. See Securities Exchange Act Rel. No. 80248 (Mar. 15, 2017), 82 FR 14547 (Mar. 21, 2017); Securities Exchange Act Rel. No. 80326 (Mar. 29, 2017), 82 FR 16460 (Apr. 4, 2017); and Securities Exchange Act Rel. No. 80325 (Mar. 29, 2017), 82 FR 16445 (Apr. 4, 2017).

¹⁶ NYSE MKT LLC has been renamed NYSE American LLC. See Securities Exchange Act Rel. No. 80283 (Mar. 21, 2017), 82 FR 15244 (Mar. 27, 2017).

¹⁷ National Stock Exchange, Inc. has been renamed NYSE National, Inc. See Securities Exchange Act Rel. No. 79902 (Jan. 30, 2017), 82 FR 9258 (Feb. 3, 2017).

¹⁸ 15 U.S.C. 78k-1.

¹⁹ 17 CFR 242.608.

²⁰ See Letter from the Participants to Brent J. Fields, Secretary, Commission, dated September 30, 2014; and Letter from Participants to Brent J. Fields, Secretary, Commission, dated February 27, 2015. On December 24, 2015, the Participants submitted an amendment to the CAT NMS Plan. See Letter from Participants to Brent J. Fields, Secretary, Commission, dated December 23, 2015.

comment in the **Federal Register** on May 17, 2016,²¹ and approved by the Commission, as modified, on November 15, 2016.²² The Plan is designed to create, implement and maintain a consolidated audit trail (“CAT”) that would capture customer and order event information for orders in NMS Securities and OTC Equity Securities, across all markets, from the time of order inception through routing, cancellation, modification, or execution in a single consolidated data source. The Plan accomplishes this by creating CAT NMS, LLC (the “Company”), of which each Participant is a member, to operate the CAT.²³ Under the CAT NMS Plan, the Operating Committee of the Company (“Operating Committee”) has discretion to establish funding for the Company to operate the CAT, including establishing fees that the Participants will pay, and establishing fees for Industry Members that will be implemented by the Participants (“CAT Fees”).²⁴ The Participants are required to file with the SEC under Section 19(b) of the Exchange Act any such CAT Fees applicable to Industry Members that the Operating Committee approves.²⁵ Accordingly, the Exchange submitted the Original Proposal to propose the Consolidated Audit Trail Funding Fees, which would require Industry Members that are Exchange members to pay the CAT Fees determined by the Operating Committee.

The Commission published the Original Proposal for public comment in the **Federal Register** on May 19, 2017,²⁶ and received comments in response to the Original Proposal or similar fee filings by other Participants.²⁷ On June 30, 2017, the Commission suspended, and instituted proceedings to determine whether to approve or disapprove, the Original Proposal.²⁸ The Commission received seven comment letters in response to those proceedings.²⁹

²¹ See Securities Exchange Act Rel. No. 77724 (Apr. 27, 2016), 81 FR 30614 (May 17, 2016).

²² See Securities Exchange Act Rel. No. 79318 (Nov. 15, 2016), 81 FR 84696 (Nov. 23, 2016) (“Approval Order”).

²³ The Plan also serves as the limited liability company agreement for the Company.

²⁴ Section 11.1(b) of the CAT NMS Plan.

²⁵ *Id.*

²⁶ *Supra* note 3.

²⁷ For a summary of comments, see generally Securities Exchange Act Rel. No. 81067 (June 30, 2017), 82 FR 31656 (July 7, 2017) (“Suspension Order”).

²⁸ Suspension Order.

²⁹ See Letter from Stuart J. Kaswell, Executive Vice President, Managing Director and General Counsel, Managed Funds Association, to Brent J. Fields, Secretary, SEC (July 28, 2017) (“MFA Letter”); Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA, to Brent J. Fields, Secretary, SEC (July 28, 2017)

In response to the comments on the Original Proposal, the Operating Committee determined to make the following changes to the funding model: (1) Add two additional CAT Fee tiers for Equity Execution Venues; (2) discount the market share of Execution Venue ATSs exclusively trading OTC Equity Securities as well as the market share of the FINRA over-the-counter reporting facility (“ORF”) by the average shares per trade ratio between NMS Stocks and OTC Equity Securities (calculated as 0.17% based on available data from the second quarter of 2017) when calculating the market share of Execution Venue ATS exclusively trading OTC Equity Securities and FINRA; (3) discount the Options Market Maker quotes by the trade to quote ratio for options (calculated as 0.01% based on available data for June 2016 through June 2017) when calculating message traffic for Options Market Makers; (4) discount equity market maker quotes by the trade to quote ratio for equities (calculated as 5.43% based on available data for June 2016 through June 2017) when calculating message traffic for equity market makers; (5) decrease the number of tiers for Industry Members (other than the Execution Venue ATSs) from nine to seven; (6) change the allocation of CAT costs between Equity Execution Venues and Options Execution Venues from 75%/25% to 67%/33%; (7) adjust tier percentages and recovery allocations for Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSs); (8) focus the comparability of CAT Fees on the individual entity level, rather than primarily on the comparability of affiliated entities; (9) commence invoicing CAT Reporters as promptly as possible following the latest operative date of the respective Consolidated Audit Trail Funding Fees filed or to be filed by each of the Participants and the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants; and (10) require the proposed fees to automatically expire two years from the operative date of the

(“SIFMA Letter”); Joanna Mallers, Secretary, FIA Principal Traders Group, to Brent J. Fields, Secretary, SEC (July 28, 2017) (“FIA Principal Traders Group Letter”); Letter from Kevin Coleman, General Counsel & Chief Compliance Officer, Belvedere Trading LLC, to Brent J. Fields, Secretary, SEC (July 28, 2017) (“Belvedere Letter”); Letter from W. Hardy Callcott, Sidley Austin LLP, to Brent J. Fields, Secretary, SEC (July 27, 2017) (“Sidley Letter”); Letter from John Kinahan, Chief Executive Officer, Group One Trading, L.P., to Brent J. Fields, Secretary, SEC (Aug. 10, 2017) (“Group One Letter”); and Letter from Joseph Molluso, Executive Vice President, Virtu Financial, to Brent J. Fields, Secretary, SEC (Aug. 18, 2017) (“Virtu Financial Letter”).

CAT NMS Plan amendment adopting CAT Fees for Participants. As discussed in detail below, the Exchange proposes to amend the Original Proposal to reflect these changes.

(1) Executive Summary

The following provides an executive summary of the CAT funding model approved by the Operating Committee, as well as Industry Members’ rights and obligations related to the payment of CAT Fees calculated pursuant to the CAT funding model, as amended by this Amendment. A detailed description of the CAT funding model and the CAT Fees, as amended by this Amendment, as well as the changes made to the Original Proposal follows this executive summary.

(A) CAT Funding Model

- *CAT Costs.* The CAT funding model is designed to establish CAT-specific fees to collectively recover the costs of building and operating the CAT from all CAT Reporters, including Industry Members and Participants. The overall CAT costs used in calculating the CAT Fees in this fee filing are comprised of Plan Processor CAT costs and non-Plan Processor CAT costs incurred, and estimated to be incurred, from November 21, 2016 through November 21, 2017. Although the CAT costs from November 21, 2016 through November 21, 2017 were used in calculating the CAT Fees, the CAT Fees set forth in this fee filing would be in effect until the automatic sunset date, as discussed below. (See Section 3(a)(2)(E) below)

- *Bifurcated Funding Model.* The CAT NMS Plan requires a bifurcated funding model, where costs associated with building and operating the CAT would be borne by (1) Participants and Industry Members that are Execution Venues for Eligible Securities through fixed tier fees based on market share, and (2) Industry Members (other than alternative trading systems (“ATSs”) that execute transactions in Eligible Securities (“Execution Venue ATSs”)) through fixed tier fees based on message traffic for Eligible Securities. (See Section 3(a)(2) below)

- *Industry Member Fees.* Each Industry Member (other than Execution Venue ATSs) will be placed into one of seven tiers of fixed fees, based on “message traffic” in Eligible Securities for a defined period (as discussed below). Prior to the start of CAT reporting, “message traffic” will be comprised of historical equity and equity options orders, cancels, quotes and executions provided by each exchange and FINRA over the previous three months. After an Industry Member

begins reporting to the CAT, “message traffic” will be calculated based on the Industry Member’s Reportable Events reported to the CAT. Industry Members with lower levels of message traffic will pay a lower fee and Industry Members with higher levels of message traffic will pay a higher fee. To avoid disincentives to quoting behavior, Options Market Maker and equity market maker quotes will be discounted when calculating message traffic. (See Section 3(a)(2)(B) below)

- **Execution Venue Fees.** Each Equity Execution Venue will be placed in one of four tiers of fixed fees based on market share, and each Options Execution Venue will be placed in one of two tiers of fixed fees based on market share. Equity Execution Venue market share will be determined by calculating each Equity Execution Venue’s proportion of the total volume of NMS Stock and OTC Equity shares reported by all Equity Execution Venues during the relevant time period. For purposes of calculating market share, the market share of Execution Venue ATs exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF will be discounted. Similarly, market share for Options Execution Venues will be determined by calculating each Options Execution Venue’s proportion of the total volume of Listed Options contracts reported by all Options Execution Venues during the relevant time period. Equity Execution Venues with a larger market share will pay a larger CAT Fee than Equity Execution Venues with a smaller market share. Similarly, Options Execution Venues with a larger market share will pay a larger CAT Fee than Options Execution Venues with a smaller market share. (See Section 3(a)(2)(C) below)

- **Cost Allocation.** For the reasons discussed below, in designing the model, the Operating Committee determined that 75 percent of total costs recovered would be allocated to Industry Members (other than Execution Venue ATs) and 25 percent would be allocated to Execution Venues. In addition, the Operating Committee determined to allocate 67 percent of Execution Venue costs recovered to Equity Execution Venues and 33 percent to Options Execution Venues. (See Section 3(a)(2)(D) below)

- **Comparability of Fees.** The CAT funding model charges CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) comparable CAT Fees. (See Section 3(a)(2)(F) below)

(B) CAT Fees for Industry Members

- **Fee Schedule.** The quarterly CAT Fees for each tier for Industry Members are set forth in the two fee schedules in the Consolidated Audit Trail Funding Fees, one for Equity ATs and one for Industry Members other than Equity ATs. (See Section 3(a)(3)(B) below)

- **Quarterly Invoices.** Industry Members will be billed quarterly for CAT Fees, with the invoices payable within 30 days. The quarterly invoices will identify within which tier the Industry Member falls. (See Section 3(a)(3)(C) below)

- **Centralized Payment.** Each Industry Member will receive from the Company one invoice for its applicable CAT Fees, not separate invoices from each Participant of which it is a member. Each Industry Member will pay its CAT Fees to the Company via the centralized system for the collection of CAT Fees established by the Operating Committee. (See Section 3(a)(3)(C) below)

- **Billing Commencement.** Industry Members will begin to receive invoices for CAT Fees as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Participants and the operative date of the Plan amendment adopting CAT Fees for Participants. (See Section 3(a)(2)(G) below)

- **Sunset Provision.** The Consolidated Audit Trail Funding Fees will sunset automatically two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. (See Section 3(a)(2)(J) below)

(2) Description of the CAT Funding Model

Article XI of the CAT NMS Plan requires the Operating Committee to approve the operating budget, including projected costs of developing and operating the CAT for the upcoming year. In addition to a budget, Article XI of the CAT NMS Plan provides that the Operating Committee has discretion to establish funding for the Company, consistent with a bifurcated funding model, where costs associated with building and operating the Central Repository would be borne by (1) Participants and Industry Members that are Execution Venues through fixed tier fees based on market share, and (2) Industry Members (other than Execution Venue ATs) through fixed tier fees based on message traffic. In its order approving the CAT NMS Plan, the Commission determined that the proposed funding model was “reasonable”³⁰ and “reflects a

reasonable exercise of the Participants’ funding authority to recover the Participants’ costs related to the CAT.”³¹

More specifically, the Commission stated in approving the CAT NMS Plan that “[t]he Commission believes that the proposed funding model is reasonably designed to allocate the costs of the CAT between the Participants and Industry Members.”³² The Commission further noted the following:

The Commission believes that the proposed funding model reflects a reasonable exercise of the Participants’ funding authority to recover the Participants’ costs related to the CAT. The CAT is a regulatory facility jointly owned by the Participants and . . . the Exchange Act specifically permits the Participants to charge their members fees to fund their self-regulatory obligations. The Commission further believes that the proposed funding model is designed to impose fees reasonably related to the Participants’ self-regulatory obligations because the fees would be directly associated with the costs of establishing and maintaining the CAT, and not unrelated SRO services.³³

Accordingly, the funding model approved by the Operating Committee imposes fees on both Participants and Industry Members.

As discussed in Appendix C of the CAT NMS Plan, in developing and approving the approved funding model, the Operating Committee considered the advantages and disadvantages of a variety of alternative funding and cost allocation models before selecting the proposed model.³⁴ After analyzing the various alternatives, the Operating Committee determined that the proposed tiered, fixed fee funding model provides a variety of advantages in comparison to the alternatives.

In particular, the fixed fee model, as opposed to a variable fee model, provides transparency, ease of calculation, ease of billing and other administrative functions, and predictability of a fixed fee. Such factors are crucial to estimating a reliable revenue stream for the Company and for permitting CAT Reporters to reasonably predict their payment obligations for budgeting purposes. Additionally, a strictly variable or metered funding model based on message volume would be far more likely to affect market behavior and place an inappropriate burden on competition.

Reviews from varying time periods of current broker-dealer order and trading

³¹ *Id.* at 84794.

³² *Id.* at 84795.

³³ *Id.* at 84794.

³⁴ Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85006.

³⁰ Approval Order at 84796.

data submitted under existing reporting requirements showed a wide range in activity among broker-dealers, with a number of broker-dealers submitting fewer than 1,000 orders per month and other broker-dealers submitting millions and even billions of orders in the same period. Accordingly, the CAT NMS Plan includes a tiered approach to fees. The tiered approach helps ensure that fees are equitably allocated among similarly situated CAT Reporters and furthers the goal of lessening the impact on smaller firms.³⁵ In addition, in choosing a tiered fee structure, the Operating Committee concluded that the variety of benefits offered by a tiered fee structure, discussed above, outweighed the fact that CAT Reporters in any particular tier would pay different rates per message traffic order event or per market share (e.g., an Industry Member with the largest amount of message traffic in one tier would pay a smaller amount per order event than an Industry Member in the same tier with the least amount of message traffic). Such variation is the natural result of a tiered fee structure.³⁶ The Operating Committee considered several approaches to developing a tiered model, including defining fee tiers based on such factors as size of firm, message traffic or trading dollar volume. After analyzing the alternatives, it concluded that the tiering should be based on message traffic which will reflect the relative impact of CAT Reporters on the CAT System.

Accordingly, the CAT NMS Plan contemplates that costs will be allocated across the CAT Reporters on a tiered basis in order to allocate higher costs to those CAT Reporters that contribute more to the costs of creating, implementing and maintaining the CAT and lower costs to those that contribute less.³⁷ The fees to be assessed at each tier are calculated so as to recoup a proportion of costs appropriate to the message traffic or market share (as applicable) from CAT Reporters in each tier. Therefore, Industry Members generating the most message traffic will be in the higher tiers, and will be charged a higher fee. Industry Members with lower levels of message traffic will be in lower tiers and will be assessed a smaller fee for the CAT.³⁸ Correspondingly, Execution Venues with the highest market shares will be in the top tier, and will be charged

higher fees. Execution Venues with the lowest market shares will be in the lowest tier and will be assessed smaller fees for the CAT.³⁹

The CAT NMS Plan states that Industry Members (other than Execution Venue ATs) will be charged based on message traffic, and that Execution Venues will be charged based on market share.⁴⁰ While there are multiple factors that contribute to the cost of building, maintaining and using the CAT, processing and storage of incoming message traffic is one of the most significant cost drivers for the CAT.⁴¹ Thus, the CAT NMS Plan provides that the fees payable by Industry Members (other than Execution Venue ATs) will be based on the message traffic generated by such Industry Member.⁴²

In contrast to Industry Members, which determine the degree to which they produce message traffic that constitutes CAT Reportable Events, the CAT Reportable Events of the Execution Venues are largely derivative of quotations and orders received from Industry Members that they are required to display. The business model for Execution Venues (other than FINRA), however, is focused on executions in their markets. As a result, the Operating Committee believes that it is more equitable to charge Execution Venues based on their market share rather than their message traffic.

Focusing on message traffic would make it more difficult to draw distinctions between large and small Execution Venues and, in particular, between large and small options exchanges. For instance, the Operating Committee analyzed the message traffic of Execution Venues and Industry Members for the period of April 2017 to June 2017 and placed all CAT Reporters into a nine-tier framework (i.e., a single tier may include both Execution Venues and Industry Members). The Operating Committee's analysis found that the majority of exchanges (15 total) were grouped in Tiers 1 and 2. Moreover, virtually all of the options exchanges were in Tiers 1 and 2.⁴³ Given the resulting concentration of options exchanges in Tiers 1 and 2 under this approach, the analysis shows that a funding model for Execution Venues based on message traffic would make it more difficult to distinguish between

large and small options exchanges, as compared to the proposed fee approach that bases fees for Execution Venues on market share.

The CAT NMS Plan's funding model also is structured to avoid a "reduction in market quality."⁴⁴ The tiered, fixed fee funding model is designed to limit the disincentives to providing liquidity to the market. For example, the Operating Committee expects that a firm that has a large volume of quotes would likely be categorized in one of the upper tiers, and would not be assessed a fee for this traffic directly as they would under a more directly metered model. In contrast, strictly variable or metered funding models based on message volume are far more likely to affect market behavior. In approving the CAT NMS Plan, the SEC stated that "[t]he Participants also offered a reasonable basis for establishing a funding model based on broad tiers, in that it may be less likely to have an incremental deterrent effect on liquidity provision."⁴⁵

The funding model also is structured to avoid a reduction market quality because it discounts Options Market Maker and equity market maker quotes when calculating message traffic for Options Market Makers and equity market makers, respectively. As discussed in more detail below, the Operating Committee determined to discount the Options Market Maker quotes by the trade to quote ratio for options when calculating message traffic for Options Market Makers. Similarly, to avoid disincentives to quoting behavior on the equities side as well, the Operating Committee determined to discount equity market maker quotes by the trade to quote ratio for equities when calculating message traffic for equity market makers. The proposed discounts recognize the value of the market makers' quoting activity to the market as a whole.

The CAT NMS Plan is further structured to avoid potential conflicts raised by the Operating Committee determining fees applicable to its own members—the Participants. First, the Company will operate on a "break-even" basis, with fees imposed to cover costs and an appropriate reserve. Any surpluses will be treated as an operational reserve to offset future fees and will not be distributed to the Participants as profits.⁴⁶ To ensure that the Participants' operation of the CAT will not contribute to the funding of their other operations, Section 11.1(c) of

³⁵ *Id.*

³⁶ Moreover, as the SEC noted in approving the CAT NMS Plan, "[t]he Participants also have offered a reasonable basis for establishing a funding model based on broad tiers, in that it may be easier to implement." Approval Order at 84796.

³⁷ Approval Order at 85005.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Section 11.3(a) and (b) of the CAT NMS Plan.

⁴¹ Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85005.

⁴² Section 11.3(b) of the CAT NMS Plan.

⁴³ The Operating Committee notes that this analysis did not place MIAx PEARL in Tier 1 or Tier 2 since the exchange commenced trading on February 6, 2017.

⁴⁴ Section 11.2(e) of the CAT NMS Plan.

⁴⁵ Approval Order at 84796.

⁴⁶ *Id.* at 84792.

the CAT NMS Plan specifically states that “[a]ny surplus of the Company’s revenues over its expenses shall be treated as an operational reserve to offset future fees.” In addition, as set forth in Article VIII of the CAT NMS Plan, the Company “intends to operate in a manner such that it qualifies as a ‘business league’ within the meaning of Section 501(c)(6) of the [Internal Revenue] Code.” To qualify as a business league, an organization must “not [be] organized for profit and no part of the net earnings of [the organization can] inure[] to the benefit of any private shareholder or individual.”⁴⁷ As the SEC stated when approving the CAT NMS Plan, “the Commission believes that the Company’s application for Section 501(c)(6) business league status addresses issues raised by commenters about the Plan’s proposed allocation of profit and loss by mitigating concerns that the Company’s earnings could be used to benefit individual Participants.”⁴⁸ The Internal Revenue Service recently has determined that the Company is exempt from federal income tax under Section 501(c)(6) of the Internal Revenue Code.

The funding model also is structured to take into account distinctions in the securities trading operations of Participants and Industry Members. For example, the Operating Committee designed the model to address the different trading characteristics in the OTC Equity Securities market. Specifically, the Operating Committee proposes to discount the market share of Execution Venue ATSs exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF by the average shares per trade ratio between NMS Stocks and OTC Equity Securities to adjust for the greater number of shares being traded in the OTC Equity Securities market, which is generally a function of a lower per share price for OTC Equity Securities when compared to NMS Stocks. In addition, the Operating Committee also proposes to discount Options Market Maker and equity market maker message traffic in recognition of their role in the securities markets. Furthermore, the funding model creates separate tiers for Equity and Options Execution Venues due to the different trading characteristics of those markets.

Finally, by adopting a CAT-specific fee, the Operating Committee will be fully transparent regarding the costs of the CAT. Charging a general regulatory fee, which would be used to cover CAT

costs as well as other regulatory costs, would be less transparent than the selected approach of charging a fee designated to cover CAT costs only.

A full description of the funding model is set forth below. This description includes the framework for the funding model as set forth in the CAT NMS Plan, as well as the details as to how the funding model will be applied in practice, including the number of fee tiers and the applicable fees for each tier. The complete funding model is described below, including those fees that are to be paid by the Participants. The proposed Consolidated Audit Trail Funding Fees, however, do not apply to the Participants; the proposed Consolidated Audit Trail Funding Fees only apply to Industry Members. The CAT Fees for Participants will be imposed separately by the Operating Committee pursuant to the CAT NMS Plan.

(A) Funding Principles

Section 11.2 of the CAT NMS Plan sets forth the principles that the Operating Committee applied in establishing the funding for the Company. The Operating Committee has considered these funding principles as well as the other funding requirements set forth in the CAT NMS Plan and in Rule 613 in developing the proposed funding model. The following are the funding principles in Section 11.2 of the CAT NMS Plan:

- To create transparent, predictable revenue streams for the Company that are aligned with the anticipated costs to build, operate and administer the CAT and other costs of the Company;
- To establish an allocation of the Company’s related costs among Participants and Industry Members that is consistent with the Exchange Act, taking into account the timeline for implementation of the CAT and distinctions in the securities trading operations of Participants and Industry Members and their relative impact upon the Company’s resources and operations;
- To establish a tiered fee structure in which the fees charged to: (i) CAT Reporters that are Execution Venues, including ATSs, are based upon the level of market share; (ii) Industry Members’ non-ATS activities are based upon message traffic; (iii) the CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT

Reporters, whether Execution Venue and/or Industry Members);

- To provide for ease of billing and other administrative functions;
- To avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality; and
- To build financial stability to support the Company as a going concern.

(B) Industry Member Tiering

Under Section 11.3(b) of the CAT NMS Plan, the Operating Committee is required to establish fixed fees to be payable by Industry Members, based on message traffic generated by such Industry Member, with the Operating Committee establishing at least five and no more than nine tiers.

The CAT NMS Plan clarifies that the fixed fees payable by Industry Members pursuant to Section 11.3(b) shall, in addition to any other applicable message traffic, include message traffic generated by: (i) An ATS that does not execute orders that is sponsored by such Industry Member; and (ii) routing orders to and from any ATS sponsored by such Industry Member. In addition, the Industry Member fees will apply to Industry Members that act as routing broker-dealers for exchanges. The Industry Member fees will not be applicable, however, to an ATS that qualifies as an Execution Venue, as discussed in more detail in the section on Execution Venue tiering.

In accordance with Section 11.3(b), the Operating Committee approved a tiered fee structure for Industry Members (other than Execution Venue ATSs) as described in this section. In determining the tiers, the Operating Committee considered the funding principles set forth in Section 11.2 of the CAT NMS Plan, seeking to create funding tiers that take into account the relative impact on CAT System resources of different Industry Members, and that establish comparable fees among the CAT Reporters with the most Reportable Events. The Operating Committee has determined that establishing seven tiers results in an allocation of fees that distinguishes between Industry Members with differing levels of message traffic. Thus, each such Industry Member will be placed into one of seven tiers of fixed fees, based on “message traffic” for a defined period (as discussed below).

A seven tier structure was selected to provide a wide range of levels for tiering Industry Members such that Industry Members submitting significantly less message traffic to the CAT would be adequately differentiated from Industry

⁴⁷ 26 U.S.C. 501(c)(6).

⁴⁸ Approval Order at 84793.

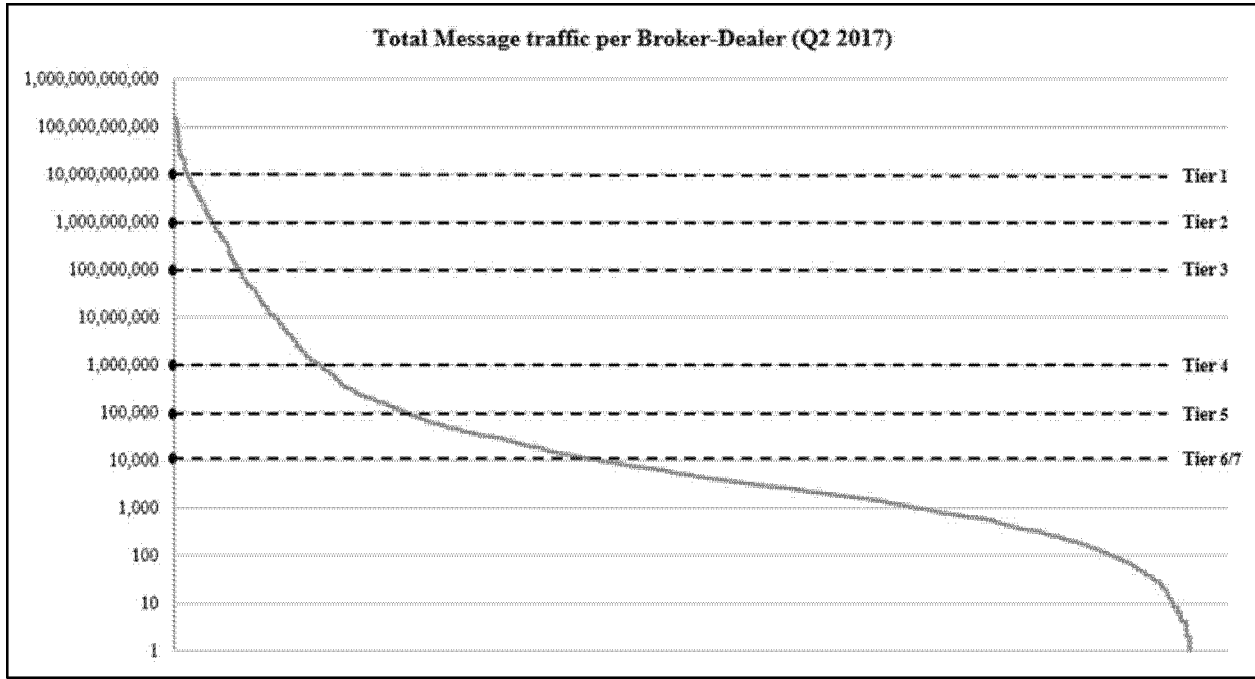
Members submitting substantially more message traffic. The Operating Committee considered historical message traffic from multiple time periods, generated by Industry Members across all exchanges and as submitted to FINRA's Order Audit Trail System ("OATS"), and considered the distribution of firms with similar levels of message traffic, grouping together firms with similar levels of message traffic. Based on this, the Operating Committee determined that seven tiers would group firms with similar levels of message traffic, charging those firms with higher impact on the CAT more, while lowering the burden on Industry Members that have less CAT-related activity. Furthermore, the selection of seven tiers establishes comparable fees among the largest CAT Reporters.

Each Industry Member (other than Execution Venue ATSS) will be ranked by message traffic and tiered by predefined Industry Member percentages (the "Industry Member Percentages"). The Operating Committee determined to use predefined percentages rather than fixed volume thresholds to ensure that the total CAT Fees collected recover the expected CAT costs regardless of changes in the total level of message traffic. To determine the fixed percentage of Industry Members in each tier, the Operating Committee analyzed historical message traffic generated by Industry Members across all exchanges and as submitted to OATS, and considered the distribution of firms with similar levels of message traffic, grouping together firms with similar

levels of message traffic. Based on this, the Operating Committee identified seven tiers that would group firms with similar levels of message traffic.

The percentage of costs recovered by each Industry Member tier will be determined by predefined percentage allocations (the "Industry Member Recovery Allocation"). In determining the fixed percentage allocation of costs recovered for each tier, the Operating Committee considered the impact of CAT Reporter message traffic on the CAT System as well as the distribution of total message volume across Industry Members while seeking to maintain comparable fees among the largest CAT Reporters. Accordingly, following the determination of the percentage of Industry Members in each tier, the Operating Committee identified the percentage of total market volume for each tier based on the historical message traffic upon which Industry Members had been initially ranked. Taking this into account along with the resulting percentage of total recovery, the percentage allocation of costs recovered for each tier were assigned, allocating higher percentages of recovery to tiers with higher levels of message traffic while avoiding any inappropriate burden on competition. Furthermore, by using percentages of Industry Members and costs recovered per tier, the Operating Committee sought to include elasticity within the funding model, allowing the funding model to respond to changes in either the total number of Industry Members or the total level of message traffic.

The following chart illustrates the breakdown of seven Industry Member tiers across the monthly average of total equity and equity options orders, cancels, quotes and executions in the second quarter of 2017 as well as message traffic thresholds between the largest of Industry Member message traffic gaps. The Operating Committee referenced similar distribution illustrations to determine the appropriate division of Industry Member percentages in each tier by considering the grouping of firms with similar levels of message traffic and seeking to identify relative breakpoints in the message traffic between such groupings. In reviewing the chart and its corresponding table, note that while these distribution illustrations were referenced to help differentiate between Industry Member tiers, the proposed funding model is driven by fixed percentages of Industry Members across tiers to account for fluctuating levels of message traffic over time. This approach also provides financial stability for the CAT by ensuring that the funding model will recover the required amounts regardless of changes in the number of Industry Members or the amount of message traffic. Actual messages in any tier will vary based on the actual traffic in a given measurement period, as well as the number of firms included in the measurement period. The Industry Member Percentages and Industry Member Recovery Allocation for each tier will remain fixed with each Industry Member's tier to be reassigned periodically, as described below in Section 3(a)(2)(I).



Industry Member tier	Approximate Message traffic per Industry Member (Q2 2017) (orders, quotes, cancels and executions)
Tier 1	>10,000,000,000
Tier 2	1,000,000,000–10,000,000,000
Tier 3	100,000,000–1,000,000,000
Tier 4	1,000,000–100,000,000
Tier 5	100,000–1,000,000
Tier 6	10,000–100,000
Tier 7	<10,000

Based on the above analysis, the Operating Committee approved the following Industry Member Percentages and Industry Member Recovery Allocations:

Industry Member tier	Percentage of Industry Members	Percentage of Industry Member recovery	Percentage of total recovery
Tier 1	0.900	12.00	9.00
Tier 2	2.150	20.50	15.38
Tier 3	2.800	18.50	13.88
Tier 4	7.750	32.00	24.00
Tier 5	8.300	10.00	7.50
Tier 6	18.800	6.00	4.50
Tier 7	59.300	1.00	0.75
Total	100	100	75

For the purposes of creating these tiers based on message traffic, the Operating Committee determined to

define the term “message traffic” separately for the period before the commencement of CAT reporting and

for the period after the start of CAT reporting. The different definition for message traffic is necessary as there will

be no Reportable Events as defined in the Plan, prior to the commencement of CAT reporting. Accordingly, prior to the start of CAT reporting, “message traffic” will be comprised of historical equity and equity options orders, cancels, quotes and executions provided by each exchange and FINRA over the previous three months. Prior to the start of CAT reporting, orders would be comprised of the total number of equity and equity options orders received and originated by a member of an exchange or FINRA over the previous three-month period, including principal orders, cancel/replace orders, market maker orders originated by a member of an exchange, and reserve (iceberg) orders as well as executions originated by a member of FINRA, and excluding order rejects, system-modified orders, order routes and implied orders.⁴⁹ In addition, prior to the start of CAT reporting, cancels would be comprised of the total number of equity and equity option cancels received and originated by a member of an exchange or FINRA over a three-month period, excluding order modifications (e.g., order updates, order splits, partial cancels) and multiple cancels of a complex order. Furthermore, prior to the start of CAT reporting, quotes would be comprised of information readily available to the exchanges and FINRA, such as the total number of historical equity and equity options quotes received and originated by a member of an exchange or FINRA over the prior three-month period. Additionally, prior to the start of CAT reporting, executions would be comprised of the total number of equity and equity option executions received or originated by a member of an exchange or FINRA over a three-month period.

After an Industry Member begins reporting to the CAT, “message traffic” will be calculated based on the Industry Member’s Reportable Events reported to the CAT as will be defined in the Technical Specifications.⁵⁰

Quotes of Options Market Makers and equity market makers will be included in the calculation of total message traffic for those market makers for purposes of tiering under the CAT funding model both prior to CAT reporting and once

⁴⁹ Consequently, firms that do not have “message traffic” reported to an exchange or OATS before they are reporting to the CAT would not be subject to a fee until they begin to report information to CAT.

⁵⁰ If an Industry Member (other than an Execution Venue ATS) has no orders, cancels, quotes and executions prior to the commencement of CAT Reporting, or no Reportable Events after CAT reporting commences, then the Industry Member would not have a CAT Fee obligation.

CAT reporting commences.⁵¹ To address potential concerns regarding burdens on competition or market quality of including quotes in the calculation of message traffic, however, the Operating Committee determined to discount the Options Market Maker quotes by the trade to quote ratio for options when calculating message traffic for Options Market Makers. Based on available data for June 2016 through June 2017, the trade to quote ratio for options is 0.01%. Similarly, to avoid disincentives to quoting behavior on the equities side, the Operating Committee determined to discount equity market maker quotes by the trade to quote ratio for equities. Based on available data for June 2016 through June 2017, the trade to quote ratio for equities is 5.43%.⁵² The trade to quote ratio for options and the trade to quote ratio for equities will be calculated every three months when tiers are recalculated (as discussed below).

The Operating Committee has determined to calculate fee tiers every three months, on a calendar quarter basis, based on message traffic from the prior three months. Based on its analysis of historical data, the Operating Committee believes that calculating tiers based on three months of data will provide the best balance between reflecting changes in activity by Industry Members while still providing predictability in the tiering for Industry Members. Because fee tiers will be calculated based on message traffic from the prior three months, the Operating Committee will begin calculating message traffic based on an Industry Member’s Reportable Events reported to the CAT once the Industry Member has been reporting to the CAT for three months. Prior to that, fee tiers will be calculated as discussed above with regard to the period prior to CAT reporting.

⁵¹ The SEC approved exemptive relief permitting Options Market Maker quotes to be reported to the Central Repository by the relevant Options Exchange in lieu of requiring that such reporting be done by both the Options Exchange and the Options Market Maker, as required by Rule 613 of Regulation NMS. See Securities Exchange Act Rel. No. 77265 (Mar. 1, 2017, 81 FR 11856 (Mar. 7, 2016)). This exemption applies to Options Market Maker quotes for CAT reporting purposes only. Therefore, notwithstanding the reporting exemption provided for Options Market Maker quotes, Options Market Maker quotes will be included in the calculation of total message traffic for Options Market Makers for purposes of tiering under the CAT funding model both prior to CAT reporting and once CAT reporting commences.

⁵² The trade to quote ratios were calculated based on the inverse of the average of the monthly equity SIP and OPRA quote to trade ratios from June 2016–June 2017 that were compiled by the Financial Information Forum using data from NASDAQ and SIA.

(C) Execution Venue Tiering

Under Section 11.3(a) of the CAT NMS Plan, the Operating Committee is required to establish fixed fees payable by Execution Venues. Section 1.1 of the CAT NMS Plan defines an Execution Venue as “a Participant or an alternative trading system (“ATS”) (as defined in Rule 300 of Regulation ATS) that operates pursuant to Rule 301 of Regulation ATS (excluding any such ATS that does not execute orders).”⁵³

The Operating Committee determined that ATSs should be included within the definition of Execution Venue. The Operating Committee believes that it is appropriate to treat ATSs as Execution Venues under the proposed funding model since ATSs have business models that are similar to those of exchanges, and ATSs also compete with exchanges.

Given the differences between Execution Venues that trade NMS Stocks and/or OTC Equity Securities and Execution Venues that trade Listed Options, Section 11.3(a) addresses Execution Venues that trade NMS Stocks and/or OTC Equity Securities separately from Execution Venues that trade Listed Options. Equity and Options Execution Venues are treated separately for two reasons. First, the differing quoting behavior of Equity and Options Execution Venues makes comparison of activity between such Execution Venues difficult. Second, Execution Venue tiers are calculated based on market share of share volume, and it is therefore difficult to compare market share between asset classes (i.e., equity shares versus options contracts). Discussed below is how the funding model treats the two types of Execution Venues.

(I) NMS Stocks and OTC Equity Securities

Section 11.3(a)(i) of the CAT NMS Plan states that each Execution Venue that (i) executes transactions or, (ii) in the case of a national securities association, has trades reported by its members to its trade reporting facility or facilities for reporting transactions effected otherwise than on an exchange, in NMS Stocks or OTC Equity Securities will pay a fixed fee depending on the market share of that Execution Venue in NMS Stocks and OTC Equity Securities, with the Operating Committee establishing at least two and not more than five tiers of fixed fees, based on an Execution Venue’s NMS Stocks and OTC Equity Securities market share. For

⁵³ Although FINRA does not operate an execution venue, because it is a Participant, it is considered an “Execution Venue” under the Plan for purposes of determining fees.

these purposes, market share for Execution Venues that execute transactions will be calculated by share volume, and market share for a national securities association that has trades reported by its members to its trade reporting facility or facilities for reporting transactions effected otherwise than on an exchange in NMS Stocks or OTC Equity Securities will be calculated based on share volume of trades reported, provided, however, that the share volume reported to such national securities association by an Execution Venue shall not be included in the calculation of such national security association's market share.

In accordance with Section 11.3(a)(i) of the CAT NMS Plan, the Operating Committee approved a tiered fee structure for Equity Execution Venues and Option Execution Venues. In determining the Equity Execution Venue Tiers, the Operating Committee considered the funding principles set forth in Section 11.2 of the CAT NMS Plan, seeking to create funding tiers that take into account the relative impact on system resources of different Equity Execution Venues, and that establish comparable fees among the CAT Reporters with the most Reportable Events. Each Equity Execution Venue will be placed into one of four tiers of fixed fees, based on the Execution Venue's NMS Stocks and OTC Equity Securities market share. In choosing four tiers, the Operating Committee performed an analysis similar to that discussed above with regard to the non-Execution Venue Industry Members to determine the number of tiers for Equity Execution Venues. The Operating Committee determined to establish four tiers for Equity Execution Venues, rather than a larger number of tiers as established for non-Execution Venue Industry Members, because the four tiers were sufficient to distinguish between the smaller number of Equity Execution Venues based on market share. Furthermore, the selection of four tiers serves to help establish comparability among the largest CAT Reporters.

Each Equity Execution Venue will be ranked by market share and tiered by predefined Execution Venue percentages, (the "Equity Execution

Venue Percentages"). In determining the fixed percentage of Equity Execution Venues in each tier, the Operating Committee reviewed historical market share of share volume for Execution Venues. Equity Execution Venue market shares of share volume were sourced from market statistics made publicly-available by Bats Global Markets, Inc. ("Bats"). ATS market shares of share volume were sourced from market statistics made publicly-available by FINRA. FINRA trade reporting facility ("TRF") and ORF market share of share volume was sourced from market statistics made publicly available by FINRA. Based on data from FINRA and the *otcmarkets.com*, ATSS accounted for 39.12% of the share volume across the TRFs and ORFs during the recent tiering period. A 39.12/60.88 split was applied to the ATS and non-ATS breakdown of FINRA market share, with FINRA tiered based only on the non-ATS portion of its market share of share volume.

The Operating Committee determined to discount the market share of Execution Venue ATSS exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF in recognition of the different trading characteristics of the OTC Equity Securities market as compared to the market in NMS Stocks. Many OTC Equity Securities are priced at less than one dollar—and a significant number at less than one penny—per share and low-priced shares tend to trade in larger quantities. Accordingly, a disproportionately large number of shares are involved in transactions involving OTC Equity Securities versus NMS Stocks. Because the proposed fee tiers are based on market share calculated by share volume, Execution Venue ATSS exclusively trading OTC Equity Securities and FINRA would likely be subject to higher tiers than their operations may warrant. To address this potential concern, the Operating Committee determined to discount the market share of Execution Venue ATSS exclusively trading OTC Equity Securities and the market share of the FINRA ORF by multiplying such market share by the average shares per trade ratio between NMS Stocks and OTC Equity Securities in order to adjust

for the greater number of shares being traded in the OTC Equity Securities market. Based on available data for the second quarter of 2017, the average shares per trade ratio between NMS Stocks and OTC Equity Securities is 0.17%.⁵⁴ The average shares per trade ratio between NMS Stocks and OTC Equity Securities will be recalculated every three months when tiers are recalculated.

Based on this, the Operating Committee considered the distribution of Execution Venues, and grouped together Execution Venues with similar levels of market share. The percentage of costs recovered by each Equity Execution Venue tier will be determined by predefined percentage allocations (the "Equity Execution Venue Recovery Allocation"). In determining the fixed percentage allocation of costs to be recovered from each tier, the Operating Committee considered the impact of CAT Reporter market share activity on the CAT System as well as the distribution of total market volume across Equity Execution Venues while seeking to maintain comparable fees among the largest CAT Reporters. Accordingly, following the determination of the percentage of Execution Venues in each tier, the Operating Committee identified the percentage of total market volume for each tier based on the historical market share upon which Execution Venues had been initially ranked. Taking this into account along with the resulting percentage of total recovery, the percentage allocation of cost recovery for each tier were assigned, allocating higher percentages of recovery to the tier with a higher level of market share while avoiding any inappropriate burden on competition. Furthermore, by using percentages of Equity Execution Venues and cost recovery per tier, the Operating Committee sought to include elasticity within the funding model, allowing the funding model to respond to changes in either the total number of Equity Execution Venues or changes in market share.

Based on this analysis, the Operating Committee approved the following Equity Execution Venue Percentages and Recovery Allocations:

Equity Execution Venue tier	Percentage of Equity Execution Venues	Percentage of Execution Venue recovery	Percentage of total recovery
Tier 1	25.00	33.25	8.31

⁵⁴ The average shares per trade ratio for both NMS Stocks and OTC Equity Securities from the second quarter of 2017 was calculated using publicly

available market volume data from Bats and OTC Markets Group, and the totals were divided to

determine the average number of shares per trade between NMS Stocks and OTC Equity Securities.

Equity Execution Venue tier	Percentage of Equity Execution Venues	Percentage of Execution Venue recovery	Percentage of total recovery
Tier 2	42.00	25.73	6.43
Tier 3	23.00	8.00	2.00
Tier 4	10.00	0.02	0.01
Total	100	67	16.75

(II) Listed Options

Section 11.3(a)(ii) of the CAT NMS Plan states that each Execution Venue that executes transactions in Listed Options will pay a fixed fee depending on the Listed Options market share of that Execution Venue, with the Operating Committee establishing at least two and no more than five tiers of fixed fees, based on an Execution Venue's Listed Options market share. For these purposes, market share will be calculated by contract volume.

In accordance with Section 11.3(a)(ii) of the CAT NMS Plan, the Operating Committee approved a tiered fee structure for Options Execution Venues. In determining the tiers, the Operating Committee considered the funding principles set forth in Section 11.2 of the CAT NMS Plan, seeking to create funding tiers that take into account the relative impact on system resources of different Options Execution Venues, and that establish comparable fees among the CAT Reporters with the most Reportable Events. Each Options Execution Venue will be placed into one of two tiers of fixed fees, based on the Execution Venue's Listed Options market share. In choosing two tiers, the Operating Committee performed an analysis similar to that discussed above with regard to Industry Members (other than Execution Venue ATSS) to

determine the number of tiers for Options Execution Venues. The Operating Committee determined to establish two tiers for Options Execution Venues, rather than a larger number, because the two tiers were sufficient to distinguish between the smaller number of Options Execution Venues based on market share. Furthermore, due to the smaller number of Options Execution Venues, the incorporation of additional Options Execution Venue tiers would result in significantly higher fees for Tier 1 Options Execution Venues and reduce comparability between Execution Venues and Industry Members. Furthermore, the selection of two tiers served to establish comparable fees among the largest CAT Reporters.

Each Options Execution Venue will be ranked by market share and tiered by predefined Execution Venue percentages, (the "Options Execution Venue Percentages"). To determine the fixed percentage of Options Execution Venues in each tier, the Operating Committee analyzed the historical and publicly available market share of Options Execution Venues to group Options Execution Venues with similar market shares across the tiers. Options Execution Venue market share of share volume were sourced from market statistics made publicly-available by

Bats. The process for developing the Options Execution Venue Percentages was the same as discussed above with regard to Equity Execution Venues.

The percentage of costs to be recovered from each Options Execution Venue tier will be determined by predefined percentage allocations (the "Options Execution Venue Recovery Allocation"). In determining the fixed percentage allocation of cost recovery for each tier, the Operating Committee considered the impact of CAT Reporter market share activity on the CAT System as well as the distribution of total market volume across Options Execution Venues while seeking to maintain comparable fees among the largest CAT Reporters. Furthermore, by using percentages of Options Execution Venues and cost recovery per tier, the Operating Committee sought to include elasticity within the funding model, allowing the funding model to respond to changes in either the total number of Options Execution Venues or changes in market share. The process for developing the Options Execution Venue Recovery Allocation was the same as discussed above with regard to Equity Execution Venues.

Based on this analysis, the Operating Committee approved the following Options Execution Venue Percentages and Recovery Allocations:

Options Execution Venue tier	Percentage of Options Execution Venues	Percentage of Execution Venue recovery	Percentage of total recovery
Tier 1	75.00	28.25	7.06
Tier 2	25.00	4.75	1.19
Total	100	33	8.25

(III) Market Share/Tier Assignments

The Operating Committee determined that, prior to the start of CAT reporting, market share for Execution Venues would be sourced from publicly-available market data. Options and equity volumes for Participants will be sourced from market data made publicly available by Bats while Execution Venue ATS volumes will be sourced from market data made publicly available by FINRA and OTC Markets.

Set forth in the Appendix are two charts, one listing the current Equity Execution Venues, each with its rank and tier, and one listing the current Options Execution Venues, each with its rank and tier.

After the commencement of CAT reporting, market share for Execution Venues will be sourced from data reported to the CAT. Equity Execution Venue market share will be determined by calculating each Equity Execution

Venue's proportion of the total volume of NMS Stock and OTC Equity shares reported by all Equity Execution Venues during the relevant time period (with the discounting of market share of Execution Venue ATSS exclusively trading OTC Equity Securities, as described above). Similarly, market share for Options Execution Venues will be determined by calculating each Options Execution Venue's proportion of the total volume of Listed Options

contracts reported by all Options Execution Venues during the relevant time period.

The Operating Committee has determined to calculate fee tiers for Execution Venues every three months based on market share from the prior three months. Based on its analysis of historical data, the Operating Committee believes calculating tiers based on three months of data will provide the best balance between reflecting changes in activity by Execution Venues while still providing predictability in the tiering for Execution Venues.

(D) Allocation of Costs

In addition to the funding principles discussed above, including comparability of fees, Section 11.1(c) of the CAT NMS Plan also requires expenses to be fairly and reasonably shared among the Participants and Industry Members. Accordingly, in developing the proposed fee schedules pursuant to the funding model, the Operating Committee calculated how the CAT costs would be allocated between Industry Members and Execution Venues, and how the portion of CAT costs allocated to Execution Venues would be allocated between Equity Execution Venues and Options Execution Venues. These determinations are described below.

(I) Allocation Between Industry Members and Execution Venues

In determining the cost allocation between Industry Members (other than Execution Venue ATSS) and Execution Venues, the Operating Committee analyzed a range of possible splits for revenue recovery from such Industry Members and Execution Venues, including 80%/20%, 75%/25%, 70%/30% and 65%/35% allocations. Based on this analysis, the Operating Committee determined that 75 percent of total costs recovered would be allocated to Industry Members (other than Execution Venue ATSS) and 25 percent would be allocated to Execution Venues. The Operating Committee determined that this 75%/25% division maintained the greatest level of comparability across the funding model. For example, the cost allocation establishes fees for the largest Industry Members (*i.e.*, those Industry Members in Tier 1) that are comparable to the largest Equity Execution Venues and Options Execution Venues (*i.e.*, those Execution Venues in Tier 1).

Furthermore, the allocation of total CAT cost recovery recognizes the difference in the number of CAT Reporters that are Industry Members versus CAT Reporters that are Execution Venues. Specifically, the cost allocation takes into consideration that there are approximately 23 times more Industry Members expected to report to the CAT than Execution Venues (*e.g.*, an estimated 1,541 Industry Members versus 67 Execution Venues as of June 2017).

(II) Allocation Between Equity Execution Venues and Options Execution Venues

The Operating Committee also analyzed how the portion of CAT costs allocated to Execution Venues would be allocated between Equity Execution Venues and Options Execution Venues. In considering this allocation of costs, the Operating Committee analyzed a range of alternative splits for revenue recovered between Equity and Options Execution Venues, including a 70%/30%, 67%/33%, 65%/35%, 50%/50% and 25%/75% split. Based on this analysis, the Operating Committee determined to allocate 67 percent of Execution Venue costs recovered to Equity Execution Venues and 33 percent to Options Execution Venues. The Operating Committee determined that a 67%/33% allocation between Equity and Options Execution Venues maintained the greatest level of fee equitability and comparability based on the current number of Equity and Options Execution Venues. For example, the allocation establishes fees for the larger Equity Execution Venues that are comparable to the larger Options Execution Venues. Specifically, Tier 1 Equity Execution Venues would pay a quarterly fee of \$81,047 and Tier 1 Options Execution Venues would pay a quarterly fee of \$81,379. In addition to fee comparability between Equity Execution Venues and Options Execution Venues, the allocation also establishes equitability between larger (Tier 1) and smaller (Tier 2) Execution Venues based upon the level of market share. Furthermore, the allocation is intended to reflect the relative levels of current equity and options order events.

(E) Fee Levels

The Operating Committee determined to establish a CAT-specific fee to collectively recover the costs of building and operating the CAT. Accordingly,

under the funding model, the sum of the CAT Fees is designed to recover the total cost of the CAT. The Operating Committee has determined overall CAT costs to be comprised of Plan Processor costs and non-Plan Processor costs, which are estimated to be \$50,700,000 in total for the year beginning November 21, 2016.⁵⁵

The Plan Processor costs relate to costs incurred and to be incurred through November 21, 2017 by the Plan Processor and consist of the Plan Processor's current estimates of average yearly ongoing costs, including development costs, which total \$37,500,000. This amount is based upon the fees due to the Plan Processor pursuant to the Company's agreement with the Plan Processor.

The non-Plan Processor estimated costs incurred and to be incurred by the Company through November 21, 2017 consist of three categories of costs. The first category of such costs are third party support costs, which include legal fees, consulting fees and audit fees from November 21, 2016 until the date of filing as well as estimated third party support costs for the rest of the year. These amount to an estimated \$5,200,000. The second category of non-Plan Processor costs are estimated cyber-insurance costs for the year. Based on discussions with potential cyber-insurance providers, assuming \$2–5 million cyber-insurance premium on \$100 million coverage, the Company has estimated \$3,000,000 for the annual cost. The final cost figures will be determined following receipt of final underwriter quotes. The third category of non-Plan Processor costs is the CAT operational reserve, which is comprised of three months of ongoing Plan Processor costs (\$9,375,000), third party support costs (\$1,300,000) and cyber-insurance costs (\$750,000). The Operating Committee aims to accumulate the necessary funds to establish the three-month operating reserve for the Company through the CAT Fees charged to CAT Reporters for the year. On an ongoing basis, the Operating Committee will account for any potential need to replenish the operating reserve or other changes to total cost during its annual budgeting process. The following table summarizes the Plan Processor and non-Plan Processor cost components which comprise the total estimated CAT costs of \$50,700,000 for the covered period.

⁵⁵ It is anticipated that CAT-related costs incurred prior to November 21, 2016 will be addressed via a separate filing.

Cost category	Cost component	Amount
Plan Processor	Operational Costs	\$37,500,000
Non-Plan Processor	Third Party Support Costs	5,200,000
	Operational Reserve	⁵⁶ 5,000,000
	Cyber-insurance Costs	3,000,000
Estimated Total		50,700,000

Based on these estimated costs and the calculations for the funding model described above, the Operating Committee determined to impose the following fees:⁵⁷

For Industry Members (other than Execution Venue ATs):

Tier	Percentage of Industry Members	Quarterly CAT fee
1	0.900	81,483
2	2.150	59,055
3	2.800	40,899
4	7.750	25,566
5	8.300	7,428
6	18.800	1,968
7	59.300	105

For Execution Venues for NMS Stocks and OTC Equity Securities:

Tier	Percentage of Equity Execution Venues	Quarterly CAT fee
1	25.00	81,048
2	42.00	37,062
3	23.00	21,126
4	10.00	\$129

Tier	Percentage of Options Execution Venues	Quarterly CAT fee
1	75.00	81,381
2	25.00	37,629

For Execution Venues for Listed Options:

The Operating Committee has calculated the schedule of effective fees for Industry Members (other than Execution Venue ATs) and Execution Venues in the following manner. Note that the calculation of CAT Fees assumes 52 Equity Execution Venues, 15 Options Execution Venues and 1,541 Industry Members (other than Execution Venue ATs) as of June 2017.

CALCULATION OF ANNUAL TIER FEES FOR INDUSTRY MEMBERS ("IM")

Industry Member tier	Percentage of Industry Members	Percentage of Industry Member recovery	Percentage of total recovery
Tier 1	0.900	12.00	9.00
Tier 2	2.150	20.50	15.38
Tier 3	2.800	18.50	13.88
Tier 4	7.750	32.00	24.00
Tier 5	8.300	10.00	7.50
Tier 6	18.800	6.00	4.50
Tier 7	59.300	1.00	0.75
Total	100	100	75

Industry Member tier	Estimated number of Industry Members
Tier 1	14
Tier 2	33
Tier 3	43
Tier 4	119
Tier 5	128
Tier 6	290
Tier 7	914
Total	1,541

⁵⁶ This \$5,000,000 represents the gradual accumulation of the funds for a target operating reserve of \$11,425,000.

⁵⁷ Note that all monthly, quarterly and annual CAT Fees have been rounded to the nearest dollar.

Calculation 1.1 (Calculation of a Tier 1 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot.IMs]} \times 0.9\% \text{ [% of Tier 1 IMs]} = 14 \text{ [Estimated Tier 1 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot.Ann.CAT Costs]} \times 75\% \text{ [IM \% of Tot.Ann.CAT Costs]} \times 12\% \text{ [% of Tier 1 IM Recovery]}}{14 \text{ [Estimated Tier 1 IMs]}} \right) \div$$

$$12 \text{ [Months per year]} = \mathbf{\$27,161}$$

Calculation 1.2 (Calculation of a Tier 2 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot.IMs]} \times 2.15\% \text{ [% of Tier 2 IMs]} = 33 \text{ [Estimated Tier 2 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot.Ann.CAT Costs]} \times 75\% \text{ [IM \% of Tot.Ann.CAT Costs]} \times 20.5\% \text{ [% of Tier 2 IM Recovery]}}{33 \text{ [Estimated Tier 2 IMs]}} \right) \div$$

$$12 \text{ [Months per year]} = \mathbf{\$19,685}$$

Calculation 1.3 (Calculation of a Tier 3 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot.IMs]} \times 2.125\% \text{ [% of Tier 3 IMs]} = 43 \text{ [Estimated Tier 3 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot.Ann.CAT Costs]} \times 75\% \text{ [IM \% of Tot.Ann.CAT Costs]} \times 18.5\% \text{ [% of Tier 3 IM Recovery]}}{43 \text{ [Estimated Tier 3 IMs]}} \right) \div$$

$$12 \text{ [Months per year]} = \mathbf{\$13,633}$$

Calculation 1.4 (Calculation of a Tier 4 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot.IMs]} \times 7.75\% \text{ [% of Tier 4 IMs]} = 119 \text{ [Estimated Tier 4 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot.Ann.CAT Costs]} \times 75\% \text{ [IM \% of Tot.Ann.CAT Costs]} \times 32\% \text{ [% of Tier 4 IM Recovery]}}{119 \text{ [Estimated Tier 4 IMs]}} \right) \div$$

$$12 \text{ [Months per year]} = \mathbf{\$8522}$$

Calculation 1.5 (Calculation of a Tier 5 Industry Member Annual Fee)

$$1,541 \text{ [Estimated Tot.IMs]} \times 8.3\% \text{ [% of Tier 5 IMs]} = 128 \text{ [Estimated Tier 5 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot.Ann.CAT Costs]} \times 75\% \text{ [IM \% of Tot.Ann.CAT Costs]} \times 7.75\% \text{ [% of Tier 5 IM Recovery]}}{128 \text{ [Estimated Tier 5 IMs]}} \right) \div$$

$$12 \text{ [Months per year]} = \mathbf{\$2476}$$

Calculation 1.6 (Calculation of a Tier 6 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot.IMs]} \times 18.8\% \text{ [% of Tier 6 IMs]} = 290 \text{ [Estimated Tier 6 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot.Ann.CAT Costs]} \times 75\% \text{ [IM \% of Tot.Ann.CAT Costs]} \times 6\% \text{ [% of Tier 6 IM Recovery]}}{290 \text{ [Estimated Tier 6 IMs]}} \right) \div$$

$$12 \text{ [Months per year]} = \mathbf{\$656}$$

Calculation 1.7 (Calculation of a Tier 7 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot.IMs]} \times 59.3\% \text{ [% of Tier 7 IMs]} = 914 \text{ [Estimated Tier 7 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot.Ann.CAT Costs]} \times 75\% \text{ [IM \% of Tot.Ann.CAT Costs]} \times 1\% \text{ [% of Tier 7 IM Recovery]}}{914 \text{ [Estimated Tier 7 IMs]}} \right) \div$$

$$12 \text{ [Months per year]} = \mathbf{\$35}$$

CALCULATION OF ANNUAL TIER FEES FOR EQUITY EXECUTION VENUES (“EV”)

Equity Execution Venue tier	Percentage of Equity Execution Venues	Percentage of Execution Venue Recovery	Percentage of total recovery
Tier 1	25.00	33.25	8.31
Tier 2	42.00	25.73	6.43
Tier 3	23.00	8.00	2.00
Tier 4	10.00	49.00	0.01
Total	100	67	16.75

Equity Execution Venue tier	Estimated number of Equity Execution Venues
Tier 1	13
Tier 2	22
Tier 3	12
Tier 4	5
Total	52

Calculation 2.1 (Calculation of a Tier 1 Equity Execution Venue Monthly Fee)

$$52 \text{ [Estimated Tot. Equity EVs]} \times 25\% \text{ [% of Tier 1 Equity EVs]} = 13 \text{ [Estimated Tier 1 Equity EVs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann.CAT Costs]} \times 33.25\% \text{ [EV \% of Tot.Ann.CAT Costs]} \times 26\% \text{ [% of Tier 1 Equity EV Recovery]}}{13 \text{ [Estimated Tier 1 Equity EVs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$27,016}$$

Calculation 2.2 (Calculation of a Tier 2 Equity Execution Venue Monthly Fee)

$$52 \text{ [Estimated Tot. Equity EVs]} \times 42\% \text{ [% of Tier 2 Equity EVs]} = 22 \text{ [Estimated Tier 2 Equity EVs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann.CAT Costs]} \times 25\% \text{ [EV \% of Tot.Ann.CAT Costs]} \times 25.73\% \text{ [% of Tier 2 Equity EV Recovery]}}{22 \text{ [Estimated Tier 2 Equity EVs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$12,353}$$

Calculation 2.3 (Calculation of a Tier 3 Equity Execution Venue Monthly Fee)

$$52 \text{ [Estimated Tot. Equity EVs]} \times 23\% \text{ [% of Tier 2 Equity EVs]} = 12 \text{ [Estimated Tier 2 Equity EVs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann.CAT Costs]} \times 25\% \text{ [EV \% of Tot.Ann.CAT Costs]} \times 8\% \text{ [% of Tier 2 Equity EV Recovery]}}{12 \text{ [Estimated Tier 2 Equity EVs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$7,042}$$

Calculation 2.4 (Calculation of a Tier 4 Equity Execution Venue Monthly Fee)

$$52 \text{ [Estimated Tot. Equity EVs]} \times 10\% \text{ [% of Tier 2 Equity EVs]} = 5 \text{ [Estimated Tier 2 Equity EVs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann.CAT Costs]} \times 25\% \text{ [EV \% of Tot.Ann.CAT Costs]} \times 0.02\% \text{ [% of Tier 2 Equity EV Recovery]}}{5 \text{ [Estimated Tier 2 Equity EVs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$42}$$

CALCULATION OF ANNUAL TIER FEES FOR OPTIONS EXECUTION VENUES (“EV”)

Options Execution Venue tier	Percentage of Options Execution Venues	Percentage of Execution Venue recovery	Percentage of total recovery
Tier 1	75.00	28.25	7.06
Tier 2	25.00	4.75	1.19
Total	100	33	8.25

Options Execution Venue tier	Estimated Number of Options Execution Venues
Tier 1	11
Tier 2	4

Options Execution Venue tier	Estimated Number of Options Execution Venues
Total	15

Calculation 3.1 (Calculation of a Tier 1 Options Execution Venue Monthly Fee)

$$15 \text{ [Estimated Tot. Options EVs]} \times 75\% \text{ [% of Tier 1 Options EVs]} = 11 \text{ [Estimated Tier 1 Options EVs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 25\% \text{ [EV \% of Tot. Ann. CAT Costs]} \times 28.25\% \text{ [% of Tier 1 Options EV Recovery]}}{11 \text{ [Estimated Tier 1 Options EVs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$27,127}$$

Calculation 3.2 (Calculation of a Tier 2 Options Execution Venue Annual Fee)

$$15 \text{ [Estimated Tot. Options EVs]} \times 25\% \text{ [% of Tier 2 Options EVs]} = 4 \text{ [Estimated Tier 2 Options EVs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 25\% \text{ [EV \% of Tot. Ann. CAT Costs]} \times 4.75\% \text{ [% of Tier 2 Options EV Recovery]}}{4 \text{ [Estimated Tier 2 Options EVs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$12,543}$$

TRACEABILITY OF TOTAL CAT FEES

Type	Industry Member tier	Estimated number of members	CAT fees paid annually	Total recovery
Industry Members	Tier 1	14	325,932	4,563,048
	Tier 2	33	236,220	7,795,260
	Tier 3	43	163,596	7,034,628
	Tier 4	119	102,264	12,169,416
	Tier 5	128	29,712	3,803,136
	Tier 6	290	7,872	2,282,880
	Tier 7	914	420	383,880
Total		1,541		38,032,248
Equity Execution Venues	Tier 1	13	324,192	4,214,496
	Tier 2	22	148,248	3,261,456
	Tier 3	12	84,504	1,014,048
	Tier 4	5	516	2,580
Total		52		8,492,580
Options Execution Venues	Tier 1	11	325,524	3,580,764
	Tier 2	4	150,516	602,064
Total		15		4,182,828
Total				50,700,000
⁵⁸ Excess				7,656

(F) Comparability of Fees

The funding principles require a funding model in which the fees charged to the CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as

applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether Execution Venue and/or Industry

⁵⁸The amount in excess of the total CAT costs will contribute to the gradual accumulation of the target operating reserve of \$11.425 million.

Members). Accordingly, in creating the model, the Operating Committee sought to establish comparable fees for the top tier of Industry Members (other than Execution Venue ATSS), Equity Execution Venues and Options Execution Venues. Specifically, each Tier 1 CAT Reporter would be required to pay a quarterly fee of approximately \$81,000.

(G) Billing Onset

Under Section 11.1(c) of the CAT NMS Plan, to fund the development and implementation of the CAT, the Company shall time the imposition and collection of all fees on Participants and Industry Members in a manner reasonably related to the timing when the Company expects to incur such development and implementation costs. The Company is currently incurring such development and implementation costs and will continue to do so prior to the commencement of CAT reporting and thereafter. In accordance with the CAT NMS Plan, all CAT Reporters, including both Industry Members and Execution Venues (including Participants), will be invoiced as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Participants and the operative date of the Plan amendment adopting CAT Fees for Participants.

(H) Changes to Fee Levels and Tiers

Section 11.3(d) of the CAT NMS Plan states that “[t]he Operating Committee shall review such fee schedule on at least an annual basis and shall make any changes to such fee schedule that it deems appropriate. The Operating Committee is authorized to review such fee schedule on a more regular basis, but shall not make any changes on more than a semi-annual basis unless, pursuant to a Supermajority Vote, the Operating Committee concludes that such change is necessary for the

adequate funding of the Company.” With such reviews, the Operating Committee will review the distribution of Industry Members and Execution Venues across tiers, and make any updates to the percentage of CAT Reporters allocated to each tier as may be necessary. In addition, the reviews will evaluate the estimated ongoing CAT costs and the level of the operating reserve. To the extent that the total CAT costs decrease, the fees would be adjusted downward, and to the extent that the total CAT costs increase, the fees would be adjusted upward.⁵⁹ Furthermore, any surplus of the Company’s revenues over its expenses is to be included within the operational reserve to offset future fees. The limitations on more frequent changes to the fee, however, are intended to provide budgeting certainty for the CAT Reporters and the Company.⁶⁰ To the extent that the Operating Committee approves changes to the number of tiers in the funding model or the fees assigned to each tier, then the Operating Committee will file such changes with the SEC pursuant to Rule 608 of the Exchange Act, and the Participants will file such changes with the SEC pursuant to Section 19(b) of the Exchange Act and Rule 19b-4 thereunder, and any such changes will become effective in accordance with the requirements of those provisions.

(I) Initial and Periodic Tier Reassignments

The Operating Committee has determined to calculate fee tiers every three months based on market share or message traffic, as applicable, from the prior three months. For the initial tier assignments, the Company will calculate the relevant tier for each CAT Reporter using the three months of data prior to the commencement date. As with the initial tier assignment, for the tri-monthly reassignments, the Company will calculate the relevant tier

using the three months of data prior to the relevant tri-monthly date. Any movement of CAT Reporters between tiers will not change the criteria for each tier or the fee amount corresponding to each tier.

In performing the tri-monthly reassignments, the assignment of CAT Reporters in each assigned tier is relative. Therefore, a CAT Reporter’s assigned tier will depend, not only on its own message traffic or market share, but also on the message traffic/market share across all CAT Reporters. For example, the percentage of Industry Members (other than Execution Venue ATSS) in each tier is relative such that such Industry Member’s assigned tier will depend on message traffic generated across all CAT Reporters as well as the total number of CAT Reporters. The Operating Committee will inform CAT Reporters of their assigned tier every three months following the periodic tiering process, as the funding model will compare an individual CAT Reporter’s activity to that of other CAT Reporters in the marketplace.

The following demonstrates a tier reassignment. In accordance with the funding model, the top 75% of Options Execution Venues in market share are categorized as Tier 1 while the bottom 25% of Options Execution Venues in market share are categorized as Tier 2. In the sample scenario below, Options Execution Venue L is initially categorized as a Tier 2 Options Execution Venue in Period A due to its market share. When market share is recalculated for Period B, the market share of Execution Venue L increases, and it is therefore subsequently reranked and reassigned to Tier 1 in Period B. Correspondingly, Options Execution Venue K, initially a Tier 1 Options Execution Venue in Period A, is reassigned to Tier 2 in Period B due to decreases in its market share.

Period A			Period B		
Options Execution Venue	Market share rank	Tier	Options Execution Venue	Market share rank	Tier
Options Execution Venue A	1	1	Options Execution Venue A	1	1
Options Execution Venue B	2	1	Options Execution Venue B	2	1
Options Execution Venue C	3	1	Options Execution Venue C	3	1
Options Execution Venue D	4	1	Options Execution Venue D	4	1
Options Execution Venue E	5	1	Options Execution Venue E	5	1
Options Execution Venue F	6	1	Options Execution Venue F	6	1
Options Execution Venue G	7	1	Options Execution Venue I	7	1

⁵⁹The CAT Fees are designed to recover the costs associated with the CAT. Accordingly, CAT Fees would not be affected by increases or decreases in other non-CAT expenses incurred by the

Participants, such as any changes in costs related to the retirement of existing regulatory systems, such as OATS.

⁶⁰Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85006.

Period A			Period B		
Options Execution Venue	Market share rank	Tier	Options Execution Venue	Market share rank	Tier
Options Execution Venue H	8	1	Options Execution Venue H	8	1
Options Execution Venue I	9	1	Options Execution Venue G	9	1
Options Execution Venue J	10	1	Options Execution Venue J	10	1
Options Execution Venue K	11	1	Options Execution Venue L	11	1
Options Execution Venue L	12	2	Options Execution Venue K	12	2
Options Execution Venue M	13	2	Options Execution Venue N	13	2
Options Execution Venue N	14	2	Options Execution Venue M	14	2
Options Execution Venue O	15	2	Options Execution Venue O	15	2

For each periodic tier reassignment, the Operating Committee will review the new tier assignments, particularly those assignments for CAT Reporters that shift from the lowest tier to a higher tier. This review is intended to evaluate whether potential changes to the market or CAT Reporters (e.g., dissolution of a large CAT Reporter) adversely affect the tier reassignments.

(J) Sunset Provision

The Operating Committee developed the proposed funding model by analyzing currently available historical data. Such historical data, however, is not as comprehensive as data that will be submitted to the CAT. Accordingly, the Operating Committee believes that it will be appropriate to revisit the funding model once CAT Reporters have actual experience with the funding model. Accordingly, the Operating Committee determined to include an automatic sunset provision for the proposed fees. Specifically, the Operating Committee determined that the CAT Fees should automatically expire two years after the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. The Operating Committee intends to monitor the operation of the funding model during this two year period and to evaluate its effectiveness during that period. Such a process will inform the Operating Committee’s approach to funding the CAT after the two year period.

(3) Proposed CAT Fee Schedule

The Exchange proposes the Consolidated Audit Trail Funding Fees to impose the CAT Fees determined by the Operating Committee on the Exchange’s members. The proposed fee schedule has four sections, covering definitions, the fee schedule for CAT Fees, the timing and manner of payments, and the automatic sunset of the CAT Fees. Each of these sections is discussed in detail below.

(A) Definitions

Paragraph (a) of the proposed fee schedule sets forth the definitions for the proposed fee schedule. Paragraph (a)(1) states that, for purposes of the Consolidated Audit Trail Funding Fees, the terms “CAT”, “CAT NMS Plan,” “Industry Member,” “NMS Stock,” “OTC Equity Security”, “Options Market Maker”, and “Participant” are defined as set forth in Rule 1701 (Consolidated Audit Trail Compliance Rule—Definitions).⁶¹

The proposed fee schedule imposes different fees on Equity ATSs and Industry Members that are not Equity ATSs. Accordingly, the proposed fee schedule defines the term “Equity ATS.” First, paragraph (a)(2) defines an “ATS” to mean an alternative trading system as defined in Rule 300(a) of Regulation ATS under the Securities Exchange Act of 1934, as amended, that operates pursuant to Rule 301 of Regulation ATS. This is the same definition of an ATS as set forth in Section 1.1 of the CAT NMS Plan in the definition of an “Execution Venue.” Then, paragraph (a)(4) defines an “Equity ATS” as an ATS that executes transactions in NMS Stocks and/or OTC Equity Securities.

Paragraph (a)(3) of the proposed fee schedule defines the term “CAT Fee” to mean the Consolidated Audit Trail Funding Fee(s) to be paid by Industry Members as set forth in paragraph (b) in the proposed fee schedule.

⁶¹ The rules contained in Miami International Securities Exchange, LLC Rule Book Chapter XVII, as such rules may be in effect from time to time (the “Chapter XVII Rules”), have been incorporated by reference into MIAx PEARL Chapter XVII, and are thus MIAx PEARL Rules and thereby applicable to MIAx PEARL members. MIAx PEARL members shall comply with the Chapter XVII Rules as though such rules were fully-set forth in the MIAx PEARL Rule Book. All defined terms, including any variations thereof, contained in Chapter XVII Rules shall be read to refer to the MIAx PEARL related meaning of such term. See Securities Exchange Act Release No. 80256 (March 15, 2017), 82 FR 14,526 (March 21, 2017) (SR-PEARL-2017-004) and Securities Exchange Act Release No. 80338 (March 29, 2017), 82 FR 16,464 (April 4, 2017).

Finally, Paragraph (a)(6) defines an “Execution Venue” as a Participant or an ATS (excluding any such ATS that does not execute orders). This definition is the same substantive definition as set forth in Section 1.1 of the CAT NMS Plan. Paragraph (a)(5) defines an “Equity Execution Venue” as an Execution Venue that trades NMS Stocks and/or OTC Equity Securities.

(B) Fee Schedule

The Exchange proposes to impose the CAT Fees applicable to its Industry Members through paragraph (b) of the proposed fee schedule. Paragraph (b)(1) of the proposed fee schedule sets forth the CAT Fees applicable to Industry Members other than Equity ATSs. Specifically, paragraph (b)(1) states that the Company will assign each Industry Member (other than an Equity ATS) to a fee tier once every quarter, where such tier assignment is calculated by ranking each Industry Member based on its total message traffic (with discounts for equity market maker quotes and Options Market Maker quotes based on the trade to quote ratio for equities and options, respectively) for the three months prior to the quarterly tier calculation day and assigning each Industry Member to a tier based on that ranking and predefined Industry Member percentages. The Industry Members with the highest total quarterly message traffic will be ranked in Tier 1, and the Industry Members with lowest quarterly message traffic will be ranked in Tier 7. Each quarter, each Industry Member (other than an Equity ATS) shall pay the following CAT Fee corresponding to the tier assigned by the Company for such Industry Member for that quarter:

Tier	Percentage of Industry Members	Quarterly CAT fee
1	0.900	\$81,483
2	2.150	59,055
3	2.800	40,899
4	7.750	25,566
5	8.300	7,428

Tier	Percentage of Industry Members	Quarterly CAT fee
6	18.800	1,968
7	59.300	105

Paragraph (b)(2) of the proposed fee schedule sets forth the CAT Fees applicable to Equity ATSS.⁶² These are the same fees that Participants that trade NMS Stocks and/or OTC Equity Securities will pay. Specifically, paragraph (b)(2) states that the Company will assign each Equity ATS to a fee tier once every quarter, where such tier assignment is calculated by ranking each Equity Execution Venue based on its total market share of NMS Stocks and OTC Equity Securities (with a discount for Equity ATSS exclusively trading OTC Equity Securities based on the average shares per trade ratio between NMS Stocks and OTC Equity Securities) for the three months prior to the quarterly tier calculation day and assigning each Equity ATS to a tier based on that ranking and predefined Equity Execution Venue percentages. The Equity ATSS with the higher total quarterly market share will be ranked in Tier 1, and the Equity ATSS with the lowest quarterly market share will be ranked in Tier 4. Specifically, paragraph (b)(2) states that, each quarter, each Equity ATS shall pay the following CAT Fee corresponding to the tier assigned by the Company for such Equity ATS for that quarter:

Tier	Percentage of Equity Execution Venues	Quarterly CAT fee
1	25.00	\$81,048
2	42.00	37,062
3	23.00	21,126
4	10.00	129

(C) Timing and Manner of Payment

Section 11.4 of the CAT NMS Plan states that the Operating Committee shall establish a system for the collection of fees authorized under the CAT NMS Plan. The Operating Committee may include such collection responsibility as a function of the Plan Processor or another administrator. To implement the payment process to be adopted by the Operating Committee, paragraph (c)(1) of the proposed fee schedule states that the Company will

⁶² Note that no fee schedule is provided for Execution Venue ATSS that execute transactions in Listed Options, as no such Execution Venue ATSS currently exist due to trading restrictions related to Listed Options.

provide each Industry Member with one invoice each quarter for its CAT Fees as determined pursuant to paragraph (b) of the proposed fee schedule, regardless of whether the Industry Member is a member of multiple self-regulatory organizations. Paragraph (c)(1) further states that each Industry Member will pay its CAT Fees to the Company via the centralized system for the collection of CAT Fees established by the Company in the manner prescribed by the Company. The Exchange will provide Industry Members with details regarding the manner of payment of CAT Fees by Regulatory Circular.

All CAT fees will be billed and collected centrally through the Company via the Plan Processor. Although each Participant will adopt its own fee schedule regarding CAT Fees, no CAT Fees or portion thereof will be collected by the individual Participants. Each Industry Member will receive from the Company one invoice for its applicable CAT fees, not separate invoices from each Participant of which it is a member. The Industry Members will pay the CAT Fees to the Company via the centralized system for the collection of CAT fees established by the Company.⁶³

Section 11.4 of the CAT NMS Plan also states that Participants shall require each Industry Member to pay all applicable authorized CAT Fees within thirty days after receipt of an invoice or other notice indicating payment is due (unless a longer payment period is otherwise indicated). Section 11.4 further states that, if an Industry Member fails to pay any such fee when due, such Industry Member shall pay interest on the outstanding balance from such due date until such fee is paid at a per annum rate equal to the lesser of: (i) The Prime Rate plus 300 basis points; or (ii) the maximum rate permitted by applicable law. Therefore, in accordance with Section 11.4 of the CAT NMS Plan, the Exchange proposes to adopt paragraph (c)(2) of the proposed fee schedule. Paragraph (c)(2) of the proposed fee schedule states that each Industry Member shall pay CAT Fees within thirty days after receipt of an invoice or other notice indicating payment is due (unless a longer payment period is otherwise indicated). If an Industry Member fails to pay any such fee when due, such Industry Member shall pay interest on the outstanding balance from such due date until such fee is paid at a per annum rate equal to the lesser of: (i) The Prime Rate plus 300 basis points; or (ii) the

⁶³ Section 11.4 of the CAT NMS Plan.

maximum rate permitted by applicable law.

(D) Sunset Provision

The Operating Committee has determined to require that the CAT Fees automatically sunset two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. Accordingly, the Exchange proposes paragraph (d) of the fee schedule, which states that “[t]hese Consolidated Audit Trailing Funding Fees will automatically expire two years after the operative date of the amendment of the CAT NMS Plan that adopts CAT fees for the Participants.”

(4) Changes to Prior CAT Fee Plan Amendment

The proposed funding model set forth in this Amendment is a revised version of the Original Proposal. The Commission received a number of comment letters in response to the Original Proposal.⁶⁴ The SEC suspended the Original Proposal and instituted proceedings to determine whether to approve or disapprove it.⁶⁵ Pursuant to those proceedings, additional comment letters were submitted regarding the proposed funding model.⁶⁶ In developing this Amendment, the Operating Committee carefully considered these comments and made a number of changes to the Original Proposal to address these comments where appropriate.

This Amendment makes the following changes to the Original Proposal: (1) Adds two additional CAT Fee tiers for Equity Execution Venues; (2) discounts the market share of Execution Venue ATSS exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF by the average shares per trade ratio between NMS Stocks and OTC Equity Securities (calculated as 0.17% based on available data from the second quarter of 2017) when calculating the market share of Execution Venue ATSS exclusively trading OTC Equity Securities and FINRA; (3) discounts the Options Market Maker quotes by the trade to quote ratio for options (calculated as 0.01% based on available data for June 2016 through June 2017) when calculating message traffic for Options Market Makers; (4) discounts equity market maker quotes by the trade to quote ratio for equities (calculated as

⁶⁴ For a description of the comments submitted in response to the Original Proposal, see Suspension Order.

⁶⁵ Suspension Order.

⁶⁶ See MFA Letter; SIFMA Letter; FIA Principal Traders Group Letter; Belvedere Letter; Sidley Letter; Group One Letter; and Virtu Financial Letter.

5.43% based on available data for June 2016 through June 2017) when calculating message traffic for equity market makers; (5) decreases the number of tiers for Industry Members (other than the Execution Venue ATs) from nine to seven; (6) changes the allocation of CAT costs between Equity Execution Venues and Options Execution Venues from 75%/25% to 67%/33%; (7) adjusts tier percentages and recovery allocations for Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATs); (8) focuses the comparability of CAT Fees on the individual entity level, rather than primarily on the comparability of affiliated entities; (9) commences invoicing of CAT Reporters as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Participants and the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants; and (10) requires the proposed fees to automatically expire two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for the Participants.

(A) Equity Execution Venues

(i) Small Equity Execution Venues

In the Original Proposal, the Operating Committee proposed to establish two fee tiers for Equity Execution Venues. The Commission and commenters raised the concern that, by establishing only two tiers, smaller Equity Execution Venues (*e.g.*, those Equity ATs representing less than 1% of NMS market share) would be placed in the same fee tier as larger Equity Execution Venues, thereby imposing an undue or inappropriate burden on competition.⁶⁷ To address this concern, the Operating Committee proposes to add two additional tiers for Equity Execution Venues, a third tier for smaller Equity Execution Venues and a fourth tier for the smallest Equity Execution Venues.

Specifically, the Original Proposal had two tiers of Equity Execution Venues. Tier 1 required the largest Equity Execution Venues to pay a quarterly fee of \$63,375. Based on available data, these largest Equity Execution Venues were those that had equity market share of share volume greater than or equal to 1%.⁶⁸ Tier 2

required the remaining smaller Equity Execution Venues to pay a quarterly fee of \$38,820.

To address concerns about the potential for the \$38,820 quarterly fee to impose an undue burden on smaller Equity Execution Venues, the Operating Committee determined to move to a four tier structure for Equity Execution Venues. Tier 1 would continue to include the largest Equity Execution Venues by share volume (that is, based on currently available data, those with market share of equity share volume greater than or equal to one percent), and these Equity Execution Venues would be required to pay a quarterly fee of \$81,048. The Operating Committee determined to divide the original Tier 2 into three tiers. The new Tier 2 Equity Execution Venues, which would include the next largest Equity Execution Venues by equity share volume, would be required to pay a quarterly fee of \$37,062. The new Tier 3 Equity Execution Venues would be required to pay a quarterly fee of \$21,126. The new Tier 4 Equity Execution Venues, which would include the smallest Equity Execution Venues by share volume, would be required to pay a quarterly fee of \$129.

In developing the proposed four tier structure, the Operating Committee considered keeping the existing two tiers, as well as shifting to three, four or five Equity Execution Venue tiers (the maximum number of tiers permitted under the Plan), to address the concerns regarding small Equity Execution Venues. For each of the two, three, four and five tier alternatives, the Operating Committee considered the assignment of various percentages of Equity Execution Venues to each tier as well as various percentages of Equity Execution Venue recovery allocations for each alternative. As discussed below in more detail, each of these options was considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined that the four tier alternative addressed the spectrum of different Equity Execution Venues. The Operating Committee determined that neither a two tier structure nor a three tier structure sufficiently accounted for the range of market shares of smaller

by market share thresholds, but rather by fixed percentages of Equity Execution Venues across tiers to account for fluctuating levels of market share across time. Actual market share in any tier will vary based on the actual market activity in a given measurement period, as well as the number of Equity Execution Venues included in the measurement period.

Equity Execution Venues. The Operating Committee also determined that, given the limited number of Equity Execution Venues, that a fifth tier was unnecessary to address the range of market shares of the Equity Execution Venues.

By increasing the number of tiers for Equity Execution Venues and reducing the proposed CAT Fees for the smaller Equity Execution Venues, the Operating Committee believes that the proposed fees for Equity Execution Venues would not impose an undue or inappropriate burden on competition under Section 6 or Section 15A of the Exchange Act. Moreover, the Operating Committee believes that the proposed fees appropriately take into account the distinctions in the securities trading operations of different Equity Execution Venues, as required under the funding principles of the CAT NMS Plan.⁶⁹ The larger number of tiers more closely tracks the variety of sizes of equity share volume of Equity Execution Venues. In addition, the reduction in the fees for the smaller Equity Execution Venues recognizes the potential burden of larger fees on smaller entities. In particular, the very small quarterly fee of \$129 for Tier 4 Equity Execution Venues reflects the fact that certain Equity Execution Venues have a very small share volume due to their typically more focused business models.

Accordingly, with this Amendment, the Exchange proposes to amend paragraph (b)(2) of the proposed fee schedule to add the two additional tiers for Equity Execution Venues, to establish the percentages and fees for Tiers 3 and 4 as described, and to revise the percentages and fees for Tiers 1 and 2 as described.

(ii) Execution Venues for OTC Equity Securities

In the Original Proposal, the Operating Committee proposed to group Execution Venues for OTC Equity Securities and Execution Venues for NMS Stocks in the same tier structure. The Commission and commenters raised concerns as to whether this determination to place Execution Venues for OTC Equity Securities in the same tier structure as Execution Venues for NMS Stocks would result in an undue or inappropriate burden on competition, recognizing that the application of share volume may lead to different outcomes as applied to OTC Equity Securities and NMS Stocks.⁷⁰ To address this concern, the Operating Committee proposes to discount the

⁶⁷ See Suspension Order at 31664; SIFMA Letter at 3.

⁶⁸ Note that while these equity market share thresholds were referenced as data points to help differentiate between Equity Execution Venue tiers, the proposed funding model is directly driven not

⁶⁹ Section 11.2(b) of the CAT NMS Plan.

⁷⁰ See Suspension Order at 31664–5.

market share of Execution Venue ATSS exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF by the average shares per trade ratio between NMS Stocks and OTC Equity Securities (0.17% for the second quarter of 2017) in order to adjust for the greater number of shares being traded in the OTC Equity Securities market, which is generally a function of a lower per share price for OTC Equity Securities when compared to NMS Stocks.

As commenters noted, many OTC Equity Securities are priced at less than one dollar—and a significant number at less than one penny—and low-priced shares tend to trade in larger quantities. Accordingly, a disproportionately large number of shares are involved in transactions involving OTC Equity Securities versus NMS Stocks, which has the effect of overstating an Execution Venue's true market share when the Execution Venue is involved in the trading of OTC Equity Securities. Because the proposed fee tiers are based on market share calculated by share volume, Execution Venue ATSS trading OTC Equity Securities and FINRA may be subject to higher tiers than their operations may warrant.⁷¹ The Operating Committee proposes to address this concern in two ways. First, the Operating Committee proposes to increase the number of Equity Execution Venue tiers, as discussed above. Second, the Operating Committee determined to discount the market share of Execution Venue ATSS exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF when calculating their tier placement. Because the disparity in share volume between Execution Venues trading in OTC Equity Securities and NMS Stocks is based on the different number of shares per trade for OTC Equity Securities and NMS Stocks, the Operating Committee believes that discounting the share volume of such Execution Venue ATSS as well as the market share of the FINRA ORF would address the difference in shares per trade for OTC Equity Securities and NMS Stocks. Specifically, the Operating Committee proposes to impose a discount based on the objective measure of the average shares per trade ratio between NMS Stocks and OTC Equity Securities. Based on available data from the second quarter of 2017, the average shares per trade ratio between NMS Stocks and OTC Equity Securities is 0.17%.

The practical effect of applying such a discount for trading in OTC Equity Securities is to shift Execution Venue

ATSS exclusively trading OTC Equity Securities to tiers for smaller Execution Venues and with lower fees. For example, under the Original Proposal, one Execution Venue ATSS exclusively trading OTC Equity Securities was placed in the first CAT Fee tier, which had a quarterly fee of \$63,375. With the imposition of the proposed tier changes and the discount, this ATSS would be ranked in Tier 3 and would owe a quarterly fee of \$21,126.

In developing the proposed discount for Equity Execution Venue ATSS exclusively trading OTC Equity Securities and FINRA, the Operating Committee evaluated different alternatives to address the concerns related to OTC Equity Securities, including creating a separate tier structure for Execution Venues trading OTC Equity Securities (like the separate tier for Options Execution Venues) as well as the proposed discounting method for Execution Venue ATSS exclusively trading OTC Equity Securities and FINRA. For these alternatives, the Operating Committee considered how each alternative would affect the recovery allocations. In addition, each of these options was considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee did not adopt a separate tier structure for Equity Execution Venues trading OTC Equity Securities as they determined that the proposed discount approach appropriately addresses the concern. The Operating Committee determined to adopt the proposed discount because it directly relates to the concern regarding the trading patterns and operations in the OTC Equity Securities markets, and is an objective discounting method.

By increasing the number of tiers for Equity Execution Venues and imposing a discount on the market share of share volume calculation for trading in OTC Equity Securities, the Operating Committee believes that the proposed fees for Equity Execution Venues would not impose an undue or inappropriate burden on competition under Section 6 or Section 15A of the Exchange Act. Moreover, the Operating Committee believes that the proposed fees appropriately take into account the distinctions in the securities trading operations of different Equity Execution Venues, as required under the funding principles of the CAT NMS Plan.⁷² As discussed above, the larger number of tiers more closely tracks the variety of

sizes of equity share volume of Equity Execution Venues. In addition, the proposed discount recognizes the different types of trading operations at Equity Execution Venues trading OTC Equity Securities versus those trading NMS Stocks, thereby more closely matching the relative revenue generation by Equity Execution Venues trading OTC Equity Securities to their CAT Fees.

Accordingly, with this Amendment, the Exchange proposes to amend paragraph (b)(2) of the proposed fee schedule to indicate that the market share for Equity ATSS exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF would be discounted. In addition, as discussed above, to address concerns related to smaller ATSS, including those that exclusively trade OTC Equity Securities, the Exchange proposes to amend paragraph (b)(2) of the proposed fee schedule to add two additional tiers for Equity Execution Venues, to establish the percentages and fees for Tiers 3 and 4 as described, and to revise the percentages and fees for Tiers 1 and 2 as described.

(B) Market Makers

In the Original Proposal, the Operating Committee proposed to include both Options Market Maker quotes and equities market maker quotes in the calculation of total message traffic for such market makers for purposes of tiering for Industry Members (other than Execution Venue ATSS). The Commission and commenters raised questions as to whether the proposed treatment of Options Market Maker quotes may result in an undue or inappropriate burden on competition or may lead to a reduction in market quality.⁷³ To address this concern, the Operating Committee determined to discount the Options Market Maker quotes by the trade to quote ratio for options when calculating message traffic for Options Market Makers. Similarly, to avoid disincentives to quoting behavior on the equities side as well, the Operating Committee determined to discount equity market maker quotes by the trade to quote ratio for equities when calculating message traffic for equities market makers.

In the Original Proposal, market maker quotes were treated the same as other message traffic for purposes of tiering for Industry Members (other than

⁷¹ Suspension Order at 31664–5.

⁷² Section 11.2(b) of the CAT NMS Plan.

⁷³ See Suspension Order at 31663–4; SIFMA Letter at 4–6; FIA Principal Traders Group Letter at 3; Sidley Letter at 2–6; Group One Letter at 2–6; and Belvedere Letter at 2.

Execution Venue ATSS). Commenters noted, however, that charging Industry Members on the basis of message traffic will impact market makers disproportionately because of their continuous quoting obligations. Moreover, in the context of options market makers, message traffic would include bids and offers for every listed options strikes and series, which are not an issue for equities.⁷⁴ The Operating Committee proposes to address this concern in two ways. First, the Operating Committee proposes to discount Options Market Maker quotes when calculating the Options Market Makers' tier placement. Specifically, the Operating Committee proposes to impose a discount based on the objective measure of the trade to quote ratio for options. Based on available data from June 2016 through June 2017, the trade to quote ratio for options is 0.01%. Second, the Operating Committee proposes to discount equities market maker quotes when calculating the equities market makers' tier placement. Specifically, the Operating Committee proposes to impose a discount based on the objective measure of the trade to quote ratio for equities. Based on available data for June 2016 through June 2017, this trade to quote ratio for equities is 5.43%.

The practical effect of applying such discounts for quoting activity is to shift market makers' calculated message traffic lower, leading to the potential shift to tiers for lower message traffic and reduced fees. Such an approach would move sixteen Industry Member CAT Reporters that are market makers to a lower tier than in the Original Proposal. For example, under the Original Proposal, Broker-Dealer Firm ABC was placed in the first CAT Fee tier, which had a quarterly fee of \$101,004. With the imposition of the proposed tier changes and the discount, Broker-Dealer Firm ABC, an options market maker, would be ranked in Tier 3 and would owe a quarterly fee of \$40,899.

In developing the proposed market maker discounts, the Operating Committee considered various discounts for Options Market Makers and equity market makers, including discounts of 50%, 25%, 0.00002%, as well as the 5.43% for option market makers and 0.01% for equity market makers. Each of these options were considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT

costs among CAT Reporters. The Operating Committee determined to adopt the proposed discount because it directly relates to the concern regarding the quoting requirement, is an objective discounting method, and has the desired potential to shift market makers to lower fee tiers.

By imposing a discount on Options Market Makers and equities market makers' quoting traffic for the calculation of message traffic, the Operating Committee believes that the proposed fees for market makers would not impose an undue or inappropriate burden on competition under Section 6 or Section 15A of the Exchange Act. Moreover, the Operating Committee believes that the proposed fees appropriately take into account the distinctions in the securities trading operations of different Industry Members, and avoid disincentives, such as a reduction in market quality, as required under the funding principles of the CAT NMS Plan.⁷⁵ The proposed discounts recognize the different types of trading operations presented by Options Market Makers and equities market makers, as well as the value of the market makers' quoting activity to the market as a whole. Accordingly, the Operating Committee believes that the proposed discounts will not impact the ability of small Options Market Makers or equities market makers to provide liquidity.

Accordingly, with this Amendment, the Exchange proposes to amend paragraph (b)(1) of the proposed fee schedule to indicate that the message traffic related to equity market maker quotes and Options Market Maker quotes would be discounted. In addition, the Exchange proposes to define the term "Options Market Maker" in paragraph (a)(1) of the proposed fee schedule.

(C) Comparability/Allocation of Costs

Under the Original Proposal, 75% of CAT costs were allocated to Industry Members (other than Execution Venue ATSS) and 25% of CAT costs were allocated to Execution Venues. This cost allocation sought to maintain the greatest level of comparability across the funding model, where comparability considered affiliations among or between CAT Reporters. The Commission and commenters expressed concerns regarding whether the proposed 75%/25% allocation of CAT costs is consistent with the Plan's funding principles and the Exchange Act, including whether the allocation places a burden on competition or

reduces market quality. The Commission and commenters also questioned whether the approach of accounting for affiliations among CAT Reporters in setting CAT Fees disadvantages non-affiliated CAT Reporters or otherwise burdens competition in the market for trading services.⁷⁶

In response to these concerns, the Operating Committee determined to revise the proposed funding model to focus the comparability of CAT Fees on the individual entity level, rather than primarily on the comparability of affiliated entities. In light of the interconnected nature of the various aspects of the funding model, the Operating Committee determined to revise various aspects of the model to enhance comparability at the individual entity level. Specifically, to achieve such comparability, the Operating Committee determined to (1) decrease the number of tiers for Industry Members (other than Execution Venue ATSS) from nine to seven; (2) change the allocation of CAT costs between Equity Execution Venues and Options Execution Venues from 75%/25% to 67%/33%; and (3) adjust tier percentages and recovery allocations for Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSS). With these changes, the proposed funding model provides fee comparability for the largest individual entities, with the largest Industry Members (other than Execution Venue ATSS), Equity Execution Venues and Options Execution Venues each paying a CAT Fee of approximately \$81,000 each quarter.

(i) Number of Industry Member Tiers

In the Original Proposal, the proposed funding model had nine tiers for Industry Members (other than Execution Venue ATSS). The Operating Committee determined that reducing the number of tiers from nine tiers to seven tiers (and adjusting the predefined Industry Member Percentages as well) continues to provide a fair allocation of fees among Industry Members and appropriately distinguishes between Industry Members with differing levels of message traffic. In reaching this conclusion, the Operating Committee considered historical message traffic generated by Industry Members across all exchanges and as submitted to FINRA's OATS, and considered the distribution of firms with similar levels

⁷⁶ See Suspension Order at 31662-3; SIFMA Letter at 3; Sidley Letter at 6-7; Group One Letter at 2; and Belvedere Letter at 2.

⁷⁴ Suspension Order at 31664.

⁷⁵ Section 11.2(b) of the CAT NMS Plan.

of message traffic, grouping together firms with similar levels of message traffic. Based on this, the Operating Committee determined that seven tiers would group firms with similar levels of message traffic, while also achieving greater comparability in the model for the individual CAT Reporters with the greatest market share or message traffic.

In developing the proposed seven tier structure, the Operating Committee considered remaining at nine tiers, as well as reducing the number of tiers down to seven when considering how to address the concerns raised regarding comparability. For each of the alternatives, the Operating Committee considered the assignment of various percentages of Industry Members to each tier as well as various percentages of Industry Member recovery allocations for each alternative. Each of these options was considered in the context of its effects on the full funding model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined that the seven tier alternative provided the most fee comparability at the individual entity level for the largest CAT Reporters, while both providing logical breaks in tiering for Industry Members with different levels of message traffic and a sufficient number of tiers to provide for the full spectrum of different levels of message traffic for all Industry Members.

(ii) Allocation of CAT Costs Between Equity and Options Execution Venues

The Operating Committee also determined to adjust the allocation of CAT costs between Equity Execution Venues and Options Execution Venues to enhance comparability at the individual entity level. In the Original Proposal, 75% of Execution Venue CAT costs were allocated to Equity Execution Venues, and 25% of Execution Venue CAT costs were allocated to Options Execution Venues. To achieve the goal of increased comparability at the individual entity level, the Operating Committee analyzed a range of alternative splits for revenue recovery between Equity and Options Execution Venues, along with other changes in the proposed funding model. Based on this analysis, the Operating Committee determined to allocate 67 percent of Execution Venue costs recovered to Equity Execution Venues and 33 percent to Options Execution Venues. The Operating Committee determined that a 67/33 allocation between Equity and Options Execution Venues enhances the level of fee comparability for the largest

CAT Reporters. Specifically, the largest Equity and Options Execution Venues would pay a quarterly CAT Fee of approximately \$81,000.

In developing the proposed allocation of CAT costs between Equity and Options Execution Venues, the Operating Committee considered various different options for such allocation, including keeping the original 75%/25% allocation, as well as shifting to a 70%/30%, 67%/33%, or 57.75%/42.25% allocation. For each of the alternatives, the Operating Committee considered the effect each allocation would have on the assignment of various percentages of Equity Execution Venues to each tier as well as various percentages of Equity Execution Venue recovery allocations for each alternative. Moreover, each of these options was considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined that the 67%/33% allocation between Equity and Options Execution Venues provided the greatest level of fee comparability at the individual entity level for the largest CAT Reporters, while still providing for appropriate fee levels across all tiers for all CAT Reporters.

(iii) Allocation of Costs Between Execution Venues and Industry Members

The Operating Committee determined to allocate 25% of CAT costs to Execution Venues and 75% to Industry Members (other than Execution Venue ATSs), as it had in the Original Proposal. The Operating Committee determined that this 75%/25% allocation, along with the other changes proposed above, led to the most comparable fees for the largest Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSs). The largest Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSs) would each pay a quarterly CAT Fee of approximately \$81,000.

As a preliminary matter, the Operating Committee determined that it is appropriate to allocate most of the costs to create, implement and maintain the CAT to Industry Members for several reasons. First, there are many more broker-dealers expected to report to the CAT than Participants (*i.e.*, 1,541 broker-dealer CAT Reporters versus 22 Participants). Second, since most of the costs to process CAT reportable data is generated by Industry Members,

Industry Members could be expected to contribute toward such costs. Finally, as noted by the SEC, the CAT “substantially enhance[s] the ability of the SROs and the Commission to oversee today’s securities markets,”⁷⁷ thereby benefitting all market participants. After making this determination, the Operating Committee analyzed several different cost allocations, as discussed further below, and determined that an allocation where 75% of the CAT costs should be borne by the Industry Members (other than Execution Venue ATSs) and 25% should be paid by Execution Venues was most appropriate and led to the greatest comparability of CAT Fees for the largest CAT Reporters.

In developing the proposed allocation of CAT costs between Execution Venues and Industry Members (other than Execution Venue ATSs), the Operating Committee considered various different options for such allocation, including keeping the original 75%/25% allocation, as well as shifting to an 80%/20%, 70%/30%, or 65%/35% allocation. Each of these options was considered in the context of the full model, including the effect on each of the changes discussed above, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. In particular, for each of the alternatives, the Operating Committee considered the effect each allocation had on the assignment of various percentages of Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSs) to each relevant tier as well as various percentages of recovery allocations for each tier. The Operating Committee determined that the 75%/25% allocation between Execution Venues and Industry Members (other than Execution Venue ATSs) provided the greatest level of fee comparability at the individual entity level for the largest CAT Reporters, while still providing for appropriate fee levels across all tiers for all CAT Reporters.

(iv) Affiliations

The funding principles set forth in Section 11.2 of the Plan require that the fees charged to CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between

⁷⁷ Securities Exchange Act Rel. No. 67457 (Jul 18, 2012), 77 FR 45722, 45726 (Aug. 1, 2012) (“Rule 613 Adopting Release”).

or among CAT Reporters, whether Execution Venue and/or Industry Members). The proposed funding model satisfies this requirement. As discussed above, under the proposed funding model, the largest Equity Execution Venues, Options Execution Venues, and Industry Members (other than Execution Venue ATSS) pay approximately the same fee. Moreover, the Operating Committee believes that the proposed funding model takes into consideration affiliations between or among CAT Reporters as complexes with multiple CAT Reporters will pay the appropriate fee based on the proposed fee schedule for each of the CAT Reporters in the complex. For example, a complex with a Tier 1 Equity Execution Venue and Tier 2 Industry Member will pay the same as another complex with a Tier 1 Equity Execution Venue and Tier 2 Industry Member.

(v) Fee Schedule Changes

Accordingly, with this Amendment, the Exchange proposes to amend paragraphs (b)(1) and (2) of the proposed fee schedule to reflect the changes discussed in this section. Specifically, the Exchange proposes to amend paragraph (b)(1) and (2) of the proposed fee schedule to update the number of tiers, and the fees and percentages assigned to each tier to reflect the described changes.

(D) Market Share/Message Traffic

In the Original Proposal, the Operating Committee proposed to charge Execution Venues based on market share and Industry Members (other than Execution Venue ATSS) based on message traffic. Commenters questioned the use of the two different metrics for calculating CAT Fees.⁷⁸ The Operating Committee continues to believe that the proposed use of market share and message traffic satisfies the requirements of the Exchange Act and the funding principles set forth in the CAT NMS Plan. Accordingly, the proposed funding model continues to charge Execution Venues based on market share and Industry Members (other than Execution Venue ATSS) based on message traffic.

In drafting the Plan and the Original Proposal, the Operating Committee expressed the view that the correlation between message traffic and size does not apply to Execution Venues, which they described as producing similar amounts of message traffic regardless of size. The Operating Committee believed that charging Execution Venues based

on message traffic would result in both large and small Execution Venues paying comparable fees, which would be inequitable, so the Operating Committee determined that it would be more appropriate to treat Execution Venues differently from Industry Members in the funding model. Upon a more detailed analysis of available data, however, the Operating Committee noted that Execution Venues have varying levels of message traffic. Nevertheless, the Operating Committee continues to believe that a bifurcated funding model—where Industry Members (other than Execution Venue ATSS) are charged fees based on message traffic and Execution Venues are charged based on market share—complies with the Plan and meets the standards of the Exchange Act for the reasons set forth below.

Charging Industry Members based on message traffic is the most equitable means for establishing fees for Industry Members (other than Execution Venue ATSS). This approach will assess fees to Industry Members that create larger volumes of message traffic that are relatively higher than those fees charged to Industry Members that create smaller volumes of message traffic. Since message traffic, along with fixed costs of the Plan Processor, is a key component of the costs of operating the CAT, message traffic is an appropriate criterion for placing Industry Members in a particular fee tier.

The Operating Committee also believes that it is appropriate to charge Execution Venues CAT Fees based on their market share. In contrast to Industry Members (other than Execution Venue ATSS), which determine the degree to which they produce the message traffic that constitutes CAT Reportable Events, the CAT Reportable Events of Execution Venues are largely derivative of quotations and orders received from Industry Members that the Execution Venues are required to display. The business model for Execution Venues, however, is focused on executions in their markets. As a result, the Operating Committee believes that it is more equitable to charge Execution Venues based on their market share rather than their message traffic.

Similarly, focusing on message traffic would make it more difficult to draw distinctions between large and small exchanges, including options exchanges in particular. For instance, the Operating Committee analyzed the message traffic of Execution Venues and Industry Members for the period of April 2017 to June 2017 and placed all CAT Reporters into a nine-tier

framework (*i.e.*, a single tier may include both Execution Venues and Industry Members). The Operating Committee's analysis found that the majority of exchanges (15 total) were grouped in Tiers 1 and 2. Moreover, virtually all of the options exchanges were in Tiers 1 and 2.⁷⁹ Given the concentration of options exchanges in Tiers 1 and 2, the Operating Committee believes that using a funding model based purely on message traffic would make it more difficult to distinguish between large and small options exchanges, as compared to the proposed bifurcated fee approach.

In addition, the Operating Committee also believes that it is appropriate to treat ATSS as Execution Venues under the proposed funding model since ATSS have business models that are similar to those of exchanges, and ATSS also compete with exchanges. For these reasons, the Operating Committee believes that charging Execution Venues based on market share is more appropriate and equitable than charging Execution Venues based on message traffic.

(E) Time Limit

In the Original Proposal, the Operating Committee did not impose any time limit on the application of the proposed CAT Fees. As discussed above, the Operating Committee developed the proposed funding model by analyzing currently available historical data. Such historical data, however, is not as comprehensive as data that will be submitted to the CAT. Accordingly, the Operating Committee believes that it will be appropriate to revisit the funding model once CAT Reporters have actual experience with the funding model. Accordingly, the Operating Committee proposes to include a sunset provision in the proposed fee model. The proposed CAT Fees will sunset two years after the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. Specifically, the Exchange proposes to add paragraph (d) of the proposed fee schedule to include this sunset provision. Such a provision will provide the Operating Committee and other market participants with the opportunity to reevaluate the performance of the proposed funding model.

⁷⁹The Participants note that this analysis did not place MIAx PEARL in Tier 1 or Tier 2 since the exchange commenced trading on February 6, 2017.

⁷⁸Suspension Order at 31663; FIA Principal Traders Group Letter at 2.

(F) Tier Structure/Decreasing Cost per Unit

In the Original Proposal, the Operating Committee determined to use a tiered fee structure. The Commission and commenters questioned whether the decreasing cost per additional unit (of message traffic in the case of Industry Members, or of share volume in the case of Execution Venues) in the proposed fee schedules burdens competition by disadvantaging small Industry Members and Execution Venues and/or by creating barriers to entry in the market for trading services and/or the market for broker-dealer services.⁸⁰

The Operating Committee does not believe that decreasing cost per additional unit in the proposed fee schedules places an unfair competitive burden on Small Industry Members and Execution Venues. While the cost per unit of message traffic or share volume necessarily will decrease as volume increases in any tiered fee model using fixed fee percentages and, as a result, Small Industry Members and small Execution Venues may pay a larger fee per message or share, this comment fails to take account of the substantial differences in the absolute fees paid by Small Industry Members and small Execution Venues as opposed to large Industry Members and large Execution Venues. For example, under the fee proposals, Tier 7 Industry Members would pay a quarterly fee of \$105, while Tier 1 Industry Members would pay a quarterly fee of \$81,483. Similarly, a Tier 4 Equity Execution Venue would pay a quarterly fee of \$129, while a Tier 1 Equity Execution Venue would pay a quarterly fee of \$81,048. Thus, Small Industry Members and small Execution Venues are not disadvantaged in terms of the total fees that they actually pay. In contrast to a tiered model using fixed fee percentages, the Operating Committee believes that strictly variable or metered funding models based on message traffic or share volume would be more likely to affect market behavior and may present administrative challenges (e.g., the costs to calculate and monitor fees may exceed the fees charged to the smallest CAT Reporters).

(G) Other Alternatives Considered

In addition to the various funding model alternatives discussed above regarding discounts, number of tiers and allocation percentages, the Operating Committee also discussed other possible funding models. For example, the Operating Committee considered

allocating the total CAT costs equally among each of the Participants, and then permitting each Participant to charge its own members as it deems appropriate.⁸¹ The Operating Committee determined that such an approach raised a variety of issues, including the likely inconsistency of the ensuing charges, potential for lack of transparency, and the impracticality of multiple SROs submitting invoices for CAT charges. The Operating Committee therefore determined that the proposed funding model was preferable to this alternative.

(H) Industry Member Input

Commenters expressed concern regarding the level of Industry Member input into the development of the proposed funding model, and certain commenters have recommended a greater role in the governance of the CAT.⁸² The Participants previously addressed this concern in its letters responding to comments on the Plan and the CAT Fees.⁸³ As discussed in those letters, the Participants discussed the funding model with the Development Advisory Group (“DAG”), the advisory group formed to assist in the development of the Plan, during its original development.⁸⁴ Moreover, Industry Members currently have a voice in the affairs of the Operating Committee and operation of the CAT generally through the Advisory Committee established pursuant to Rule 613(b)(7) and Section 4.13 of the Plan. The Advisory Committee attends all meetings of the Operating Committee, as well as meetings of various subcommittees and working groups, and provides valuable and critical input for the Participants’ and Operating Committee’s consideration. The Operating Committee continues to believe that that Industry Members have an appropriate voice regarding the funding of the Company.

(I) Conflicts of Interest

Commenters also raised concerns regarding Participant conflicts of interest in setting the CAT Fees.⁸⁵ The Participants previously responded to this concern in both the Plan Response

⁸¹ See FIA Principal Traders Group Letter at 2; Belvedere Letter at 4.

⁸² See Suspension Order at 31662; MFA Letter at 1–2.

⁸³ Letter from Participants to Brent J. Fields, Secretary, SEC (Sept. 23, 2016) (“Plan Response Letter”); Letter from CAT NMS Plan Participants to Brent J. Fields, Secretary, SEC (June 29, 2017) (“Fee Rule Response Letter”).

⁸⁴ Fee Rule Response Letter at 2; Plan Response Letter at 18.

⁸⁵ See Suspension Order at 31662; FIA Principal Traders Group at 3.

Letter and the Fee Rule Response Letter.⁸⁶ As discussed in those letters, the Plan, as approved by the SEC, adopts various measures to protect against the potential conflicts issues raised by the Participants’ fee-setting authority. Such measures include the operation of the Company as a not for profit business league and on a break-even basis, and the requirement that the Participants file all CAT Fees under Section 19(b) of the Exchange Act. The Operating Committee continues to believe that these measures adequately protect against concerns regarding conflicts of interest in setting fees, and that additional measures, such as an independent third party to evaluate an appropriate CAT Fee, are unnecessary.

(J) Fee Transparency

Commenters also argued that they could not adequately assess whether the CAT Fees were fair and equitable because the Operating Committee has not provided details as to what the Participants are receiving in return for the CAT Fees.⁸⁷ The Operating Committee provided a detailed discussion of the proposed funding model in the Plan, including the expenses to be covered by the CAT Fees. In addition, the agreement between the Company and the Plan Processor sets forth a comprehensive set of services to be provided to the Company with regard to the CAT. Such services include, without limitation: User support services (e.g., a help desk); tools to allow each CAT Reporter to monitor and correct their submissions; a comprehensive compliance program to monitor CAT Reporters’ adherence to Rule 613; publication of detailed Technical Specifications for Industry Members and Participants; performing data linkage functions; creating comprehensive data security and confidentiality safeguards; creating query functionality for regulatory users (i.e., the Participants, and the SEC and SEC staff); and performing billing and collection functions. The Operating Committee further notes that the services provided by the Plan Processor and the costs related thereto were subject to a bidding process.

(K) Funding Authority

Commenters also questioned the authority of the Operating Committee to impose CAT Fees on Industry

⁸⁶ See Plan Response Letter at 16, 17; Fee Rule Response Letter at 10–12.

⁸⁷ See FIA Principal Traders Group at 3; SIFMA Letter at 3.

⁸⁰ Suspension Order at 31667.

Members.⁸⁸ The Participants previously responded to this same comment in the Plan Response Letter and the Fee Rule Response Letter.⁸⁹ As the Participants previously noted, SEC Rule 613 specifically contemplates broker-dealers contributing to the funding of the CAT. In addition, as noted by the SEC, the CAT “substantially enhance[s] the ability of the SROs and the Commission to oversee today’s securities markets,”⁹⁰ thereby benefitting all market participants. Therefore, the Operating Committing continues to believe that it is equitable for both Participants and Industry Members to contribute to funding the cost of the CAT.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with the provisions of Section 6(b)(5) of the Act,⁹¹ which require, among other things, that the Exchange rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest, and not designed to permit unfair discrimination between customers, issuers, brokers and dealers, and Section 6(b)(4) of the Act,⁹² which requires that Exchange rules provide for equitable allocation of reasonable dues, fees and other charges among its members and issuers and other persons using its facilities. As discussed above, the SEC approved the bifurcated, tiered, fixed fee funding model in the CAT NMS Plan, finding it was reasonable and that it equitably allocated fees among Participants and Industry Members. The Exchange believes that the proposed tiered fees adopted pursuant to the funding model approved by the SEC in the CAT NMS Plan are reasonable, equitably allocated and not unfairly discriminatory.

The Exchange believes that this proposal is consistent with the Act because it implements, interprets or clarifies the provisions of the Plan, and is designed to assist the Exchange and its Industry Members in meeting regulatory obligations pursuant to the Plan. In approving the Plan, the SEC noted that the Plan “is necessary and appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect

the mechanism of a national market system, or is otherwise in furtherance of the purposes of the Act.”⁹³ To the extent that this proposal implements, interprets or clarifies the Plan and applies specific requirements to Industry Members, the Exchange believes that this proposal furthers the objectives of the Plan, as identified by the SEC, and is therefore consistent with the Act.

The Exchange believes that the proposed tiered fees are reasonable. First, the total CAT Fees to be collected would be directly associated with the costs of establishing and maintaining the CAT, where such costs include Plan Processor costs and costs related to insurance, third party services and the operational reserve. The CAT Fees would not cover Participant services unrelated to the CAT. In addition, any surplus CAT Fees cannot be distributed to the individual Participants; such surpluses must be used as a reserve to offset future fees. Given the direct relationship between the fees and the CAT costs, the Exchange believes that the total level of the CAT Fees is reasonable.

In addition, the Exchange believes that the proposed CAT Fees are reasonably designed to allocate the total costs of the CAT equitably between and among the Participants and Industry Members, and are therefore not unfairly discriminatory. As discussed in detail above, the proposed tiered fees impose comparable fees on similarly situated CAT Reporters. For example, those with a larger impact on the CAT (measured via message traffic or market share) pay higher fees, whereas CAT Reporters with a smaller impact pay lower fees. Correspondingly, the tiered structure lessens the impact on smaller CAT Reporters by imposing smaller fees on those CAT Reporters with less market share or message traffic. In addition, the fee structure takes into consideration distinctions in securities trading operations of CAT Reporters, including ATSS trading OTC Equity Securities, and equity and options market makers.

Moreover, the Exchange believes that the division of the total CAT costs between Industry Members and Execution Venues, and the division of the Execution Venue portion of total costs between Equity and Options Execution Venues, is reasonably designed to allocate CAT costs among CAT Reporters. The 75%/25% division between Industry Members (other than Execution Venue ATSSs) and Execution Venues maintains the greatest level of comparability across the funding model.

For example, the cost allocation establishes fees for the largest Industry Members (*i.e.*, those Industry Members in Tier 1) that are comparable to the largest Equity Execution Venues and Options Execution Venues (*i.e.*, those Execution Venues in Tier 1). Furthermore, the allocation of total CAT cost recovery recognizes the difference in the number of CAT Reporters that are Industry Members (other than Execution Venue ATSSs) versus CAT Reporters that are Execution Venues. Similarly, the 67%/33% allocation between Equity and Options Execution Venues also helps to provide fee comparability for the largest CAT Reporters.

Finally, the Exchange believes that the proposed fees are reasonable because they would provide ease of calculation, ease of billing and other administrative functions, and predictability of a fixed fee. Such factors are crucial to estimating a reliable revenue stream for the Company and for permitting CAT Reporters to reasonably predict their payment obligations for budgeting purposes.

B. Self-Regulatory Organization’s Statement on Burden on Competition

Section 6(b)(8) of the Act⁹⁴ requires that Exchange rules not impose any burden on competition that is not necessary or appropriate. The Exchange does not believe that the proposed amendments to its Fee Schedule will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange notes that the proposed rule change implements provisions of the CAT NMS Plan approved by the Commission, and is designed to assist the Exchange in meeting its regulatory obligations pursuant to the Plan. Similarly, all national securities exchanges and FINRA are proposing this proposed fee schedule to implement the requirements of the CAT NMS Plan. Therefore, this is not a competitive fee filing and, therefore, it does not raise competition issues between and among the exchanges and FINRA.

Moreover, as previously described, the Exchange believes that the proposed rule change fairly and equitably allocates costs among CAT Reporters. In particular, the proposed fee schedule is structured to impose comparable fees on similarly situated CAT Reporters, and lessen the impact on smaller CAT Reporters. CAT Reporters with similar levels of CAT activity will pay similar fees. For example, Industry Members (other than Execution Venue ATSSs) with

⁸⁸ See Suspension Order at 31661–2; SIFMA Letter at 2.

⁸⁹ See Plan Response Letter at 9–10; Fee Rule Response Letter at 3–4.

⁹⁰ Rule 613 Adopting Release at 45726.

⁹¹ 15 U.S.C. 78f(b)(5).

⁹² 15 U.S.C. 78f(b)(4).

⁹³ Approval Order at 84697.

⁹⁴ 15 U.S.C. 78f(b)(8).

higher levels of message traffic will pay higher fees, and those with lower levels of message traffic will pay lower fees. Similarly, Execution Venue ATSS and other Execution Venues with larger market share will pay higher fees, and those with lower levels of market share will pay lower fees. Therefore, given that there is generally a relationship between message traffic and/or market share to the CAT Reporter's size, smaller CAT Reporters generally pay less than larger CAT Reporters. Accordingly, the Exchange does not believe that the CAT Fees would have a disproportionate effect on smaller or larger CAT Reporters. In addition, ATSS and exchanges will pay the same fees based on market share. Therefore, the Exchange does not believe that the fees will impose any burden on the competition between ATSS and exchanges. Accordingly, the Exchange believes that the proposed fees will minimize the potential for adverse effects on competition between CAT Reporters in the market.

Furthermore, the tiered, fixed fee funding model limits the disincentives to providing liquidity to the market. Therefore, the proposed fees are structured to limit burdens on competitive quoting and other liquidity provision in the market.

In addition, the Operating Committee believes that the proposed changes to the Original Proposal, as discussed above in detail, address certain competitive concerns raised by commenters, including concerns related to, among other things, smaller ATSS, ATSS trading OTC Equity Securities, market making quoting and fee comparability. As discussed above, the Operating Committee believes that the proposals address the competitive concerns raised by commenters.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Solicitation of Comments on Amendment No. 1

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment No. 1 is consistent with the Act. In particular, the Commission seeks comment on the following:

Allocation of Costs

(1) Commenters' views as to whether the allocation of CAT costs is consistent with the funding principle expressed in

the CAT NMS Plan that requires the Operating Committee to "avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality."⁹⁵

(2) Commenters' views as to whether the allocation of 25% of CAT costs to the Execution Venues (including all the Participants) and 75% to Industry Members, will incentivize or disincentivize the Participants to effectively and efficiently manage the CAT costs incurred by the Participants since they will only bear 25% of such costs.

(3) Commenters' views on the determination to allocate 75% of all costs incurred by the Participants from November 21, 2016 to November 21, 2017 to Industry Members (other than Execution Venue ATSS), when such costs are development and build costs and when Industry Member reporting is scheduled to commence a year later, including views on whether such "fees, costs and expenses . . . [are] fairly and reasonably shared among the Participants and Industry Members" in accordance with the CAT NMS Plan.⁹⁶

(4) Commenters' views on whether an analysis of the ratio of the expected Industry Member-reported CAT messages to the expected SRO-reported CAT messages should be the basis for determining the allocation of costs between Industry Members and Execution Venues.⁹⁷

(5) Any additional data analysis on the allocation of CAT costs, including any existing supporting evidence.

Comparability

(6) Commenters' views on the shift in the standard used to assess the comparability of CAT Fees, with the emphasis now on comparability of individual entities instead of affiliated entities, including views as to whether this shift is consistent with the funding principle expressed in the CAT NMS Plan that requires the Operating Committee to establish a fee structure in which the fees charged to "CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration

affiliations between or among CAT Reporters, whether Execution Venues and/or Industry Members)."⁹⁸

(7) Commenters' views as to whether the reduction in the number of tiers for Industry Members (other than Execution Venue ATSS) from nine to seven, the revised allocation of CAT costs between Equity Execution Venues and Options Execution Venues from a 75%/25% split to a 67%/33% split, and the adjustment of all tier percentages and recovery allocations achieves comparability across individual entities, and whether these changes should have resulted in a change to the allocation of 75% of total CAT costs to Industry Members (other than Execution Venue ATSS) and 25% of such costs to Execution Venues.

Discounts

(8) Commenters' views as to whether the discounts for options market-makers, equities market-makers, and Equity ATSS trading OTC Equity Securities are clear, reasonable, and consistent with the funding principle expressed in the CAT NMS Plan that requires the Operating Committee to "avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality,"⁹⁹ including views as to whether the discounts for market-makers limit any potential disincentives to act as a market-maker and/or to provide liquidity due to CAT fees.

Calculation of Costs and Imposition of CAT Fees

(9) Commenters' views as to whether the amendment provides sufficient information regarding the amount of costs incurred from November 21, 2016 to November 21, 2017, particularly, how those costs were calculated, how those costs relate to the proposed CAT Fees, and how costs incurred after November 21, 2017 will be assessed upon Industry Members and Execution Venues;

(10) Commenters' views as to whether the timing of the imposition and collection of CAT Fees on Execution Venues and Industry Members is reasonably related to the timing of when the Company expects to incur such development and implementation costs.¹⁰⁰

(11) Commenters' views on dividing CAT costs equally among each of the Participants, and then each Participant charging its own members as it deems appropriate, taking into consideration the possibility of inconsistency in

⁹⁵ Section 11.2(e) of the CAT NMS Plan.

⁹⁶ Section 11.1(c) of the CAT NMS Plan.

⁹⁷ The Notice for the CAT NMS Plan did not provide a comprehensive count of audit trail message traffic from different regulatory data sources, but the Commission did estimate the ratio of all SRO audit trail messages to OATS audit trail messages to be 1.9431. See Securities Exchange Act Release No. 77724 (April 27, 2016), 81 FR 30613, 30721 n.919 and accompanying text (May 17, 2016).

⁹⁸ Section 11.2(c) of the CAT NMS Plan.

⁹⁹ Section 11.2(e) of the CAT NMS Plan.

¹⁰⁰ Section 11.1(c) of the CAT NMS Plan.

charges, the potential for lack of transparency, and the impracticality of multiple SROs submitting invoices for CAT charges.

Burden on Competition and Barriers to Entry

(12) Commenters' views as to whether the allocation of 75% of CAT costs to Industry Members (other than Execution Venue ATSS) imposes any burdens on competition to Industry Members, including views on what baseline competitive landscape the Commission should consider when analyzing the proposed allocation of CAT costs.

(13) Commenters' views on the burdens on competition, including the relevant markets and services and the impact of such burdens on the baseline competitive landscape in those relevant markets and services.

(14) Commenters' views on any potential burdens imposed by the fees on competition between and among CAT Reporters, including views on which baseline markets and services the fees could have competitive effects on and whether the fees are designed to minimize such effects.

(15) Commenters' general views on the impact of the proposed fees on economies of scale and barriers to entry.

(16) Commenters' views on the baseline economies of scale and barriers to entry for Industry Members and Execution Venues and the relevant markets and services over which these economies of scale and barriers to entry exist.

(17) Commenters' views as to whether a tiered fee structure necessarily results in less active tiers paying more per unit than those in more active tiers, thus creating economies of scale, with supporting information if possible.

(18) Commenters' views as to how the level of the fees for the least active tiers would or would not affect barriers to entry.

(19) Commenters' views on whether the difference between the cost per unit (messages or market share) in less active tiers compared to the cost per unit in more active tiers creates regulatory economies of scale that favor larger competitors and, if so:

(a) How those economies of scale compare to operational economies of scale; and

(b) Whether those economies of scale reduce or increase the current advantages enjoyed by larger competitors or otherwise alter the competitive landscape.

(20) Commenters' views on whether the fees could affect competition between and among national securities exchanges and FINRA, in light of the

fact that implementation of the fees does not require the unanimous consent of all such entities, and, specifically:

(a) Whether any of the national securities exchanges or FINRA are disadvantaged by the fees; and

(b) If so, whether any such disadvantages would be of a magnitude that would alter the competitive landscape.

(21) Commenters' views on any potential burden imposed by the fees on competitive quoting and other liquidity provision in the market, including, specifically:

(a) Commenters' views on the kinds of disincentives that discourage liquidity provision and/or disincentives that the Commission should consider in its analysis;

(b) Commenters' views as to whether the fees could disincentivize the provision of liquidity; and

(c) Commenters' views as to whether the fees limit any disincentives to provide liquidity.

(22) Commenters' views as to whether the amendment adequately responds to and/or addresses comments received on related filings.

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-PEARL-2017-20 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-PEARL-2017-20. 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 website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official

business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-PEARL-2017-20, and should be submitted on or before January 4, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁰¹

Robert W. Errett,
Deputy Secretary.

[FR Doc. 2017-27014 Filed 12-13-17; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-82262; File No. SR-NYSEMKT-2017-26]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing of Amendment No. 1 to a Proposed Rule Change Amending the Consolidated Audit Trail Funding Fees

December 11, 2017.

On May 10, 2017, NYSE MKT LLC¹ (the "Exchange" or "NYSE MKT") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")² and Rule 19b-4 thereunder,³ a proposed rule change to adopt a fee schedule to establish the fees for Industry Members related to the National Market System Plan Governing the Consolidated Audit Trail ("CAT NMS Plan"). The proposed rule change was published in the **Federal Register** for comment on May 22, 2017.⁴ The Commission received seven comment letters on the proposed rule change,⁵ and a response to

¹⁰¹ 17 CFR 200.30-3(a)(12).

¹ NYSE MKT LLC has been renamed NYSE American LLC. See Securities Exchange Act Rel. No. 80283 (Mar. 21, 2017), 82 FR 15244 (Mar. 27, 2017).

² 15 U.S.C. 78s(b)(1).

³ 17 CFR 240.19b-4.

⁴ See Securities Exchange Act Release No. 80694 (May 16, 2017), 82 FR 23416 (May 22, 2017) ("Original Proposal").

⁵ Since the CAT NMS Plan Participants' proposed rule changes to adopt fees to be charged to Industry Members to fund the consolidated audit trail are substantively identical, the Commission is considering all comments received on the proposed rule changes regardless of the comment file to

comments from the Participants.⁶ On June 30, 2017, the Commission temporarily suspended and initiated proceedings to determine whether to approve or disapprove the proposed rule change.⁷ The Commission thereafter received seven comment letters,⁸ and a response to comments

which they were submitted. See text accompanying notes 14–16 *infra*, for a list of the CAT NMS Plan Participants. See Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, to Brent J. Fields, Secretary, Commission (dated June 6, 2017), available at: <https://www.sec.gov/comments/sr-batsbzx-2017-38/batsbzx201738-1788188-153228.pdf>; Letter from Patricia L. Cerny and Steven O'Malley, Compliance Consultants, to Brent J. Fields, Secretary, Commission (dated June 12, 2017), available at: <https://www.sec.gov/comments/sr-cboe-2017-040/cboe2017040-1799253-153675.pdf>; Letter from Daniel Zinn, General Counsel, OTC Markets Group Inc., to Eduardo A. Aleman, Assistant Secretary, Commission (dated June 13, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-1801717-153703.pdf>; Letter from Joanna Mallers, Secretary, FIA Principal Traders Group, to Brent J. Fields, Secretary, Commission (dated June 22, 2017), available at: <https://www.sec.gov/comments/sr-cboe-2017-040/cboe2017040-1819670-154195.pdf>; Letter from Stuart J. Kaswell, Executive Vice President and Managing Director, General Counsel, Managed Funds Association, to Brent J. Fields, Secretary, Commission (dated June 23, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-1822454-154283.pdf>; and Letter from Suzanne H. Shatto, Investor, to Commission (dated June 27, 2017), available at: <https://www.sec.gov/comments/sr-batsedgx-2017-22/batsedgx201722-154443.pdf>. The Commission also received a comment letter which is not pertinent to these proposed rule changes. See Letter from Christina Crouch, Smart Ltd., to Brent J. Fields, Secretary, Commission (dated June 5, 2017), available at: <https://www.sec.gov/comments/sr-batsbzx-2017-38/batsbzx201738-1785545-153152.htm>.

⁶ See Letter from CAT NMS Plan Participants to Brent J. Fields, Secretary, Commission (dated June 29, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-1832632-154584.pdf>.

⁷ See Securities Exchange Act Release No. 81067 (June 30, 2017), 82 FR 31656 (July 7, 2017).

⁸ See Letter from W. Hardy Callcott, Partner, Sidley Austin LLP, to Brent J. Fields, Secretary, Commission (dated July 27, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2148338-157737.pdf>; Letter from Kevin Coleman, General Counsel and Chief Compliance Officer, Belvedere Trading LLC, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2148360-157740.pdf>; Letter from Joanna Mallers, Secretary, FIA Principal Traders Group, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2151228-157745.pdf>; Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2150977-157744.pdf>; Letter from Stuart J. Kaswell, Executive Vice President and Managing Director, General Counsel, Managed Funds Association, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2150818-157743.pdf>; Letter from

from the Participants.⁹ On October 25, 2017, the Exchange filed Amendment No. 1 to the proposed rule change, as described in Items I and II below, which Items have been prepared by the Exchange.¹⁰ On November 9, 2017, the Commission extended the time period within which to approve the proposed rule change or disapprove the proposed rule change to January 14, 2018.¹¹ The Commission is publishing this notice to solicit comments from interested persons on Amendment No. 1.¹²

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the NYSE American Equities Price List (“Price List”) and the NYSE American Options Fee Schedule (“Fee Schedule”) to adopt the fees for Industry Members related to the National Market System Plan Governing the Consolidated Audit Trail (the “CAT NMS Plan” or “Plan”).¹³ The Exchange files this

John Kinahan, Chief Executive Officer, Group One Trading, L.P., to Brent J. Fields, Secretary, Commission (dated August 10, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-2214568-160619.pdf>; Letter from Joseph Molluso, Executive Vice President and CFO, Virtu Financial, to Brent J. Fields, Secretary, Commission (dated August 18, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-2238648-160830.pdf>.

⁹ See Letter from Michael Simon, Chair, CAT NMS Plan Operating Committee, to Brent J. Fields, Secretary, Commission (dated November 2, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2674608-161412.pdf>.

¹⁰ Amendment No. 1 to the proposed rule change replaces and supersedes the Original Proposal in its entirety.

¹¹ See Securities Exchange Act Release No. 82049 (November 9, 2017), 82 FR 53549 (November 16, 2017).

¹² The Commission notes that on November 29, 2017, the Exchange filed Amendment No. 2 to the proposed rule change. Amendment No. 2 is a partial amendment to the proposed rule change, as amended by Amendment No. 1. Amendment No. 2 proposes to change the parenthetical regarding the OTC Equity Securities discount in paragraph (b)(2) of the proposed fee schedule from “with a discount for Equity ATSS exclusively trading OTC Equity Securities based on the average shares per trade ratio between NMS Stocks and OTC Equity Securities” to “with a discount for OTC Equity Securities market share of Equity ATSS trading OTC Equity Securities based on the average shares per trade ratio between NMS Stocks and OTC Equity Securities.” Amendment No. 2 also deletes footnote 45 in Section 3(a) on page 23 of the First Amendment which reads, “The discount is only applied to the market share of Execution Venue ATSS exclusively trading OTC Equity Securities. Accordingly, FINRA’s market share, which includes market share from the OTC Reporting Facility, is not discounted as a result of its OTC Equity Securities activity,” as the footnote is erroneous and was included inadvertently. See Securities Exchange Act Release No. 82263 (December 11, 2017).

¹³ Unless otherwise specified, capitalized terms used in this rule filing are defined as set forth

proposed rule change (the “Amendment”) to amend the Original Proposal. This Amendment replaces the Original Proposal in its entirety, and also describes the changes from the Original Proposal. The proposed change is available on the Exchange’s website at www.nyse.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

BOX Options Exchange LLC, Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe C2 Exchange, Inc., Cboe Exchange, Inc.,¹⁴ Chicago Stock Exchange, Inc., Financial Industry Regulatory Authority, Inc. (“FINRA”), Investors’ Exchange LLC, Miami International Securities Exchange, LLC, MIAIX PEARL, LLC, NASDAQ BX, Inc., Nasdaq GEMX, LLC, Nasdaq ISE, LLC, Nasdaq MRX, LLC,¹⁵ NASDAQ PHLX LLC, The NASDAQ Stock Market LLC, New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc. and NYSE

herein, the CAT Compliance Rule Series or in the CAT NMS Plan.

¹⁴ Note that Bats BYX Exchange, Inc., Bats BZX Exchange, Inc., Bats EDGA Exchange, Inc., Bats EDGX Exchange, Inc., LLC, C2 Options Exchange, Incorporated, and Chicago Board Options Exchange, Incorporated, have been renamed Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe C2 Exchange, Inc., Cboe Exchange, Inc., respectively.

¹⁵ ISE Gemini, LLC, ISE Mercury, LLC and International Securities Exchange, LLC have been renamed Nasdaq GEMX, LLC, Nasdaq MRX, LLC, and Nasdaq ISE, LLC, respectively. See Securities Exchange Act Rel. No. 80248 (Mar. 15, 2017), 82 FR 14547 (Mar. 21, 2017); Securities Exchange Act Rel. No. 80326 (Mar. 29, 2017), 82 FR 16460 (Apr. 4, 2017); and Securities Exchange Act Rel. No. 80325 (Mar. 29, 2017), 82 FR 16445 (Apr. 4, 2017).

National, Inc.¹⁶ (collectively, the “Participants”) filed with the Commission, pursuant to Section 11A of the Exchange Act¹⁷ and Rule 608 of Regulation NMS thereunder,¹⁸ the CAT NMS Plan.¹⁹ The Participants filed the Plan to comply with Rule 613 of Regulation NMS under the Exchange Act. The Plan was published for comment in the **Federal Register** on May 17, 2016,²⁰ and approved by the Commission, as modified, on November 15, 2016.²¹ The Plan is designed to create, implement and maintain a consolidated audit trail (“CAT”) that would capture customer and order event information for orders in NMS Securities and OTC Equity Securities, across all markets, from the time of order inception through routing, cancellation, modification, or execution in a single consolidated data source. The Plan accomplishes this by creating CAT NMS, LLC (the “Company”), of which each Participant is a member, to operate the CAT.²² Under the CAT NMS Plan, the Operating Committee of the Company (“Operating Committee”) has discretion to establish funding for the Company to operate the CAT, including establishing fees that the Participants will pay, and establishing fees for Industry Members that will be implemented by the Participants (“CAT Fees”).²³ The Participants are required to file with the SEC under Section 19(b) of the Exchange Act any such CAT Fees applicable to Industry Members that the Operating Committee approves.²⁴ Accordingly, the Exchange submitted the Original Proposal to amend the Price List and the Fee Schedule to adopt the Consolidated Audit Trail Funding Fees, which would require Industry Members that are Exchange members to pay the CAT Fees determined by the Operating Committee.

¹⁶ National Stock Exchange, Inc. has been renamed NYSE National, Inc. See Securities Exchange Act Rel. No. 79902 (Jan. 30, 2017), 82 FR 9258 (Feb. 3, 2017).

¹⁷ 15 U.S.C. 78k-1.

¹⁸ 17 CFR 242.608.

¹⁹ See Letter from the Participants to Brent J. Fields, Secretary, Commission, dated September 30, 2014; and Letter from Participants to Brent J. Fields, Secretary, Commission, dated February 27, 2015. On December 24, 2015, the Participants submitted an amendment to the CAT NMS Plan. See Letter from Participants to Brent J. Fields, Secretary, Commission, dated December 23, 2015.

²⁰ Securities Exchange Act Rel. No. 77724 (Apr. 27, 2016), 81 FR 30614 (May 17, 2016).

²¹ Securities Exchange Act Rel. No. 79318 (Nov. 15, 2016), 81 FR 84696 (Nov. 23, 2016) (“Approval Order”).

²² The Plan also serves as the limited liability company agreement for the Company.

²³ Section 11.1(b) of the CAT NMS Plan.

²⁴ *Id.*

The Commission published the Original Proposal for public comment in the **Federal Register** on May 22, 2017,²⁵ and received comments in response to the Original Proposal or similar fee filings by other Participants.²⁶ On June 30, 2017, the Commission suspended, and instituted proceedings to determine whether to approve or disapprove, the Original Proposal.²⁷ The Commission received seven comment letters in response to those proceedings.²⁸

In response to the comments on the Original Proposal, the Operating Committee determined to make the following changes to the funding model: (1) Add two additional CAT Fee tiers for Equity Execution Venues; (2) discount the market share of Execution Venue ATSS exclusively trading OTC Equity Securities as well as the market share of the FINRA over-the-counter reporting facility (“ORF”) by the average shares per trade ratio between NMS Stocks and OTC Equity Securities (calculated as 0.17% based on available data from the second quarter of June 2017) when calculating the market share of Execution Venue ATS exclusively trading OTC Equity Securities and FINRA; (3) discount the Options Market Maker quotes by the trade to quote ratio for options (calculated as 0.01% based on available data for June 2016 through June 2017) when calculating message traffic for Options Market Makers; (4) discount equity market maker quotes by the trade to quote ratio for equities (calculated as 5.43% based on available data for June 2016 through June 2017) when calculating message traffic for equity market makers; (5) decrease the

²⁵ Securities Exchange Act Rel. No. 80694 (May 16, 2017), 82 FR 23416 (May 22, 2017) (SR–NYSEMKT–2017–26).

²⁶ For a summary of comments, see generally Securities Exchange Act Rel. No. 81067 (June 30, 2017), 82 FR 31656 (July 7, 2017) (“Suspension Order”).

²⁷ Suspension Order.

²⁸ See Letter from Stuart J. Kaswell, Executive Vice President, Managing Director and General Counsel, Managed Funds Association, to Brent J. Fields, Secretary, SEC (July 28, 2017) (“MFA Letter”); Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA, to Brent J. Fields, Secretary, SEC (July 28, 2017) (“SIFMA Letter”); Joanna Mallers, Secretary, FIA Principal Traders Group, to Brent J. Fields, Secretary, SEC (July 28, 2017) (“FIA Principal Traders Group Letter”); Letter from Kevin Coleman, General Counsel & Chief Compliance Officer, Belvedere Trading LLC, to Brent J. Fields, Secretary, SEC (July 28, 2017) (“Belvedere Letter”); Letter from W. Hardy Callcott, Sidley Austin LLP, to Brent J. Fields, Secretary, SEC (July 27, 2017) (“Sidley Letter”); Letter from John Kinahan, Chief Executive Officer, Group One Trading, L.P., to Brent J. Fields, Secretary, SEC (Aug. 10, 2017) (“Group One Letter”); and Letter from Joseph Molluso, Executive Vice President, Virtu Financial, to Brent J. Fields, Secretary, SEC (Aug. 18, 2017) (“Virtu Financial Letter”).

number of tiers for Industry Members (other than the Execution Venue ATSS) from nine to seven; (6) change the allocation of CAT costs between Equity Execution Venues and Options Execution Venues from 75%/25% to 67%/33%; (7) adjust tier percentages and recovery allocations for Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSS); (8) focus the comparability of CAT Fees on the individual entity level, rather than primarily on the comparability of affiliated entities; (9) commence invoicing of CAT Reporters as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Participants and the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants; and (10) require the proposed fees to automatically expire two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. As discussed in detail below, the Exchange proposes to amend the Original Proposal to reflect these changes.

(1) Executive Summary

The following provides an executive summary of the CAT funding model approved by the Operating Committee, as well as Industry Members’ rights and obligations related to the payment of CAT Fees calculated pursuant to the CAT funding model, as amended by this Amendment. A detailed description of the CAT funding model and the CAT Fees, as amended by this Amendment, as well as the changes made to the Original Proposal follows this executive summary.

(A) CAT Funding Model

- *CAT Costs.* The CAT funding model is designed to establish CAT-specific fees to collectively recover the costs of building and operating the CAT from all CAT Reporters, including Industry Members and Participants. The overall CAT costs for the calculation of the CAT Fees in this fee filing are comprised of Plan Processor CAT costs and non-Plan Processor CAT costs incurred, and estimated to be incurred, from November 21, 2016 through November 21, 2017. (See Section 3(a)(2)(E) below)
- *Bifurcated Funding Model.* The CAT NMS Plan requires a bifurcated funding model, where costs associated with building and operating the CAT would be borne by (1) Participants and Industry Members that are Execution Venues for Eligible Securities through fixed tier fees based on market share, and (2) Industry Members (other than

alternative trading systems (“ATs”) that execute transactions in Eligible Securities (“Execution Venue ATs”) through fixed tier fees based on message traffic for Eligible Securities. (See Section 3(a)(2) below)

- *Industry Member Fees.* Each Industry Member (other than Execution Venue ATs) will be placed into one of seven tiers of fixed fees, based on “message traffic” in Eligible Securities for a defined period (as discussed below). Prior to the start of CAT reporting, “message traffic” will be comprised of historical equity and equity options orders, cancels, quotes and executions provided by each exchange and FINRA over the previous three months. After an Industry Member begins reporting to the CAT, “message traffic” will be calculated based on the Industry Member’s Reportable Events reported to the CAT. Industry Members with lower levels of message traffic will pay a lower fee and Industry Members with higher levels of message traffic will pay a higher fee. To avoid disincentives to quoting behavior, Options Market Maker and equity market maker quotes will be discounted when calculating message traffic. (See Section 3(a)(2)(B) below)

- *Execution Venue Fees.* Each Equity Execution Venue will be placed in one of four tiers of fixed fees based on market share, and each Options Execution Venue will be placed in one of two tiers of fixed fees based on market share. Equity Execution Venue market share will be determined by calculating each Equity Execution Venue’s proportion of the total volume of NMS Stock and OTC Equity shares reported by all Equity Execution Venues during the relevant time period. For purposes of calculating market share, the market share of Execution Venue ATs exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF will be discounted. Similarly, market share for Options Execution Venues will be determined by calculating each Options Execution Venue’s proportion of the total volume of Listed Options contracts reported by all Options Execution Venues during the relevant time period. Equity Execution Venues with a larger market share will pay a larger CAT Fee than Equity Execution Venues with a smaller market share. Similarly, Options Execution Venues with a larger market share will pay a larger CAT Fee than Options Execution Venues with a smaller market share. (See Section 3(a)(2)(C) below)

- *Cost Allocation.* For the reasons discussed below, in designing the model, the Operating Committee

determined that 75 percent of total costs recovered would be allocated to Industry Members (other than Execution Venue ATs) and 25 percent would be allocated to Execution Venues. In addition, the Operating Committee determined to allocate 67 percent of Execution Venue costs recovered to Equity Execution Venues and 33 percent to Options Execution Venues. (See Section 3(a)(2)(D) below)

- *Comparability of Fees.* The CAT funding model charges CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) comparable CAT Fees. (See Section 3(a)(2)(F) below)

(B) CAT Fees for Industry Members

- *Fee Schedule.* The quarterly CAT Fees for each tier for Industry Members are set forth in the two fee schedules in the Consolidated Audit Trail Funding Fees, one for Equity ATs and one for Industry Members other than Equity ATs. (See Section 3(a)(3)(B) below)

- *Quarterly Invoices.* Industry Members will be billed quarterly for CAT Fees, with the invoices payable within 30 days. The quarterly invoices will identify within which tier the Industry Member falls. (See Section 3(a)(3)(C) below)

- *Centralized Payment.* Each Industry Member will receive from the Company one invoice for its applicable CAT Fees, not separate invoices from each Participant of which it is a member. Each Industry Member will pay its CAT Fees to the Company via the centralized system for the collection of CAT Fees established by the Operating Committee. (See Section 3(a)(3)(C) below)

- *Billing Commencement.* Industry Members will begin to receive invoices for CAT Fees as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Participants and the operative date of the Plan amendment adopting CAT Fees for Participants. (See Section 3(a)(2)(G) below)

- *Sunset Provision.* The Consolidated Audit Trail Funding Fees will sunset automatically two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. (See Section 3(a)(2)(J) below)

(2) Description of the CAT Funding Model

Article XI of the CAT NMS Plan requires the Operating Committee to approve the operating budget, including projected costs of developing and operating the CAT for the upcoming year. In addition to a budget, Article XI

of the CAT NMS Plan provides that the Operating Committee has discretion to establish funding for the Company, consistent with a bifurcated funding model, where costs associated with building and operating the Central Repository would be borne by (1) Participants and Industry Members that are Execution Venues through fixed tier fees based on market share, and (2) Industry Members (other than Execution Venue ATs) through fixed tier fees based on message traffic. In its order approving the CAT NMS Plan, the Commission determined that the proposed funding model was “reasonable”²⁹ and “reflects a reasonable exercise of the Participants’ funding authority to recover the Participants’ costs related to the CAT.”³⁰

More specifically, the Commission stated in approving the CAT NMS Plan that “[t]he Commission believes that the proposed funding model is reasonably designed to allocate the costs of the CAT between the Participants and Industry Members.”³¹ The Commission further noted the following:

The Commission believes that the proposed funding model reflects a reasonable exercise of the Participants’ funding authority to recover the Participants’ costs related to the CAT. The CAT is a regulatory facility jointly owned by the Participants and . . . the Exchange Act specifically permits the Participants to charge their members fees to fund their self-regulatory obligations. The Commission further believes that the proposed funding model is designed to impose fees reasonably related to the Participants’ self-regulatory obligations because the fees would be directly associated with the costs of establishing and maintaining the CAT, and not unrelated SRO services.³²

Accordingly, the funding model approved by the Operating Committee imposes fees on both Participants and Industry Members.

As discussed in Appendix C of the CAT NMS Plan, in developing and approving the approved funding model, the Operating Committee considered the advantages and disadvantages of a variety of alternative funding and cost allocation models before selecting the proposed model.³³ After analyzing the various alternatives, the Operating Committee determined that the

²⁹ Approval Order at 84796.

³⁰ *Id.* at 84794.

³¹ *Id.* at 84795.

³² *Id.* at 84794.

³³ Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85006.

proposed tiered, fixed fee funding model provides a variety of advantages in comparison to the alternatives.

In particular, the fixed fee model, as opposed to a variable fee model, provides transparency, ease of calculation, ease of billing and other administrative functions, and predictability of a fixed fee. Such factors are crucial to estimating a reliable revenue stream for the Company and for permitting CAT Reporters to reasonably predict their payment obligations for budgeting purposes. Additionally, a strictly variable or metered funding model based on message volume would be far more likely to affect market behavior and place an inappropriate burden on competition.

In addition, reviews from varying time periods of current broker-dealer order and trading data submitted under existing reporting requirements showed a wide range in activity among broker-dealers, with a number of broker-dealers submitting fewer than 1,000 orders per month and other broker-dealers submitting millions and even billions of orders in the same period. Accordingly, the CAT NMS Plan includes a tiered approach to fees. The tiered approach helps ensure that fees are equitably allocated among similarly situated CAT Reporters and furthers the goal of lessening the impact on smaller firms.³⁴ In addition, in choosing a tiered fee structure, the Operating Committee concluded that the variety of benefits offered by a tiered fee structure, discussed above, outweighed the fact that CAT Reporters in any particular tier would pay different rates per message traffic order event or per market share (e.g., an Industry Member with the largest amount of message traffic in one tier would pay a smaller amount per order event than an Industry Member in the same tier with the least amount of message traffic). Such variation is the natural result of a tiered fee structure.³⁵ The Operating Committee considered several approaches to developing a tiered model, including defining fee tiers based on such factors as size of firm, message traffic or trading dollar volume. After analyzing the alternatives, it was concluded that the tiering should be based on message traffic which will reflect the relative impact of CAT Reporters on the CAT System.

Accordingly, the CAT NMS Plan contemplates that costs will be allocated

across the CAT Reporters on a tiered basis in order to allocate higher costs to those CAT Reporters that contribute more to the costs of creating, implementing and maintaining the CAT and lower costs to those that contribute less.³⁶ The fees to be assessed at each tier are calculated so as to recoup a proportion of costs appropriate to the message traffic or market share (as applicable) from CAT Reporters in each tier. Therefore, Industry Members generating the most message traffic will be in the higher tiers, and will be charged a higher fee. Industry Members with lower levels of message traffic will be in lower tiers and will be assessed a lower fee for the CAT.³⁷

Correspondingly, Execution Venues with the highest market shares will be in the top tier, and will be charged higher fees. Execution Venues with the lowest market shares will be in the lowest tier and will be assessed lower fees for the CAT.³⁸

The CAT NMS Plan states that Industry Members (other than Execution Venue ATSS) will be charged based on message traffic, and that Execution Venues will be charged based on market share.³⁹ While there are multiple factors that contribute to the cost of building, maintaining and using the CAT, processing and storage of incoming message traffic is one of the most significant cost drivers for the CAT.⁴⁰ Thus, the CAT NMS Plan provides that the fees payable by Industry Members (other than Execution Venue ATSS) will be based on the message traffic generated by such Industry Member.⁴¹

In contrast to Industry Members, which determine the degree to which they produce message traffic that constitute CAT Reportable Events, the CAT Reportable Events of the Execution Venues are largely derivative of quotations and orders received from Industry Members that they are required to display. The business model for Execution Venues (other than FINRA), however, is focused on executions on their markets. As a result, the Operating Committee believes that it is more equitable to charge Execution Venues based on their market share rather than their message traffic.

Focusing on message traffic would make it more difficult to draw distinctions between large and small Execution Venues and, in particular,

between large and small options exchanges. For instance, the Operating Committee analyzed the message traffic of Execution Venues and Industry Members for the period of April 2017 to June 2017 and placed all CAT Reporters into a nine-tier framework (i.e., a single tier may include both Execution Venues and Industry Members). The Operating Committee's analysis found that the majority of exchanges (15 total) were grouped in Tiers 1 and 2. Moreover, virtually all of the options exchanges were in Tiers 1 and 2.⁴² Given the resulting concentration of options exchanges in Tiers 1 and 2 under this approach, the analysis shows that a funding model for Execution Venues based on message traffic would make it more difficult to distinguish between large and small options exchanges, as compared to the proposed fee approach that bases fees for Execution Venues on market share.

The CAT NMS Plan's funding model also is structured to avoid a "reduction in market quality."⁴³ The tiered, fixed fee funding model is designed to limit the disincentives to providing liquidity to the market. For example, the Operating Committee expects that a firm that has a large volume of quotes would likely be categorized in one of the upper tiers, and would not be assessed a fee for this traffic directly as they would under a more directly metered model. In contrast, strictly variable or metered funding models based on message volume are far more likely to affect market behavior. In approving the CAT NMS Plan, the SEC stated that "[t]he Participants also offered a reasonable basis for establishing a funding model based on broad tiers, in that it may be . . . less likely to have an incremental deterrent effect on liquidity provision."⁴⁴

The funding model also is structured to avoid a reduction in market quality because it discounts Options Market Maker and equity market maker quotes when calculating message traffic for Options Market Makers and equity market makers, respectively. As discussed in more detail below, the Operating Committee determined to discount the Options Market Maker quotes by the trade to quote ratio for options when calculating message traffic for Options Market Makers. Similarly, to avoid disincentives to quoting behavior on the equities side as well, the Operating Committee determined to

³⁴ Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85006.

³⁵ Moreover, as the SEC noted in approving the CAT NMS Plan, "[t]he Participants also have offered a reasonable basis for establishing a funding model based on broad tiers, in that it may be easier to implement." Approval Order at 84796.

³⁶ Approval Order at 85005.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Section 11.3(a) and (b) of the CAT NMS Plan.

⁴⁰ Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85005.

⁴¹ Section 11.3(b) of the CAT NMS Plan.

⁴² The Operating Committee notes that this analysis did not place MIAx PEARL in Tier 1 or Tier 2 since the exchange commenced trading on February 6, 2017.

⁴³ Section 11.2(e) of the CAT NMS Plan.

⁴⁴ Approval Order at 84796.

discount equity market maker quotes by the trade to quote ratio for equities when calculating message traffic for equity market makers. The proposed discounts recognize the value of the market makers' quoting activity to the market as a whole.

The CAT NMS Plan is further structured to avoid potential conflicts raised by the Operating Committee determining fees applicable to its own members—the Participants. First, the Company will operate on a “break-even” basis, with fees imposed to cover costs and an appropriate reserve. Any surpluses will be treated as an operational reserve to offset future fees and will not be distributed to the Participants as profits.⁴⁵ To ensure that the Participants' operation of the CAT will not contribute to the funding of their other operations, Section 11.1(c) of the CAT NMS Plan specifically states that “[a]ny surplus of the Company's revenues over its expenses shall be treated as an operational reserve to offset future fees.” In addition, as set forth in Article VIII of the CAT NMS Plan, the Company “intends to operate in a manner such that it qualifies as a ‘business league’ within the meaning of Section 501(c)(6) of the [Internal Revenue] Code.” To qualify as a business league, an organization must “not [be] organized for profit and no part of the net earnings of [the organization can] inure[] to the benefit of any private shareholder or individual.”⁴⁶ As the SEC stated when approving the CAT NMS Plan, “the Commission believes that the Company's application for Section 501(c)(6) business league status addresses issues raised by commenters about the Plan's proposed allocation of profit and loss by mitigating concerns that the Company's earnings could be used to benefit individual Participants.”⁴⁷ The Internal Revenue Service recently has determined that the Company is exempt from federal income tax under Section 501(c)(6) of the Internal Revenue Code.

The funding model also is structured to take into account distinctions in the securities trading operations of Participants and Industry Members. For example, the Operating Committee designed the model to address the different trading characteristics in the OTC Equity Securities market. Specifically, the Operating Committee proposes to discount the market share of Execution Venue ATSs exclusively trading OTC Equity Securities as well as

the market share of the FINRA ORF by the average shares per trade ratio between NMS Stocks and OTC Equity Securities to adjust for the greater number of shares being traded in the OTC Equity Securities market, which is generally a function of a lower per share price for OTC Equity Securities when compared to NMS Stocks. In addition, the Operating Committee also proposes to discount Options Market Maker and equity market maker message traffic in recognition of their role in the securities markets. Furthermore, the funding model creates separate tiers for Equity and Options Execution Venues due to the different trading characteristics of those markets.

Finally, by adopting a CAT-specific fee, the Operating Committee will be fully transparent regarding the costs of the CAT. Charging a general regulatory fee, which would be used to cover CAT costs as well as other regulatory costs, would be less transparent than the selected approach of charging a fee designated to cover CAT costs only.

A full description of the funding model is set forth below. This description includes the framework for the funding model as set forth in the CAT NMS Plan, as well as the details as to how the funding model will be applied in practice, including the number of fee tiers and the applicable fees for each tier. The complete funding model is described below, including those fees that are to be paid by the Participants. The proposed Consolidated Audit Trail Funding Fees, however, do not apply to the Participants; the proposed Consolidated Audit Trail Funding Fees only apply to Industry Members. The CAT Fees for Participants will be imposed separately by the Operating Committee pursuant to the CAT NMS Plan.

(A) Funding Principles

Section 11.2 of the CAT NMS Plan sets forth the principles that the Operating Committee applied in establishing the funding for the Company. The Operating Committee has considered these funding principles as well as the other funding requirements set forth in the CAT NMS Plan and in Rule 613 in developing the proposed funding model. The following are the funding principles in Section 11.2 of the CAT NMS Plan:

- To create transparent, predictable revenue streams for the Company that are aligned with the anticipated costs to build, operate and administer the CAT and other costs of the Company;
- To establish an allocation of the Company's related costs among Participants and Industry Members that

is consistent with the Exchange Act, taking into account the timeline for implementation of the CAT and distinctions in the securities trading operations of Participants and Industry Members and their relative impact upon the Company's resources and operations;

- To establish a tiered fee structure in which the fees charged to: (i) CAT Reporters that are Execution Venues, including ATSs, are based upon the level of market share; (ii) Industry Members' non-ATS activities are based upon message traffic; (iii) the CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether Execution Venue and/or Industry Members);

- To provide for ease of billing and other administrative functions;
- To avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality; and
- To build financial stability to support the Company as a going concern.

(B) Industry Member Tiering

Under Section 11.3(b) of the CAT NMS Plan, the Operating Committee is required to establish fixed fees to be payable by Industry Members, based on message traffic generated by such Industry Member, with the Operating Committee establishing at least five and no more than nine tiers.

The CAT NMS Plan clarifies that the fixed fees payable by Industry Members pursuant to Section 11.3(b) shall, in addition to any other applicable message traffic, include message traffic generated by: (i) An ATS that does not execute orders that is sponsored by such Industry Member; and (ii) routing orders to and from any ATS sponsored by such Industry Member. In addition, the Industry Member fees will apply to Industry Members that act as routing broker-dealers for exchanges. The Industry Member fees will not be applicable, however, to an ATS that qualifies as an Execution Venue, as discussed in more detail in the section on Execution Venue tiering.

In accordance with Section 11.3(b), the Operating Committee approved a tiered fee structure for Industry Members (other than Execution Venue ATSs) as described in this section. In determining the tiers, the Operating Committee considered the funding principles set forth in Section 11.2 of

⁴⁵ *Id.* at 84792.

⁴⁶ 26 U.S.C. 501(c)(6).

⁴⁷ Approval Order at 84793.

the CAT NMS Plan, seeking to create funding tiers that take into account the relative impact on CAT System resources of different Industry Members, and that establish comparable fees among the CAT Reporters with the most Reportable Events. The Operating Committee has determined that establishing seven tiers results in an allocation of fees that distinguishes between Industry Members with differing levels of message traffic. Thus, each such Industry Member will be placed into one of seven tiers of fixed fees, based on “message traffic” for a defined period (as discussed below).

A seven tier structure was selected to provide a wide range of levels for tiering Industry Members such that Industry Members submitting significantly less message traffic to the CAT would be adequately differentiated from Industry Members submitting substantially more message traffic. The Operating Committee considered historical message traffic from multiple time periods, generated by Industry Members across all exchanges and as submitted to FINRA’s Order Audit Trail System (“OATS”), and considered the distribution of firms with similar levels of message traffic, grouping together firms with similar levels of message traffic. Based on this, the Operating Committee determined that seven tiers would group firms with similar levels of message traffic, charging those firms with higher impact on the CAT more, while lowering the burden on Industry Members that have less CAT-related activity. Furthermore, the selection of seven tiers establishes comparable fees among the largest CAT Reporters.

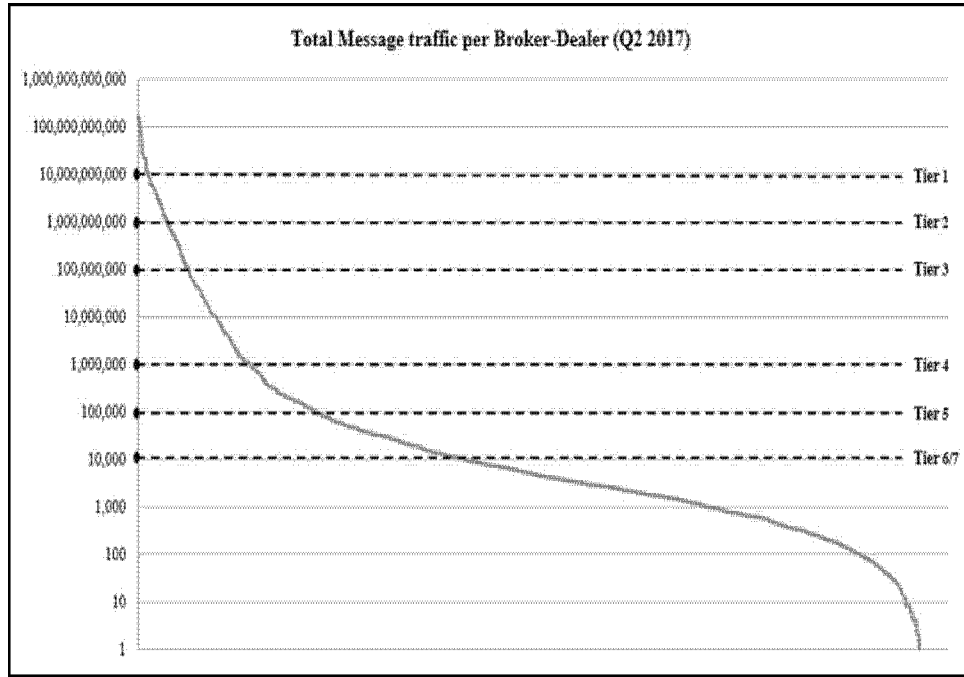
Each Industry Member (other than Execution Venue ATSS) will be ranked by message traffic and tiered by predefined Industry Member percentages (the “Industry Member Percentages”). The Operating

Committee determined to use predefined percentages rather than fixed volume thresholds to ensure that the total CAT Fees collected recover the expected CAT costs regardless of changes in the total level of message traffic. To determine the fixed percentage of Industry Members in each tier, the Operating Committee analyzed historical message traffic generated by Industry Members across all exchanges and as submitted to OATS, and considered the distribution of firms with similar levels of message traffic, grouping together firms with similar levels of message traffic. Based on this, the Operating Committee identified seven tiers that would group firms with similar levels of message traffic.

The percentage of costs recovered by each Industry Member tier will be determined by predefined percentage allocations (the “Industry Member Recovery Allocation”). In determining the fixed percentage allocation of costs recovered for each tier, the Operating Committee considered the impact of CAT Reporter message traffic on the CAT System as well as the distribution of total message volume across Industry Members while seeking to maintain comparable fees among the largest CAT Reporters. Accordingly, following the determination of the percentage of Industry Members in each tier, the Operating Committee identified the percentage of total market volume for each tier based on the historical message traffic upon which Industry Members had been initially ranked. Taking this into account along with the resulting percentage of total recovery, the percentage allocation of costs recovered for each tier were assigned, allocating higher percentages of recovery to tiers with higher levels of message traffic while avoiding any inappropriate burden on competition. Furthermore, by using percentages of Industry Members

and costs recovered per tier, the Operating Committee sought to include elasticity within the funding model, allowing the funding model to respond to changes in either the total number of Industry Members or the total level of message traffic.

The following chart illustrates the breakdown of seven Industry Member tiers across the monthly average of total equity and equity options orders, cancels, quotes and executions in the second quarter of 2017 as well as message traffic thresholds between the largest of Industry Member message traffic gaps. The Operating Committee referenced similar distribution illustrations to determine the appropriate division of Industry Member percentages in each tier by considering the grouping of firms with similar levels of message traffic and seeking to identify relative breakpoints in the message traffic between such groupings. In reviewing the chart and its corresponding table, note that while these distribution illustrations were referenced to help differentiate between Industry Member tiers, the proposed funding model is driven by fixed percentages of Industry Members across tiers to account for fluctuating levels of message traffic over time. This approach also provides financial stability for the CAT by ensuring that the funding model will recover the required amounts regardless of changes in the number of Industry Members or the amount of message traffic. Actual messages in any tier will vary based on the actual traffic in a given measurement period, as well as the number of firms included in the measurement period. The Industry Member Percentages and Industry Member Recovery Allocation for each tier will remain fixed with each Industry Member’s tier to be reassigned periodically, as described below in Section 3(a)(2)(I).



Industry Member tier	Approximate message traffic per Industry Member (Q2 2017) (orders, quotes, cancels and Executions)
Tier 1	>10,000,000,000
Tier 2	1,000,000,000–10,000,000,000
Tier 3	100,000,000–1,000,000,000
Tier 4	1,000,000–100,000,000
Tier 5	100,000–1,000,000
Tier 6	10,000–100,000
Tier 7	<10,000

Based on the above analysis, the Operating Committee approved the following Industry Member Percentages and Industry Member Recovery Allocations:

Industry Member tier	Percentage of Industry Members	Percentage of Industry Member Recovery	Percentage of total recovery
Tier 1	0.900	12.00	9.00
Tier 2	2.150	20.50	15.38
Tier 3	2.800	18.50	13.88
Tier 4	7.750	32.00	24.00
Tier 5	8.300	10.00	7.50
Tier 6	18.800	6.00	4.50
Tier 7	59.300	1.00	0.75
Total	100	100	75

For the purposes of creating these tiers based on message traffic, the Operating Committee determined to define the term “message traffic” separately for the period before the commencement of CAT reporting and for the period after the start of CAT reporting. The different definition for message traffic is necessary as there will

be no Reportable Events as defined in the Plan, prior to the commencement of CAT reporting. Accordingly, prior to the start of CAT reporting, “message traffic” will be comprised of historical equity and equity options orders, cancels, quotes and executions provided by each exchange and FINRA over the previous three months. Prior to the start of CAT

reporting, orders would be comprised of the total number of equity and equity options orders received and originated by a member of an exchange or FINRA over the previous three-month period, including principal orders, cancel/replace orders, market maker orders originated by a member of an exchange, and reserve (iceberg) orders as well as

executions originated by a member of FINRA, and excluding order rejects, system-modified orders, order routes and implied orders.⁴⁸ In addition, prior to the start of CAT reporting, cancels would be comprised of the total number of equity and equity option cancels received and originated by a member of an exchange or FINRA over a three-month period, excluding order modifications (e.g., order updates, order splits, partial cancels) and multiple cancels of a complex order. Furthermore, prior to the start of CAT reporting, quotes would be comprised of information readily available to the exchanges and FINRA, such as the total number of historical equity and equity options quotes received and originated by a member of an exchange or FINRA over the prior three-month period. Additionally, prior to the start of CAT reporting, executions would be comprised of the total number of equity and equity option executions received or originated by a member of an exchange or FINRA over a three-month period.

After an Industry Member begins reporting to the CAT, “message traffic” will be calculated based on the Industry Member’s Reportable Events reported to the CAT as will be defined in the Technical Specifications.⁴⁹

Quotes of Options Market Makers and equity market makers will be included in the calculation of total message traffic for those market makers for purposes of tiering under the CAT funding model both prior to CAT reporting and once CAT reporting commences.⁵⁰ To address potential concerns regarding burdens on competition or market quality of including quotes in the calculation of message traffic, however,

⁴⁸ Consequently, firms that do not have “message traffic” reported to an exchange or OATS before they are reporting to the CAT would not be subject to a fee until they begin to report information to CAT.

⁴⁹ If an Industry Member (other than an Execution Venue ATS) has no orders, cancels, quotes and executions prior to the commencement of CAT Reporting, or no Reportable Events after CAT reporting commences, then the Industry Member would not have a CAT Fee obligation.

⁵⁰ The SEC approved exemptive relief permitting Options Market Maker quotes to be reported to the Central Repository by the relevant Options Exchange in lieu of requiring that such reporting be done by both the Options Exchange and the Options Market Maker, as required by Rule 613 of Regulation NMS. See Securities Exchange Act Rel. No. 77265 (Mar. 1, 2017, 81 FR 11856 (Mar. 7, 2016)). This exemption applies to Options Market Maker quotes for CAT reporting purposes only. Therefore, notwithstanding the reporting exemption provided for Options Market Maker quotes, Options Market Maker quotes will be included in the calculation of total message traffic for Options Market Makers for purposes of tiering under the CAT funding model both prior to CAT reporting and once CAT reporting commences.

the Operating Committee determined to discount the Options Market Maker quotes by the trade to quote ratio for options when calculating message traffic for Options Market Makers. Based on available data for June 2016 through June 2017, the trade to quote ratio for options is 0.01%. Similarly, to avoid disincentives to quoting behavior on the equities side, the Operating Committee determined to discount equity market maker quotes by the trade to quote ratio for equities. Based on available data for June 2016 through June 2017, the trade to quote ratio for equities is 5.43%.⁵¹ The trade to quote ratio for options and the trade to quote ratio for equities will be calculated every three months when tiers are recalculated (as discussed below).

The Operating Committee has determined to calculate fee tiers every three months, on a calendar quarter basis, based on message traffic from the prior three months. Based on its analysis of historical data, the Operating Committee believes that calculating tiers based on three months of data will provide the best balance between reflecting changes in activity by Industry Members while still providing predictability in the tiering for Industry Members. Because fee tiers will be calculated based on message traffic from the prior three months, the Operating Committee will begin calculating message traffic based on an Industry Member’s Reportable Events reported to the CAT once the Industry Member has been reporting to the CAT for three months. Prior to that, fee tiers will be calculated as discussed above with regard to the period prior to CAT reporting.

(C) Execution Venue Tiering

Under Section 11.3(a) of the CAT NMS Plan, the Operating Committee is required to establish fixed fees payable by Execution Venues. Section 1.1 of the CAT NMS Plan defines an Execution Venue as “a Participant or an alternative trading system (“ATS”) (as defined in Rule 300 of Regulation ATS) that operates pursuant to Rule 301 of Regulation ATS (excluding any such ATS that does not execute orders).”⁵²

The Operating Committee determined that ATSs should be included within the definition of Execution Venue. The

⁵¹ The trade to quote ratios were calculated based on the inverse of the average of the monthly equity SIP and OPRA quote to trade ratios from June 2016—June 2017 that were compiled by the Financial Information Forum using data from NASDAQ and SIAC.

⁵² Although FINRA does not operate an execution venue, because it is a Participant, it is considered an “Execution Venue” under the Plan for purposes of determining fees.

Operating Committee believes that it is appropriate to treat ATSs as Execution Venues under the proposed funding model since ATSs have business models that are similar to those of exchanges, and ATSs also compete with exchanges.

Given the differences between Execution Venues that trade NMS Stocks and/or OTC Equity Securities and Execution Venues that trade Listed Options, Section 11.3(a) addresses Execution Venues that trade NMS Stocks and/or OTC Equity Securities separately from Execution Venues that trade Listed Options. Equity Execution Venues and Options Execution Venues are treated separately for two reasons. First, the differing quoting behavior of Equity Execution Venues and Options Execution Venues makes comparison of activity between Execution Venues difficult. Second, Execution Venue tiers are calculated based on market share of share volume, and it is therefore difficult to compare market share between asset classes (i.e., equity shares versus options contracts). Discussed below is how the funding model treats the two types of Execution Venues.

(I) NMS Stocks and OTC Equity Securities

Section 11.3(a)(i) of the CAT NMS Plan states that each Execution Venue that (i) executes transactions or, (ii) in the case of a national securities association, has trades reported by its members to its trade reporting facility or facilities for reporting transactions effected otherwise than on an exchange, in NMS Stocks or OTC Equity Securities will pay a fixed fee depending on the market share of that Execution Venue in NMS Stocks and OTC Equity Securities, with the Operating Committee establishing at least two and not more than five tiers of fixed fees, based on an Execution Venue’s NMS Stocks and OTC Equity Securities market share. For these purposes, market share for Execution Venues that execute transactions will be calculated by share volume, and market share for a national securities association that has trades reported by its members to its trade reporting facility or facilities for reporting transactions effected otherwise than on an exchange in NMS Stocks or OTC Equity Securities will be calculated based on share volume of trades reported, provided, however, that the share volume reported to such national securities association by an Execution Venue shall not be included in the calculation of such national security association’s market share.

In accordance with Section 11.3(a)(i) of the CAT NMS Plan, the Operating Committee approved a tiered fee

structure for Equity Execution Venues and Option Execution Venues. In determining the Equity Execution Venue Tiers, the Operating Committee considered the funding principles set forth in Section 11.2 of the CAT NMS Plan, seeking to create funding tiers that take into account the relative impact on system resources of different Equity Execution Venues, and that establish comparable fees among the CAT Reporters with the most Reportable Events. Each Equity Execution Venue will be placed into one of four tiers of fixed fees, based on the Execution Venue's NMS Stocks and OTC Equity Securities market share. In choosing four tiers, the Operating Committee performed an analysis similar to that discussed above with regard to the non-Execution Venue Industry Members to determine the number of tiers for Equity Execution Venues. The Operating Committee determined to establish four tiers for Equity Execution Venues, rather than a larger number of tiers as established for non-Execution Venue Industry Members, because the four tiers were sufficient to distinguish between the smaller number of Equity Execution Venues based on market share. Furthermore, the selection of four tiers serves to help establish comparability among the largest CAT Reporters.

Each Equity Execution Venue will be ranked by market share and tiered by predefined Execution Venue percentages, (the "Equity Execution Venue Percentages"). In determining the fixed percentage of Equity Execution Venues in each tier, the Operating Committee reviewed historical market share of share volume for Execution Venues. Equity Execution Venue market shares of share volume were sourced from market statistics made publicly-available by Bats Global Markets, Inc. ("Bats"). ATS market shares of share volume was sourced from market statistics made publicly-available by FINRA. FINRA trade reporting facility

("TRF") and ORF market share of share volume was sourced from market statistics made publicly available by FINRA. Based on data from FINRA and otcmarkets.com, ATSs accounted for 39.12% of the share volume across the TRFs and ORFs during the recent tiering period. A 39.12%/60.88% split was applied to the ATS and non-ATS breakdown of FINRA market share, with FINRA tiered based only on the non-ATS portion of its market share of share volume.

The Operating Committee determined to discount the market share of Execution Venue ATSs exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF in recognition of the different trading characteristics of the OTC Equity Securities market as compared to the market in NMS Stocks. Many OTC Equity Securities are priced at less than one dollar—and a significant number at less than one penny—per share and low-priced shares tend to trade in larger quantities. Accordingly, a disproportionately large number of shares are involved in transactions involving OTC Equity Securities versus NMS Stocks. Because the proposed fee tiers are based on market share calculated by share volume, Execution Venue ATSs exclusively trading OTC Equity Securities and FINRA would likely be subject to higher tiers than their operations may warrant. To address this potential concern, the Operating Committee determined to discount the market share of Execution Venue ATSs exclusively trading OTC Equity Securities and the market share of the FINRA ORF by multiplying such market share by the average shares per trade ratio between NMS Stocks and OTC Equity Securities in order to adjust for the greater number of shares being traded in the OTC Equity Securities market. Based on available data for the second quarter of 2017, the average shares per trade ratio between NMS Stocks and OTC Equity Securities is

0.17%.⁵³ The average shares per trade ratio between NMS Stocks and OTC Equity Securities will be recalculated every three months when tiers are recalculated.⁵⁴

Based on this, the Operating Committee considered the distribution of Execution Venues, and grouped together Execution Venues with similar levels of market share. The percentage of costs recovered by each Equity Execution Venue tier will be determined by predefined percentage allocations (the "Equity Execution Venue Recovery Allocation"). In determining the fixed percentage allocation of costs to be recovered from each tier, the Operating Committee considered the impact of CAT Reporter market share activity on the CAT System as well as the distribution of total market volume across Equity Execution Venues while seeking to maintain comparable fees among the largest CAT Reporters. Accordingly, following the determination of the percentage of Execution Venues in each tier, the Operating Committee identified the percentage of total market volume for each tier based on the historical market share upon which Execution Venues had been initially ranked. Taking this into account along with the resulting percentage of total recovery, the percentage allocation of cost recovery for each tier were assigned, allocating higher percentages of recovery to the tier with a higher level of market share while avoiding any inappropriate burden on competition. Furthermore, by using percentages of Equity Execution Venues and cost recovery per tier, the Operating Committee sought to include elasticity within the funding model, allowing the funding model to respond to changes in either the total number of Equity Execution Venues or changes in market share.

Based on this analysis, the Operating Committee approved the following Equity Execution Venue Percentages and Recovery Allocations:

Equity Execution Venue tier	Percentage of Equity Execution Venues	Percentage of Execution Venue Recovery	Percentage of total recovery
Tier 1	25.00	33.25	8.31
Tier 2	42.00	25.73	6.43
Tier 3	23.00	8.00	2.00
Tier 4	10.00	0.02	0.01
Total	100	67	16.75

⁵³ The average shares per trade ratio for both NMS Stocks and OTC Equity Securities from the second quarter of 2017 was calculated using publicly available market volume data from Bats and OTC Markets Group, and the totals were divided to

determine the average number of shares per trade between NMS Stocks and OTC Equity Securities.

⁵⁴ The discount is only applied to the market share of Execution Venue ATSs exclusively trading

OTC Equity Securities. Accordingly, FINRA's market share, which includes market share from the OTC Reporting Facility, is not discounted as a result of its OTC Equity Securities activity.

(II) Listed Options

Section 11.3(a)(ii) of the CAT NMS Plan states that each Execution Venue that executes transactions in Listed Options will pay a fixed fee depending on the Listed Options market share of that Execution Venue, with the Operating Committee establishing at least two and no more than five tiers of fixed fees, based on an Execution Venue's Listed Options market share. For these purposes, market share will be calculated by contract volume.

In accordance with Section 11.3(a)(ii) of the CAT NMS Plan, the Operating Committee approved a tiered fee structure for Options Execution Venues. In determining the tiers, the Operating Committee considered the funding principles set forth in Section 11.2 of the CAT NMS Plan, seeking to create funding tiers that take into account the relative impact on system resources of different Options Execution Venues, and that establish comparable fees among the CAT Reporters with the most Reportable Events. Each Options Execution Venue will be placed into one of two tiers of fixed fees, based on the Execution Venue's Listed Options market share. In choosing two tiers, the Operating Committee performed an analysis similar to that discussed above with regard to Industry Members (other than Execution Venue ATSs) to

determine the number of tiers for Options Execution Venues. The Operating Committee determined to establish two tiers for Options Execution Venues, rather than a larger number, because the two tiers were sufficient to distinguish between the smaller number of Options Execution Venues based on market share. Furthermore, due to the smaller number of Options Execution Venues, the incorporation of additional Options Execution Venue tiers would result in significantly higher fees for Tier 1 Options Execution Venues and reduce comparability between Execution Venues and Industry Members. Furthermore, the selection of two tiers served to establish comparable fees among the largest CAT Reporters.

Each Options Execution Venue will be ranked by market share and tiered by predefined Execution Venue percentages, (the "Options Execution Venue Percentages"). To determine the fixed percentage of Options Execution Venues in each tier, the Operating Committee analyzed the historical and publicly available market share of Options Execution Venues to group Options Execution Venues with similar market shares across the tiers. Options Execution Venue market share of share volume were sourced from market statistics made publicly-available by

Bats. The process for developing the Options Execution Venue Percentages was the same as discussed above with regard to Equity Execution Venues.

The percentage of costs to be recovered from each Options Execution Venue tier will be determined by predefined percentage allocations (the "Options Execution Venue Recovery Allocation"). In determining the fixed percentage allocation of cost recovery for each tier, the Operating Committee considered the impact of CAT Reporter market share activity on the CAT System as well as the distribution of total market volume across Options Execution Venues while seeking to maintain comparable fees among the largest CAT Reporters. Furthermore, by using percentages of Options Execution Venues and cost recovery per tier, the Operating Committee sought to include elasticity within the funding model, allowing the funding model to respond to changes in either the total number of Options Execution Venues or changes in market share. The process for developing the Options Execution Venue Recovery Allocation was the same as discussed above with regard to Equity Execution Venues.

Based on this analysis, the Operating Committee approved the following Options Execution Venue Percentages and Recovery Allocations:

Options Execution Venue tier	Percentage of Options Execution Venues	Percentage of Execution Venue Recovery	Percentage of total recovery
Tier 1	75.00	28.25	7.06
Tier 2	25.00	4.75	1.19
Total	100	33	8.25

(III) Market Share/Tier Assignments

The Operating Committee determined that, prior to the start of CAT reporting, market share for Execution Venues would be sourced from publicly-available market data. Options and equity volumes for Participants will be sourced from market data made publicly available by Bats while Execution Venue ATS volumes will be sourced from market data made publicly available by FINRA and OTC Markets. Set forth in Exhibit 3 of the proposed rule change are two charts, one listing the current Equity Execution Venues, each with its rank and tier, and one listing the current Options Execution Venues, each with its rank and tier.

After the commencement of CAT reporting, market share for Execution Venues will be sourced from data reported to the CAT. Equity Execution

Venue market share will be determined by calculating each Equity Execution Venue's proportion of the total volume of NMS Stock and OTC Equity shares reported by all Equity Execution Venues during the relevant time period (with the discounting of market share of Execution Venue ATSs exclusively trading OTC Equity Securities, as described above). Similarly, market share for Options Execution Venues will be determined by calculating each Options Execution Venue's proportion of the total volume of Listed Options contracts reported by all Options Execution Venues during the relevant time period.

The Operating Committee has determined to calculate fee tiers for Execution Venues every three months based on market share from the prior three months. Based on its analysis of

historical data, the Operating Committee believes calculating tiers based on three months of data will provide the best balance between reflecting changes in activity by Execution Venues while still providing predictability in the tiering for Execution Venues.

(D) Allocation of Costs

In addition to the funding principles discussed above, including comparability of fees, Section 11.1(c) of the CAT NMS Plan also requires expenses to be fairly and reasonably shared among the Participants and Industry Members. Accordingly, in developing the proposed fee schedules pursuant to the funding model, the Operating Committee calculated how the CAT costs would be allocated between Industry Members and Execution Venues, and how the portion

of CAT costs allocated to Execution Venues would be allocated between Equity Execution Venues and Options Execution Venues. These determinations are described below.

(I) Allocation Between Industry Members and Execution Venues

In determining the cost allocation between Industry Members (other than Execution Venue ATSS) and Execution Venues, the Operating Committee analyzed a range of possible splits for revenue recovery from such Industry Members and Execution Venues, including 80%/20%, 75%/25%, 70%/30% and 65%/35% allocations. Based on this analysis, the Operating Committee determined that 75 percent of total costs recovered would be allocated to Industry Members (other than Execution Venue ATSS) and 25 percent would be allocated to Execution Venues. The Operating Committee determined that this 75%/25% division maintained the greatest level of comparability across the funding model. For example, the cost allocation establishes fees for the largest Industry Members (*i.e.*, those Industry Members in Tiers 1) that are comparable to the largest Equity Execution Venues and Options Execution Venues (*i.e.*, those Execution Venues in Tier 1).

Furthermore, the allocation of total CAT cost recovery recognizes the difference in the number of CAT Reporters that are Industry Members versus CAT Reporters that are Execution Venues. Specifically, the cost allocation takes into consideration that there are approximately 23 times more Industry Members expected to report to the CAT than Execution Venues (*e.g.*, an estimated 1541 Industry Members versus 67 Execution Venues as of June 2017).

(II) Allocation Between Equity Execution Venues and Options Execution Venues

The Operating Committee also analyzed how the portion of CAT costs allocated to Execution Venues would be allocated between Equity Execution

Venues and Options Execution Venues. In considering this allocation of costs, the Operating Committee analyzed a range of alternative splits for revenue recovered between Equity Execution Venues and Options Execution Venues, including a 70%/30%, 67%/33%, 65%/35%, 50%/50% and 25%/75% split. Based on this analysis, the Operating Committee determined to allocate 67 percent of Execution Venue costs recovered to Equity Execution Venues and 33 percent to Options Execution Venues. The Operating Committee determined that a 67%/33% allocation between Equity Execution Venues and Options Execution Venues maintained the greatest level of fee equitability and comparability based on the current number of Equity Execution Venues and Options Execution Venues. For example, the allocation establishes fees for the larger Equity Execution Venues that are comparable to the larger Options Execution Venues. Specifically, Tier 1 Equity Execution Venues would pay a quarterly fee of \$81,047 and Tier 1 Options Execution Venues would pay a quarterly fee of \$81,379. In addition to fee comparability between Equity Execution Venues and Options Execution Venues, the allocation also establishes equitability between larger (Tier 1) and smaller (Tier 2) Execution Venues based upon the level of market share. Furthermore, the allocation is intended to reflect the relative levels of current equity and options order events.

(E) Fee Levels

The Operating Committee determined to establish a CAT-specific fee to collectively recover the costs of building and operating the CAT. Accordingly, under the funding model, the sum of the CAT Fees is designed to recover the total cost of the CAT. The Operating Committee has determined overall CAT costs to be comprised of Plan Processor costs and non-Plan Processor costs, which are estimated to be \$50,700,000 in total for the year beginning November 21, 2016.⁵⁵

The Plan Processor costs relate to costs incurred and to be incurred through November 21, 2017 by the Plan Processor and consist of the Plan Processor's current estimates of average yearly ongoing costs, including development costs, which total \$37,500,000. This amount is based upon the fees due to the Plan Processor pursuant to the Company's agreement with the Plan Processor.

The non-Plan Processor estimated costs incurred and to be incurred by the Company through November 21, 2017 consist of three categories of costs. The first category of such costs are third party support costs, which include legal fees, consulting fees and audit fees from November 21, 2016 until the date of filing as well as estimated third party support costs for the rest of the year. These amount to an estimated \$5,200,000. The second category of non-Plan Processor costs are estimated cyber-insurance costs for the year. Based on discussions with potential cyber-insurance providers, assuming \$2–5 million cyber-insurance premium on \$100 million coverage, the Company has estimated \$3,000,000 for the annual cost. The final cost figures will be determined following receipt of final underwriter quotes. The third category of non-Plan Processor costs is the CAT operational reserve, which is comprised of three months of ongoing Plan Processor costs (\$9,375,000), third party support costs (\$1,300,000) and cyber-insurance costs (\$750,000). The Operating Committee aims to accumulate the necessary funds to establish the three-month operating reserve for the Company through the CAT Fees charged to CAT Reporters for the year. On an ongoing basis, the Operating Committee will account for any potential need to replenish the operating reserve or other changes to total cost during its annual budgeting process. The following table summarizes the Plan Processor and non-Plan Processor cost components which comprise the total estimated CAT costs of \$50,700,000 for the covered period.

Cost category	Cost component	Amount
Plan Processor	Operational Costs	\$37,500,000
Non-Plan Processor	Third Party Support Costs	5,200,000
	Operational Reserve	5,000,000 ⁵⁶
	Cyber-insurance Costs	3,000,000
Estimated Total		\$50,700,000

⁵⁵ It is anticipated that CAT-related costs incurred prior to November 21, 2016 will be addressed via a separate filing.

Based on these estimated costs and the calculations for the funding model described above, the Operating

Committee determined to impose the following fees:⁵⁷

For Industry Members (other than Execution Venue ATSs):

Tier	Percentage of Equity Execution Venues	Quarterly CAT Fee
1	0.900	\$81,483
2	2.150	59,055
3	2.800	40,899
4	7.750	25,566
5	8.300	7,428
6	18.800	1,968
7	59.300	105

For Execution Venues for NMS Stocks and OTC Equity Securities:

Tier	Percentage of Options Execution Venues	Quarterly CAT Fee
1	25.00	\$81,048
2	42.00	37,062
3	23.00	21,126
4	10.00	129

For Execution Venues for Listed Options:

Tier	Percentage of Industry Members	Quarterly CAT Fee
1	75.00	\$81,381
2	25.00	37,629

The Operating Committee has calculated the schedule of effective fees for Industry Members (other than Execution Venue ATSs) and Execution

Venues in the following manner. Note that the calculation of CAT Fees assumes 52 Equity Execution Venues, 15 Options Execution Venues and 1,541

Industry Members (other than Execution Venue ATSs) as of June 2017.

CALCULATION OF ANNUAL TIER FEES FOR INDUSTRY MEMBERS ("IM")

Industry Member tier	Percentage of Industry Members	Percentage of Industry Member Recovery	Percentage of total recovery
Tier 1	0.900	12.00	9.00
Tier 2	2.150	20.50	15.38
Tier 3	2.800	18.50	13.88
Tier 4	7.750	32.00	24.00
Tier 5	8.300	10.00	7.50
Tier 6	18.800	6.00	4.50
Tier 7	59.300	1.00	0.75
Total	100	100	75

⁵⁶ This \$5,000,000 represents the gradual accumulation of the funds for a target operating reserve of \$11,425,000.

⁵⁷ Note that all monthly, quarterly and annual CAT Fees have been rounded to the nearest dollar.

Industry Member tier	Estimated number of Industry Members
Tier 1	14
Tier 2	33
Tier 3	43
Tier 4	119
Tier 5	128
Tier 6	290
Tier 7	914
Total	1,541

Calculation 1.1 (Calculation of a Tier 1 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 0.9\% \text{ [% of Tier 1 IMs]} = 14 \text{ [Estimated Tier 1 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 12\% \text{ [% of Tier 1 IM Recovery]}}{14 \text{ [Estimated Tier 1 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$27,161}$$

Calculation 1.2 (Calculation of a Tier 2 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 2.15\% \text{ [% of Tier 2 IMs]} = 33 \text{ [Estimated Tier 2 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 20.5\% \text{ [% of Tier 2 IM Recovery]}}{33 \text{ [Estimated Tier 2 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$19,685}$$

Calculation 1.3 (Calculation of a Tier 3 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 2.125\% \text{ [% of Tier 3 IMs]} = 43 \text{ [Estimated Tier 3 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 18.5\% \text{ [% of Tier 3 IM Recovery]}}{43 \text{ [Estimated Tier 3 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$13,633}$$

Calculation 1.4 (Calculation of a Tier 4 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 7.75\% \text{ [% of Tier 4 IMs]} = 119 \text{ [Estimated Tier 4 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 32\% \text{ [% of Tier 4 IM Recovery]}}{119 \text{ [Estimated Tier 4 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$8522}$$

Calculation 1.5 (Calculation of a Tier 5 Industry Member Annual Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 8.3\% \text{ [% of Tier 5 IMs]} = 128 \text{ [Estimated Tier 5 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 7.75\% \text{ [% of Tier 5 IM Recovery]}}{128 \text{ [Estimated Tier 5 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$2476}$$

Calculation 1.6 (Calculation of a Tier 6 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 18.8\% \text{ [% of Tier 6 IMs]} = 290 \text{ [Estimated Tier 6 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 6\% \text{ [% of Tier 6 IM Recovery]}}{290 \text{ [Estimated Tier 6 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$656}$$

Calculation 1.7 (Calculation of a Tier 7 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 59.3\% \text{ [% of Tier 7 IMs]} = 914 \text{ [Estimated Tier 7 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 1\% \text{ [% of Tier 7 IM Recovery]}}{914 \text{ [Estimated Tier 7 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$35}$$

CALCULATION OF ANNUAL TIER FEES FOR EQUITY EXECUTION VENUES ("EV")

Equity Execution Venue tier	Percentage of Equity Execution Venues	Percentage of Execution Venue Recovery	Percentage of total recovery
Tier 1	25.00	33.25	8.31
Tier 2	42.00	25.73	6.43
Tier 3	23.00	8.00	2.00
Tier 4	10.00	49.00	0.01
Total	100	67	16.75

Equity Execution Venue tier	Estimated number of Equity Execution Venues
Tier 1	13
Tier 2	22
Tier 3	12
Tier 4	5
Total	52

Calculation 2.1 (Calculation of a Tier 1 Equity Execution Venue Monthly Fee)

$$52 \left[\frac{\text{Estimated Tot. Equity EVs} \times 25\% \left[\% \text{ of Tier 1 Equity EVs} \right]}{\left(\frac{\$50,700,000 \left[\text{Tot. Ann. CAT Costs} \right] \times 33.25\% \left[\text{EV \% of Tot. Ann. CAT Costs} \right] \times 26\% \left[\% \text{ of Tier 1 Equity EV Recovery} \right]}{13 \left[\text{Estimated Tier 1 Equity EVs} \right]} \right)} \right] \div 12 \left[\text{Months per year} \right] = \$27,016$$

Calculation 2.2 (Calculation of a Tier 2 Equity Execution Venue Monthly Fee)

$$52 \left[\frac{\text{Estimated Tot. Equity EVs} \times 42\% \left[\% \text{ of Tier 2 Equity EVs} \right]}{\left(\frac{\$50,700,000 \left[\text{Tot. Ann. CAT Costs} \right] \times 25\% \left[\text{EV \% of Tot. Ann. CAT Costs} \right] \times 25.73\% \left[\% \text{ of Tier 2 Equity EV Recovery} \right]}{22 \left[\text{Estimated Tier 2 Equity EVs} \right]} \right)} \right] \div 12 \left[\text{Months per year} \right] = \$12,353$$

Calculation 2.3 (Calculation of a Tier 3 Equity Execution Venue Monthly Fee)

$$52 \left[\frac{\text{Estimated Tot. Equity EVs} \times 23\% \left[\% \text{ of Tier 2 Equity EVs} \right]}{\left(\frac{\$50,700,000 \left[\text{Tot. Ann. CAT Costs} \right] \times 25\% \left[\text{EV \% of Tot. Ann. CAT Costs} \right] \times 8\% \left[\% \text{ of Tier 2 Equity EV Recovery} \right]}{12 \left[\text{Estimated Tier 2 Equity EVs} \right]} \right)} \right] \div 12 \left[\text{Months per year} \right] = \$7,042$$

Calculation 2.4 (Calculation of a Tier 4 Equity Execution Venue Monthly Fee)

$$52 \left[\frac{\text{Estimated Tot. Equity EVs} \times 10\% \left[\% \text{ of Tier 2 Equity EVs} \right]}{\left(\frac{\$50,700,000 \left[\text{Tot. Ann. CAT Costs} \right] \times 25\% \left[\text{EV \% of Tot. Ann. CAT Costs} \right] \times 0.02\% \left[\% \text{ of Tier 2 Equity EV Recovery} \right]}{5 \left[\text{Estimated Tier 2 Equity EVs} \right]} \right)} \right] \div 12 \left[\text{Months per year} \right] = \$42$$

CALCULATION OF ANNUAL TIER FEES FOR OPTIONS EXECUTION VENUES (“EV”)

Options Execution Venue tier	Percentage of Options Execution Venues	Percentage of Execution Venue Recovery	Percentage of total recovery
Tier 1	75.00	28.25	7.06
Tier 2	25.00	4.75	1.19
Total	100	33	8.25

Options Execution Venue tier	Estimated number of Options Execution Venues
Tier 1	11
Tier 2	4
Total	15

Calculation 3.1 (Calculation of a Tier 1 Options Execution Venue Monthly Fee)

$$15 \left[\frac{\text{Estimated Tot. Options EVs} \times 75\% \left[\% \text{ of Tier 1 Options EVs} \right]}{\left(\frac{\$50,700,000 \left[\text{Tot. Ann. CAT Costs} \right] \times 25\% \left[\text{EV \% of Tot. Ann. CAT Costs} \right] \times 28.25\% \left[\% \text{ of Tier 1 Options EV Recovery} \right]}{11 \left[\text{Estimated Tier 1 Options EVs} \right]} \right)} \right] \div 12 \left[\text{Months per year} \right] = \$27,127$$

Calculation 3.2 (Calculation of a Tier 2 Options Execution Venue Annual Fee)

$$15 \left[\frac{\text{Estimated Tot. Options EVs} \times 25\% \left[\% \text{ of Tier 2 Options EVs} \right]}{\left(\frac{\$50,700,000 \left[\text{Tot. Ann. CAT Costs} \right] \times 25\% \left[\text{EV \% of Tot. Ann. CAT Costs} \right] \times 4.75\% \left[\% \text{ of Tier 2 Options EV Recovery} \right]}{4 \left[\text{Estimated Tier 2 Options EVs} \right]} \right)} \right] \div 12 \left[\text{Months per year} \right] = \$12,543$$

TRACEABILITY OF TOTAL CAT FEES

Type	Industry Member tier	Estimated number of members	CAT Fees paid annually	Total recovery
Industry Members	Tier 1	14	\$325,932	\$4,563,048
	Tier 2	33	236,220	7,795,260
	Tier 3	43	163,596	7,034,628
	Tier 4	119	102,264	12,169,416
	Tier 5	128	29,712	3,803,136
	Tier 6	290	7,872	2,282,880
	Tier 7	914	420	383,880
Total		1,541		38,032,248
Equity Execution Venues	Tier 1	13	324,192	4,214,496
	Tier 2	22	148,248	3,261,456
	Tier 3	12	84,504	1,014,048
	Tier 4	5	516	2,580
Total		52		8,492,580
Options Execution Venues	Tier 1	11	325,524	3,580,764
	Tier 2	4	150,516	602,064

TRACEABILITY OF TOTAL CAT FEES—Continued

Type	Industry Member tier	Estimated number of members	CAT Fees paid annually	Total recovery
Total		15	.....	4,182,828
Total	50,700,000
Excess ⁵⁸	7,656

(F) Comparability of Fees

The funding principles require a funding model in which the fees charged to the CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether Execution Venue and/or Industry Members). Accordingly, in creating the model, the Operating Committee sought to establish comparable fees for the top tier of Industry Members (other than Execution Venue ATSS), Equity Execution Venues and Options Execution Venues. Specifically, each Tier 1 CAT Reporter would be required to pay a quarterly fee of approximately \$81,000.

(G) Billing Onset

Under Section 11.1(c) of the CAT NMS Plan, to fund the development and implementation of the CAT, the Company shall time the imposition and collection of all fees on Participants and Industry Members in a manner reasonably related to the timing when the Company expects to incur such development and implementation costs. The Company is currently incurring such development and implementation costs and will continue to do so prior to the commencement of CAT reporting and thereafter. In accordance with the CAT NMS Plan, all CAT Reporters, including both Industry Members and Execution Venues (including Participants), will be invoiced as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Participants and the operative date of the Plan amendment adopting CAT Fees for Participants.

(H) Changes to Fee Levels and Tiers

Section 11.3(d) of the CAT NMS Plan states that “[t]he Operating Committee shall review such fee schedule on at

⁵⁸ The amount in excess of the total CAT costs will contribute to the gradual accumulation of the target operating reserve of \$11.425 million.

least an annual basis and shall make any changes to such fee schedule that it deems appropriate. The Operating Committee is authorized to review such fee schedule on a more regular basis, but shall not make any changes on more than a semi-annual basis unless, pursuant to a Supermajority Vote, the Operating Committee concludes that such change is necessary for the adequate funding of the Company.” With such reviews, the Operating Committee will review the distribution of Industry Members and Execution Venues across tiers, and make any updates to the percentage of CAT Reporters allocated to each tier as may be necessary. In addition, the reviews will evaluate the estimated ongoing CAT costs and the level of the operating reserve. To the extent that the total CAT costs decrease, the fees would be adjusted downward, and to the extent that the total CAT costs increase, the fees would be adjusted upward.⁵⁹ Furthermore, any surplus of the Company’s revenues over its expenses is to be included within the operational reserve to offset future fees. The limitations on more frequent changes to the fee, however, are intended to provide budgeting certainty for the CAT Reporters and the Company.⁶⁰ To the extent that the Operating Committee approves changes to the number of tiers in the funding model or the fees assigned to each tier, then the Exchange will file such changes with the SEC pursuant to Section 19(b) of the Exchange Act, and any such changes will become effective in accordance with the requirements of Section 19(b).

(I) Initial and Periodic Tier Reassignments

The Operating Committee has determined to calculate fee tiers every three months based on market share or

⁵⁹ The CAT Fees are designed to recover the costs associated with the CAT. Accordingly, CAT Fees would not be affected by increases or decreases in other non-CAT expenses incurred by the Participants, such as any changes in costs related to the retirement of existing regulatory systems, such as OATS.

⁶⁰ Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85006.

message traffic, as applicable, from the prior three months. For the initial tier assignments, the Company will calculate the relevant tier for each CAT Reporter using the three months of data prior to the commencement date. As with the initial tier assignment, for the tri-monthly reassignments, the Company will calculate the relevant tier using the three months of data prior to the relevant tri-monthly date. Any movement of CAT Reporters between tiers will not change the criteria for each tier or the fee amount corresponding to each tier.

In performing the tri-monthly reassignments, the assignment of CAT Reporters in each assigned tier is relative. Therefore, a CAT Reporter’s assigned tier will depend, not only on its own message traffic or market share, but also on the message traffic/market share across all CAT Reporters. For example, the percentage of Industry Members (other than Execution Venue ATSS) in each tier is relative such that such Industry Member’s assigned tier will depend on message traffic generated across all CAT Reporters as well as the total number of CAT Reporters. The Operating Committee will inform CAT Reporters of their assigned tier every three months following the periodic tiering process, as the funding model will compare an individual CAT Reporter’s activity to that of other CAT Reporters in the marketplace.

The following demonstrates a tier reassignment. In accordance with the funding model, the top 75% of Options Execution Venues in market share are categorized as Tier 1 while the bottom 25% of Options Execution Venues in market share are categorized as Tier 2. In the sample scenario below, Options Execution Venue L is initially categorized as a Tier 2 Options Execution Venue in Period A due to its market share. When market share is recalculated for Period B, the market share of Execution Venue L increases, and it is therefore subsequently reranked and reassigned to Tier 1 in Period B. Correspondingly, Options Execution Venue K, initially a Tier 1

Options Execution Venue in Period A, is reassigned to Tier 2 in Period B due to decreases in its market share.

Period A			Period B		
Options Execution Venue	Market Share Rank	Tier	Options Execution Venue	Market Share Rank	Tier
Options Execution Venue A	1	1	Options Execution Venue A	1	1
Options Execution Venue B	2	1	Options Execution Venue B	2	1
Options Execution Venue C	3	1	Options Execution Venue C	3	1
Options Execution Venue D	4	1	Options Execution Venue D	4	1
Options Execution Venue E	5	1	Options Execution Venue E	5	1
Options Execution Venue F	6	1	Options Execution Venue F	6	1
Options Execution Venue G	7	1	Options Execution Venue I	7	1
Options Execution Venue H	8	1	Options Execution Venue H	8	1
Options Execution Venue I	9	1	Options Execution Venue G	9	1
Options Execution Venue J	10	1	Options Execution Venue J	10	1
Options Execution Venue K	11	1	Options Execution Venue L	11	1
Options Execution Venue L	12	2	Options Execution Venue K	12	2
Options Execution Venue M	13	2	Options Execution Venue N	13	2
Options Execution Venue N	14	2	Options Execution Venue M	14	2
Options Execution Venue O	15	2	Options Execution Venue O	15	2

For each periodic tier reassignment, the Operating Committee will review the new tier assignments, particularly those assignments for CAT Reporters that shift from the lowest tier to a higher tier. This review is intended to evaluate whether potential changes to the market or CAT Reporters (e.g., dissolution of a large CAT Reporter) adversely affect the tier reassignments.

(J) Sunset Provision

The Operating Committee developed the proposed funding model by analyzing currently available historical data. Such historical data, however, is not as comprehensive as data that will be submitted to the CAT. Accordingly, the Operating Committee believes that it will be appropriate to revisit the funding model once CAT Reporters have actual experience with the funding model. Accordingly, the Operating Committee determined to include an automatic sunset provision for the proposed fees. Specifically, the Operating Committee determined that the CAT Fees should automatically expire two years after the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. The Operating Committee intends to monitor the operation of the funding model during this two year period and to evaluate its effectiveness during that period. Such a process will inform the Operating Committee’s approach to funding the CAT after the two year period.

(3) Proposed CAT Fee Schedule

The Exchange proposes the Consolidated Audit Trail Funding Fees to adopt the CAT Fees determined by the Operating Committee on the Exchange’s Industry Members. The

proposed fee change has four sections, covering definitions, the fee schedule for CAT Fees, the timing and manner of payments, and the automatic sunset of the CAT Fees. Each of these sections is discussed in detail below.

(A) Definitions

Paragraph (a) sets forth the definitions applicable to the proposed Consolidated Audit Trail Funding Fees. Proposed paragraph (a)(1) states that, for purposes of the Consolidated Audit Trail Funding Fees, the terms “CAT”, “CAT NMS Plan,” “Industry Member,” “NMS Stock,” “OTC Equity Security”, “Options Market Maker”, and “Participant” are defined as set forth in Rule 6810 (Consolidated Audit Trail—Definitions) of the CAT Compliance Rule.⁶¹

The Exchange proposes to adopt different fees for Equity ATSs and Industry Members that are not Equity ATSs. Accordingly, the Exchange proposes to define the term “Equity ATS.” First, paragraph (a)(2) defines an “ATS” to mean an alternative trading system as defined in Rule 300(a) of Regulation ATS under the Securities Exchange Act of 1934, as amended, that operates pursuant to Rule 301 of Regulation ATS. This is the same definition of an ATS as set forth in Section 1.1 of the CAT NMS Plan in the definition of an “Execution Venue.” Then, paragraph (a)(4) defines an “Equity ATS” as an ATS that executes transactions in NMS Stocks and/or OTC Equity Securities.

Paragraph (a)(3) defines the term “CAT Fee” to mean the Consolidated

Audit Trail Funding Fee(s) to be paid by Industry Members as set forth in paragraph (b) of the proposed rule change.

Finally, Paragraph (a)(6) defines an “Execution Venue” as a Participant or an ATS (excluding any such ATS that does not execute orders). This definition is the same substantive definition as set forth in Section 1.1 of the CAT NMS Plan. Paragraph (a)(5) defines an “Equity Execution Venue” as an Execution Venue that trades NMS Stocks and/or OTC Equity Securities.

(B) Fee Schedule

The Exchange proposes to adopt the CAT Fees applicable to its Industry Members through paragraph (b) of the proposed rule change. Paragraph (b)(1) of the proposed rule change sets forth the CAT Fees applicable to Industry Members other than Equity ATSs. Specifically, paragraph (b)(1) states that the Company will assign each Industry Member (other than an Equity ATS) to a fee tier once every quarter, where such tier assignment is calculated by ranking each Industry Member based on its total message traffic (with discounts for equity market maker quotes and Options Market Maker quotes based on the trade to quote ratio for equities and options, respectively) for the three months prior to the quarterly tier calculation day and assigning each Industry Member to a tier based on that ranking and predefined Industry Member percentages. The Industry Members with the highest total quarterly message traffic will be ranked in Tier 1, and the Industry Members with lowest quarterly message traffic will be ranked in Tier 7. Each quarter, each Industry Member (other than an Equity ATS) shall pay the following

⁶¹ Securities Exchange Act Rel. No. 80256 (Mar. 15, 2017), 82 FR 14526 (Mar. 21, 2017) (SR-NYSEMKT-2017-02).

CAT Fee corresponding to the tier assigned by the Company for such Industry Member for that quarter:

Tier	Percentage of Industry Members	Quarterly CAT Fee
1	0.900	81,483
2	2.150	59,055
3	2.800	40,899
4	7.750	25,566
5	8.300	7,428
6	18.800	1,968
7	59.300	105

Paragraph (b)(2) of the proposed rule change sets forth the CAT Fees applicable to Equity ATSs.⁶² These are the same fees that Participants that trade NMS Stocks and/or OTC Equity Securities will pay. Specifically, paragraph (b)(2) states that the Company will assign each Equity ATS to a fee tier once every quarter, where such tier assignment is calculated by ranking each Equity Execution Venue based on its total market share of NMS Stocks and OTC Equity Securities (with a discount for Equity ATSs exclusively trading OTC Equity Securities based on the average shares per trade ratio between NMS Stocks and OTC Equity Securities) for the three months prior to the quarterly tier calculation day and assigning each Equity ATS to a tier based on that ranking and predefined Equity Execution Venue percentages. The Equity ATSs with the highest total quarterly market share will be ranked in Tier 1, and the Equity ATSs with the lowest quarterly market share will be ranked in Tier 4. Specifically, paragraph (b)(2) states that, each quarter, each Equity ATS shall pay the following CAT Fee corresponding to the tier assigned by the Company for such Equity ATS for that quarter:

Tier	Percentage of Equity Execution Venues	Quarterly CAT Fee
1	25.00	81,048
2	42.00	37,062
3	23.00	21,126
4	10.00	129

(C) Timing and Manner of Payment

Section 11.4 of the CAT NMS Plan states that the Operating Committee shall establish a system for the collection of fees authorized under the CAT NMS Plan. The Operating Committee may include such collection

⁶² Note that no fee schedule is provided for Execution Venue ATSs that execute transactions in Listed Options, as no such Execution Venue ATSs currently exist due to trading restrictions related to Listed Options.

responsibility as a function of the Plan Processor or another administrator. To implement the payment process to be adopted by the Operating Committee, paragraph (c)(1) of the proposed rule change states that the Company will provide each Industry Member with one invoice each quarter for its CAT Fees as determined pursuant to paragraph (b) of the proposed rule change, regardless of whether the Industry Member is a member of multiple self-regulatory organizations. Paragraph (c)(1) further states that each Industry Member will pay its CAT Fees to the Company via the centralized system for the collection of CAT Fees established by the Company in the manner prescribed by the Company. The Exchange will provide Industry Members with details regarding the manner of payment of CAT Fees by Trader Update.

All CAT fees will be billed and collected centrally through the Company via the Plan Processor. Although each Participant will adopt its own fee schedule regarding CAT Fees, no CAT Fees or portion thereof will be collected by the individual Participants. Each Industry Member will receive from the Company one invoice for its applicable CAT fees, not separate invoices from each Participant of which it is a member. The Industry Members will pay the CAT Fees to the Company via the centralized system for the collection of CAT fees established by the Company.⁶³

Section 11.4 of the CAT NMS Plan also states that Participants shall require each Industry Member to pay all applicable authorized CAT Fees within thirty days after receipt of an invoice or other notice indicating payment is due (unless a longer payment period is otherwise indicated). Section 11.4 further states that, if an Industry Member fails to pay any such fee when due, such Industry Member shall pay interest on the outstanding balance from such due date until such fee is paid at a per annum rate equal to the lesser of: (i) The Prime Rate plus 300 basis points; or (ii) the maximum rate permitted by applicable law. Therefore, in accordance with Section 11.4 of the CAT NMS Plan, the Exchange proposes to adopt paragraph (c)(2), which states that each Industry Member shall pay CAT Fees within thirty days after receipt of an invoice or other notice indicating payment is due (unless a longer payment period is otherwise indicated). If an Industry Member fails to pay any such fee when due, such Industry Member shall pay interest on the outstanding balance from such due date

⁶³ Section 11.4 of the CAT NMS Plan.

until such fee is paid at a per annum rate equal to the lesser of: (i) The Prime Rate plus 300 basis points; or (ii) the maximum rate permitted by applicable law.

(D) Sunset Provision

The Operating Committee has determined to require that the CAT Fees automatically sunset two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. Accordingly, the Exchange proposes to adopt paragraph (d) of the proposed rule change, which states that “[t]hese Consolidated Audit Trailing Funding Fees will automatically expire two years after the operative date of the amendment of the CAT NMS Plan that adopts CAT fees for the Participants.”

(4) Changes to Original Proposal

The proposed funding model set forth in this Amendment is a revised version of the Original Proposal. The Commission received a number of comment letters in response to the Original Proposal.⁶⁴ The SEC suspended the Original Proposal and instituted proceedings to determine whether to approve or disapprove it.⁶⁵ Pursuant to those proceedings, additional comment letters were submitted regarding the proposed funding model.⁶⁶ In developing this Amendment, the Operating Committee carefully considered these comments and made a number of changes to the Original Proposal to address these comments where appropriate.

This Amendment makes the following changes to the Original Proposal: (1) Adds two additional CAT Fee tiers for Equity Execution Venues; (2) discounts the market share of Execution Venue ATSs exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF by the average shares per trade ratio between NMS Stocks and OTC Equity Securities (calculated as 0.17% based on available data from the second quarter of June 2017) when calculating the market share of Execution Venue ATSs exclusively trading OTC Equity Securities and FINRA; (3) discounts the Options Market Maker quotes by the trade to quote ratio for options (calculated as 0.01% based on available data for June 2016 through June 2017) when calculating message traffic for Options Market Makers; (4) discounts equity

⁶⁴ For a description of the comments submitted in response to those Original Proposal, see Suspension Order.

⁶⁵ Suspension Order.

⁶⁶ See MFA Letter; SIFMA Letter; FIA Principal Traders Group Letter; Belvedere Letter; Sidley Letter; Group One Letter; and Virtu Financial Letter.

market maker quotes by the trade to quote ratio for equities (calculated as 5.43% based on available data for June 2016 through June 2017) when calculating message traffic for equity market makers; (5) decreases the number of tiers for Industry Members (other than the Execution Venue ATSS) from nine to seven; (6) changes the allocation of CAT costs between Equity Execution Venues and Options Execution Venues from 75%/25% to 67%/33%; (7) adjusts tier percentages and recovery allocations for Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSS); (8) focuses the comparability of CAT Fees on the individual entity level, rather than primarily on the comparability of affiliated entities; (9) commences invoicing of CAT Reporters as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Participants and the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants; and (10) requires the proposed fees to automatically expire two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for the Participants.

(A) Equity Execution Venues

(i) Small Equity Execution Venues

In the Original Proposal, the Operating Committee proposed to establish two fee tiers for Equity Execution Venues. The Commission and commenters raised the concern that, by establishing only two tiers, smaller Equity Execution Venues (*e.g.*, those Equity ATSS representing less than 1% of NMS market share) would be placed in the same fee tier as larger Equity Execution Venues, thereby imposing an undue or inappropriate burden on competition.⁶⁷ To address this concern, the Operating Committee proposes to add two additional tiers for Equity Execution Venues, a third tier for smaller Equity Execution Venues and a fourth tier for the smallest Equity Execution Venues.

Specifically, the Original Proposal had two tiers of Equity Execution Venues. Tier 1 required the largest Equity Execution Venues to pay a quarterly fee of \$63,375. Based on available data, these largest Equity Execution Venues were those that had equity market share of share volume greater than or equal to 1%.⁶⁸ Tier 2

required the remaining smaller Equity Execution Venues to pay a quarterly fee of \$38,820.

To address concerns about the potential for the \$38,820 quarterly fee to impose an undue burden on smaller Equity Execution Venues, the Operating Committee determined to move to a four tier structure for Equity Execution Venues. Tier 1 would continue to include the largest Equity Execution Venues by share volume (that is, based on currently available data, those with market share of equity share volume greater than or equal to 1%), and these Equity Execution Venues would be required to pay a quarterly fee of \$81,048. The Operating Committee determined to divide the original Tier 2 into three tiers. The new Tier 2 Equity Execution Venues, which would include the next largest Equity Execution Venues by equity share volume, would be required to pay a quarterly fee of \$37,062. The new Tier 3 Equity Execution Venues would be required to pay a quarterly fee of \$21,126. The new Tier 4 Equity Execution Venues, which would include the smallest Equity Execution Venues by share volume, would be required to pay a quarterly fee of \$129.

In developing the proposed four tier structure, the Operating Committee considered keeping the existing two tiers, as well as shifting to three, four or five Equity Execution Venue tiers (the maximum number of tiers permitted under the Plan), to address the concerns regarding small Equity Execution Venues. For each of the two, three, four and five tier alternatives, the Operating Committee considered the assignment of various percentages of Equity Execution Venues to each tier as well as various percentage of Equity Execution Venue recovery allocations for each alternative. As discussed below in more detail, each of these options was considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined that the four tier alternative addressed the spectrum of different Equity Execution Venues. The Operating Committee determined that neither a two tier structure nor a three tier structure sufficiently accounted for

differentiate between Equity Execution Venue tiers, the proposed funding model is directly driven not by market share thresholds, but rather by fixed percentages of Equity Execution Venues across tiers to account for fluctuating levels of market share across time. Actual market share in any tier will vary based on the actual market activity in a given measurement period, as well as the number of Equity Execution Venues included in the measurement period.

the range of market shares of smaller Equity Execution Venues. The Operating Committee also determined that, given the limited number of Equity Execution Venues, that a fifth tier was unnecessary to address the range of market shares of the Equity Execution Venues.

By increasing the number of tiers for Equity Execution Venues and reducing the proposed CAT Fees for the smaller Equity Execution Venues, the Exchange believes that the proposed fees for Equity Execution Venues would not impose an undue or inappropriate burden on competition under Section 6 of the Exchange Act. Moreover, the Exchange believes that the proposed fees appropriately take into account the distinctions in the securities trading operations of different Equity Execution Venues, as required under the funding principles of the CAT NMS Plan.⁶⁹ The larger number of tiers more closely tracks the variety of sizes of equity share volume of Equity Execution Venues. In addition, the reduction in the fees for the smaller Equity Execution Venues recognizes the potential burden of larger fees on smaller entities. In particular, the very small quarterly fee of \$129 for Tier 4 Equity Execution Venues reflects the fact that certain Equity Execution Venues have a very small share volume due to their typically more focused business models.

Accordingly, with this Amendment, the Exchange proposes to amend paragraph (b)(2) of the proposed rule change to add the two additional tiers for Equity Execution Venues, to establish the percentages and fees for Tiers 3 and 4 as described, and to revise the percentages and fees for Tiers 1 and 2 as described.

(ii) Execution Venues for OTC Equity Securities

In the Original Proposal, the Execution Venues for OTC Equity Securities and Execution Venues for NMS Stocks were grouped in the same tier structure. The Commission and commenters raised concerns as to whether this determination to place Execution Venues for OTC Equity Securities in the same tier structure as Execution Venues for NMS Stocks would result in an undue or inappropriate burden on competition, recognizing that the application of share volume may lead to different outcomes as applied to OTC Equity Securities and NMS Stocks.⁷⁰ To address this concern, the Operating Committee proposes to discount the market share of Execution

⁶⁷ See Suspension Order at 31664; SIFMA Letter at 3.

⁶⁸ Note that while these equity market share thresholds were referenced as data points to help

⁶⁹ Section 11.2(b) of the CAT NMS Plan.

⁷⁰ See Suspension Order at 31664–5.

Venue ATSS exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF by the average shares per trade ratio between NMS Stocks and OTC Equity Securities (0.17% for the second quarter of 2017) in order to adjust for the greater number of shares being traded in the OTC Equity Securities market, which is generally a function of a lower per share price for OTC Equity Securities when compared to NMS Stocks.

As commenters noted, many OTC Equity Securities are priced at less than one dollar—and a significant number at less than one penny—and low-priced shares tend to trade in larger quantities. Accordingly, a disproportionately large number of shares are involved in transactions involving OTC Equity Securities versus NMS Stocks, which has the effect of overstating an Execution Venue's true market share when the Execution Venue is involved in the trading of OTC Equity Securities. Because the proposed fee tiers are based on market share calculated by share volume, Execution Venue ATSS trading OTC Equity Securities and FINRA may be subject to higher tiers than their operations may warrant.⁷¹ The Operating Committee proposes to address this concern in two ways. First, the Operating Committee proposes to increase the number of Equity Execution Venue tiers, as discussed above. Second, the Operating Committee determined to discount the market share of Execution Venue ATSS exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF when calculating their tier placement. Because the disparity in share volume between Execution Venues trading in OTC Equity Securities and NMS Stocks is based on the different number of shares per trade for OTC Equity Securities and NMS Stocks, the Operating Committee believes that discounting the share volume of such Execution Venue ATSS as well as the market share of the FINRA ORF would address the difference in shares per trade for OTC Equity Securities and NMS Stocks. Specifically, the Operating Committee proposes to impose a discount based on the objective measure of the average shares per trade ratio between NMS Stocks and OTC Equity Securities. Based on available data from the second quarter of 2017, the average shares per trade ratio between NMS Stocks and OTC Equity Securities is 0.17%.

The practical effect of applying such a discount for trading in OTC Equity Securities is to shift Execution Venue ATSS exclusively trading OTC Equity

Securities to tiers for smaller Execution Venues and with lower fees. For example, under the Original Proposal, one Execution Venue ATSS exclusively trading OTC Equity Securities was placed in the first CAT Fee tier, which had a quarterly fee of \$63,375. With the imposition of the proposed tier changes and the discount, this ATSS would be ranked in Tier 3 and would be subject to a quarterly fee of \$21,126.

In developing the proposed discount for Equity Execution Venue ATSS exclusively trading OTC Equity Securities and FINRA, the Operating Committee evaluated different alternatives to address the concerns related to OTC Equity Securities, including creating a separate tier structure for Execution Venues trading OTC Equity Securities (like the separate tier for Options Execution Venues) as well as the proposed discounting method for Execution Venue ATSS exclusively trading OTC Equity Securities and FINRA. For these alternatives, the Operating Committee considered how each alternative would affect the recovery allocations. In addition, each of these options was considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee did not adopt a separate tier structure for Equity Execution Venues trading OTC Equity Securities as they determined that the proposed discount approach appropriately addresses the concern. The Operating Committee determined to adopt the proposed discount because it directly relates to the concern regarding the trading patterns and operations in the OTC Equity Securities markets, and is an objective discounting method.

By increasing the number of tiers for Equity Execution Venues and imposing a discount on the market share of share volume calculation for trading in OTC Equity Securities, the Exchange believes that the proposed fees for Equity Execution Venues would not impose an undue or inappropriate burden on competition under Section 6 of the Exchange Act. Moreover, the Exchange believes that the proposed fees appropriately take into account the distinctions in the securities trading operations of different Equity Execution Venues, as required under the funding principles of the CAT NMS Plan.⁷² As discussed above, the larger number of tiers more closely tracks the variety of sizes of equity share volume of Equity Execution Venues. In addition, the

proposed discount recognizes the different types of trading operations at Equity Execution Venues trading OTC Equity Securities versus those trading NMS Stocks, thereby more closely matching the relative revenue generation by Equity Execution Venues trading OTC Equity Securities to their CAT Fees.

Accordingly, with this Amendment, the Exchange proposes to amend paragraph (b)(2) of the proposed rule change to indicate that the market share for Equity ATSS exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF would be discounted. In addition, as discussed above, to address concerns related to smaller ATSS, including those that exclusively trade OTC Equity Securities, the Exchange proposes to amend paragraph (b)(2) of the proposed rule change to add two additional tiers for Equity Execution Venues, to establish the percentages and fees for Tiers 3 and 4 as described, and to revise the percentages and fees for Tiers 1 and 2 as described.

(B) Market Makers

In the Original Proposal, the proposed funding model included both Options Market Maker quotes and equities market maker quotes in the calculation of total message traffic for such market makers for purposes of tiering for Industry Members (other than Execution Venue ATSS). The Commission and commenters raised questions as to whether the proposed treatment of Options Market Maker quotes may result in an undue or inappropriate burden on competition or may lead to a reduction in market quality.⁷³ To address this concern, the Operating Committee determined to discount the Options Market Maker quotes by the trade to quote ratio for options when calculating message traffic for Options Market Makers. Similarly, to avoid disincentives to quoting behavior on the equities side as well, the Operating Committee determined to discount equity market maker quotes by the trade to quote ratio for equities when calculating message traffic for equities market makers.

In the Original Proposal, market maker quotes were treated the same as other message traffic for purposes of tiering for Industry Members (other than Execution Venue ATSS). Commenters noted, however, that charging Industry Members on the basis of message traffic

⁷¹ Suspension Order at 31664–5.

⁷² Section 11.2(b) of the CAT NMS Plan.

⁷³ See Suspension Order at 31663–4; SIFMA Letter at 4–5; FIA Principal Traders Group Letter at 3; Sidley Letter at 2–6; Group One Letter at 2–5; and Belvedere Letter at 2.

will impact market makers disproportionately because of their continuous quoting obligations. Moreover, in the context of options market makers, message traffic would include bids and offers for every listed options strikes and series, which are not an issue for equities.⁷⁴ The Operating Committee proposes to address this concern in two ways. First, the Operating Committee proposes to discount Options Market Maker quotes when calculating the Options Market Makers' tier placement. Specifically, the Operating Committee proposes to impose a discount based on the objective measure of the trade to quote ratio for options. Based on available data from June 2016 through June 2017, the trade to quote ratio for options is 0.01%. Second, the Operating Committee proposes to discount equities market maker quotes when calculating the equities market makers' tier placement. Specifically, the Operating Committee proposes to impose a discount based on the objective measure of the trade to quote ratio for equities. Based on available data for June 2016 through June 2017, this trade to quote ratio for equities is 5.43%.

The practical effect of applying such discounts for quoting activity is to shift market makers' calculated message traffic lower, leading to the potential shift to tiers for lower message traffic and reduced fees. Such an approach would move sixteen Industry Member CAT Reporters that are market makers to a lower tier than in the Original Proposal. For example, under the Original Proposal, Broker-Dealer Firm ABC was placed in the first CAT Fee tier, which had a quarterly fee of \$101,004. With the imposition of the proposed tier changes and the discount, Broker-Dealer Firm ABC, an options market maker, would be ranked in Tier 3 and would be subject to a quarterly fee of \$40,899.

In developing the proposed market maker discounts, the Operating Committee considered various discounts for Options Market Makers and equity market makers, including discounts of 50%, 25%, 0.0002%, as well as the 5.43% for option market makers and 0.01% for equity market makers. Each of these options were considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined to adopt the proposed discount because it

directly relates to the concern regarding the quoting requirement, is an objective discounting method, and has the desired potential to shift market makers to lower fee tiers.

By imposing a discount on Options Market Makers and equities market makers' quoting traffic for the calculation of message traffic, the Exchange believes that the proposed fees for market makers would not impose an undue or inappropriate burden on competition under Section 6 of the Exchange Act. Moreover, the Exchange believes that the proposed fees appropriately take into account the distinctions in the securities trading operations of different Industry Members, and avoid disincentives, such as a reduction in market quality, as required under the funding principles of the CAT NMS Plan.⁷⁵ The proposed discounts recognize the different types of trading operations presented by Options Market Makers and equities market makers, as well as the value of the market makers' quoting activity to the market as a whole. Accordingly, the Exchange believes that the proposed discounts will not impact the ability of small Options Market Makers or equities market makers to provide liquidity.

Accordingly, with this Amendment, the Exchange proposes to amend paragraph (b)(1) of the proposed rule change to indicate that the message traffic related to equity market maker quotes and Options Market Maker quotes would be discounted. In addition, the Exchange proposes to define the term "Options Market Maker" in paragraph (a)(1) of the proposed rule change.

(C) Comparability/Allocation of Costs

Under the Original Proposal, 75% of CAT costs were allocated to Industry Members (other than Execution Venue ATs) and 25% of CAT costs were allocated to Execution Venues. This cost allocation sought to maintain the greatest level of comparability across the funding model, where comparability considered affiliations among or between CAT Reporters. The Commission and commenters expressed concerns regarding whether the proposed 75%/25% allocation of CAT costs is consistent with the Plan's funding principles and the Exchange Act, including whether the allocation places a burden on competition or reduces market quality. The Commission and commenters also questioned whether the approach of accounting for affiliations among CAT Reporters in setting CAT Fees

disadvantages non-affiliated CAT Reporters or otherwise burdens competition in the market for trading services.⁷⁶

In response to these concerns, the Operating Committee determined to revise the proposed funding model to focus the comparability of CAT Fees at the individual entity level, rather than primarily on the comparability of affiliated entities. In light of the interconnected nature of the various aspects of the funding model, the Operating Committee determined to revise various aspects of the model to enhance comparability at the individual entity level. Specifically, to achieve such comparability, the Operating Committee determined to (1) decrease the number of tiers for Industry Members (other than Execution Venue ATs) from nine to seven; (2) change the allocation of CAT costs between Equity Execution Venues and Options Execution Venues from 75%/25% to 67%/33%; and (3) adjust tier percentages and recovery allocations for Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATs). With these changes, the proposed funding model provides fee comparability for the largest individual entities, with the largest Industry Members (other than Execution Venue ATs), Equity Execution Venues and Options Execution Venues each paying a CAT Fee of approximately \$81,000 each quarter.

(i) Number of Industry Member Tiers

In the Original Proposal, the proposed funding model had nine tiers for Industry Members (other than Execution Venue ATs). The Operating Committee determined that reducing the number of tiers from nine tiers to seven tiers (and adjusting the predefined Industry Member Percentages as well) continues to provide a fair allocation of fees among Industry Members and appropriately distinguishes between Industry Members with differing levels of message traffic. In reaching this conclusion, the Operating Committee considered historical message traffic generated by Industry Members across all exchanges and as submitted to FINRA's OATS, and considered the distribution of firms with similar levels of message traffic, grouping together firms with similar levels of message traffic. Based on this, the Operating Committee determined that seven tiers would group firms with similar levels of

⁷⁴ Suspension Order at 31664.

⁷⁵ Section 11.2(b) of the CAT NMS Plan.

⁷⁶ See Suspension Order at 31662-3; SIFMA Letter at 3; Sidley Letter at 6-7; Group One Letter at 2; and Belvedere Letter at 2.

message traffic, while also achieving greater comparability in the model for the individual CAT Reporters with the greatest market share or message traffic.

In developing the proposed seven tier structure, the Operating Committee considered remaining at nine tiers, as well as reducing the number of tiers down to seven when considering how to address the concerns raised regarding comparability. For each of the alternatives, the Operating Committee considered the assignment of various percentages of Industry Members to each tier as well as various percentages of Industry Member recovery allocations for each alternative. Each of these options was considered in the context of its effects on the full funding model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined that the seven tier alternative provided the most fee comparability at the individual entity level for the largest CAT Reporters, while both providing logical breaks in tiering for Industry Members with different levels of message traffic and a sufficient number of tiers to provide for the full spectrum of different levels of message traffic for all Industry Members.

(ii) Allocation of CAT Costs Between Equity and Options Execution Venues

The Operating Committee also determined to adjust the allocation of CAT costs between Equity Execution Venues and Options Execution Venues to enhance comparability at the individual entity level. In the Original Proposal, 75% of Execution Venue CAT costs were allocated to Equity Execution Venues, and 25% of Execution Venue CAT costs were allocated to Options Execution Venues. To achieve the goal of increased comparability at the individual entity level, the Operating Committee analyzed a range of alternative splits for revenue recovery between Equity Execution Venues and Options Execution Venues, along with other changes in the proposed funding model. Based on this analysis, the Operating Committee determined to allocate 67 percent of Execution Venue costs recovered to Equity Execution Venues and 33 percent to Options Execution Venues. The Operating Committee determined that a 67%/33% allocation between Equity Execution Venues and Options Execution Venues enhances the level of fee comparability for the largest CAT Reporters. Specifically, the largest Equity Execution Venues and Options

Execution Venues would pay a quarterly CAT Fee of approximately \$81,000.

In developing the proposed allocation of CAT costs between Equity Execution Venues and Options Execution Venues, the Operating Committee considered various different options for such allocation, including keeping the original 75%/25% allocation, as well as shifting to a 70%/30%, 67%/33%, or 57.75%/42.25% allocation. For each of the alternatives, the Operating Committee considered the effect each allocation would have on the assignment of various percentages of Equity Execution Venues to each tier as well as various percentages of Equity Execution Venue recovery allocations for each alternative. Moreover, each of these options was considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined that the 67%/33% allocation between Equity Execution Venues and Options Execution Venues provided the greatest level of fee comparability at the individual entity level for the largest CAT Reporters, while still providing for appropriate fee levels across all tiers for all CAT Reporters.

(iii) Allocation of Costs Between Execution Venues and Industry Members

The Operating Committee determined to allocate 25% of CAT costs to Execution Venues and 75% to Industry Members (other than Execution Venue ATSSs), as it had in the Original Proposal. The Operating Committee determined that this 75%/25% allocation, along with the other changes proposed above, led to the most comparable fees for the largest Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSSs). The largest Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSSs) would each pay a quarterly CAT Fee of approximately \$81,000.

As a preliminary matter, the Operating Committee determined that it is appropriate to allocate most of the costs to create, implement and maintain the CAT to Industry Members for several reasons. First, there are many more Industry Members expected to report to the CAT than Participants (*i.e.*, 1,541 broker-dealer CAT Reporters versus 22 Participants). Second, since most of the costs to process CAT reportable data is generated by Industry Members, Industry Members could be

expected to contribute toward such costs. Finally, as noted by the SEC, the CAT “substantially enhance[s] the ability of the SROs and the Commission to oversee today’s securities markets,”⁷⁷ thereby benefitting all market participants. After making this determination, the Operating Committee analyzed several different cost allocations, as discussed further below, and determined that an allocation where 75% of the CAT costs should be borne by the Industry Members (other than Execution Venue ATSSs) and 25% should be paid by Execution Venues was most appropriate and led to the greatest comparability of CAT Fees for the largest CAT Reporters.

In developing the proposed allocation of CAT costs between Execution Venues and Industry Members (other than Execution Venue ATSSs), the Operating Committee considered various different options for such allocation, including keeping the original 75%/25% allocation, as well as shifting to an 80%/20%, 70%/30%, or 65%/35% allocation. Each of these options was considered in the context of the full model, including the effect on each of the changes discussed above, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. In particular, for each of the alternatives, the Operating Committee considered the effect each allocation had on the assignment of various percentages of Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSSs) to each relevant tier as well as various percentages of recovery allocations for each tier. The Operating Committee determined that the 75%/25% allocation between Execution Venues and Industry Members (other than Execution Venue ATSSs) provided the greatest level of fee comparability at the individual entity level for the largest CAT Reporters, while still providing for appropriate fee levels across all tiers for all CAT Reporters.

(iv) Affiliations

The funding principles set forth in Section 11.2 of the Plan require that the fees charged to CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether

⁷⁷ Securities Exchange Act Rel. No. 67457 (Jul 18, 2012), 77 FR 45722, 45726 (Aug. 1, 2012) (“Rule 613 Adopting Release”).

Execution Venue and/or Industry Members). The proposed funding model satisfies this requirement. As discussed above, under the proposed funding model, the largest Equity Execution Venues, Options Execution Venues, and Industry Members (other than Execution Venue ATSS) pay approximately the same fee. Moreover, the Operating Committee believes that the proposed funding model takes into consideration affiliations between or among CAT Reporters as complexes with multiple CAT Reporters will pay the appropriate fee based on the proposed rule change for each of the CAT Reporters in the complex. For example, a complex with a Tier 1 Equity Execution Venue and Tier 2 Industry Member will pay the same as another complex with a Tier 1 Equity Execution Venue and Tier 2 Industry Member.

(v) Fee Schedule Changes

Accordingly, with this Amendment, the Exchange proposes to amend paragraphs (b)(1) and (2) of the proposed rule change to reflect the changes discussed in this section. Specifically, the Exchange proposes to amend paragraph (b)(1) and (2) to update the number of tiers, and the fees and percentages assigned to each tier to reflect the described changes.

(D) Market Share/Message Traffic

In the Original Proposal, the Operating Committee proposed to charge Execution Venues based on market share and Industry Members (other than Execution Venue ATSS) based on message traffic. Commenters questioned the use of the two different metrics for calculating CAT Fees.⁷⁸ The Operating Committee continues to believe that the proposed use of market share and message traffic satisfies the requirements of the Exchange Act and the funding principles set forth in the CAT NMS Plan. Accordingly, the proposed funding model continues to charge Execution Venues based on market share and Industry Members (other than Execution Venue ATSS) based on message traffic.

In drafting the Plan and the Original Proposal, the Operating Committee expressed the view that the correlation between message traffic and size does not apply to Execution Venues, which they described as producing similar amounts of message traffic regardless of size. The Operating Committee believed that charging Execution Venues based on message traffic would result in both large and small Execution Venues

paying comparable fees, which would be inequitable, so the Operating Committee determined that it would be more appropriate to treat Execution Venues differently from Industry Members in the funding model. Upon a more detailed analysis of available data, however, the Operating Committee noted that Execution Venues have varying levels of message traffic. Nevertheless, the Operating Committee continues to believe that a bifurcated funding model—where Industry Members (other than Execution Venue ATSS) are charged fees based on message traffic and Execution Venues are charged based on market share—complies with the Plan and meets the standards of the Exchange Act for the reasons set forth below.

Charging Industry Members based on message traffic is the most equitable means for establishing fees for Industry Members (other than Execution Venue ATSS). This approach will assess fees to Industry Members that create larger volumes of message traffic that are relatively higher than those fees charged to Industry Members that create smaller volumes of message traffic. Since message traffic, along with fixed costs of the Plan Processor, is a key component of the costs of operating the CAT, message traffic is an appropriate criterion for placing Industry Members in a particular fee tier.

The Operating Committee also believes that it is appropriate to charge Execution Venues CAT Fees based on their market share. In contrast to Industry Members (other than Execution Venue ATSS), which determine the degree to which they produce the message traffic that constitutes CAT Reportable Events, the CAT Reportable Events of Execution Venues are largely derivative of quotations and orders received from Industry Members that the Execution Venues are required to display. The business model for Execution Venues, however, is focused on executions on their markets. As a result, the Operating Committee believes that it is more equitable to charge Execution Venues based on their market share rather than their message traffic.

Similarly, focusing on message traffic would make it more difficult to draw distinctions between large and small exchanges, including options exchanges in particular. For instance, the Operating Committee analyzed the message traffic of Execution Venues and Industry Members for the period of April 2017 to June 2017 and placed all CAT Reporters into a nine-tier framework (*i.e.*, a single tier may include both Execution Venues and

Industry Members). The Operating Committee's analysis found that the majority of exchanges (15 total) were grouped in Tiers 1 and 2. Moreover, virtually all of the options exchanges were in Tiers 1 and 2.⁷⁹ Given the concentration of options exchanges in Tiers 1 and 2, the Operating Committee believes that using a funding model based purely on message traffic would make it more difficult to distinguish between large and small options exchanges, as compared to the proposed bifurcated fee approach.

In addition, the Operating Committee also believes that it is appropriate to treat ATSS as Execution Venues under the proposed funding model since ATSS have business models that are similar to those of exchanges, and ATSS also compete with exchanges. For these reasons, the Operating Committee believes that charging Execution Venues based on market share is more appropriate and equitable than charging Execution Venues based on message traffic.

(E) Time Limit

In the Original Proposal, the Operating Committee did not impose any time limit on the application of the proposed CAT Fees. As discussed above, the Operating Committee developed the proposed funding model by analyzing currently available historical data. Such historical data, however, is not as comprehensive as data that will be submitted to the CAT. Accordingly, the Operating Committee believes that it will be appropriate to revisit the funding model once CAT Reporters have actual experience with the funding model. Accordingly, the Operating Committee proposes to include a sunset provision in the proposed fee model. The proposed CAT Fees will sunset two years after the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. Specifically, the Exchange proposes to add paragraph (d) to the proposed rule change to include this sunset provision. Such a provision will provide the Operating Committee and other market participants with the opportunity to reevaluate the performance of the proposed funding model.

(F) Tier Structure/Decreasing Cost per Unit

In the Original Proposal, the Operating Committee determined to use a tiered fee structure. The Commission

⁷⁸ Suspension Order at 31663; FIA Principal Traders Group Letter at 2.

⁷⁹ The Participants note that this analysis did not place MIAx PEARL in Tier 1 or Tier 2 since the exchange commenced trading on February 6, 2017.

and commenters questioned whether the decreasing cost per additional unit (of message traffic in the case of Industry Members, or of share volume in the case of Execution Venues) burdens competition by disadvantaging small Industry Members and Execution Venues and/or by creating barriers to entry in the market for trading services and/or the market for broker-dealer services.⁸⁰

The Operating Committee does not believe that decreasing cost per additional unit places an unfair competitive burden on Small Industry Members and Execution Venues. While the cost per unit of message traffic or share volume necessarily will decrease as volume increases in any tiered fee model using fixed fee percentages and, as a result, Small Industry Members and small Execution Venues may pay a larger fee per message or share, this comment fails to take account of the substantial differences in the absolute fees paid by Small Industry Members and small Execution Venues as opposed to large Industry Members and large Execution Venues. For example, under the revised funding model, Tier 7 Industry Members would pay a quarterly fee of \$105, while Tier 1 Industry Members would pay a quarterly fee of \$81,483. Similarly, a Tier 4 Equity Execution Venue would pay a quarterly fee of \$129, while a Tier 1 Equity Execution Venue would pay a quarterly fee of \$81,048. Thus, Small Industry Members and small Execution Venues are not disadvantaged in terms of the total fees that they actually pay. In contrast to a tiered model using fixed fee percentages, the Operating Committee believes that strictly variable or metered funding models based on message traffic or share volume would be more likely to affect market behavior and may present administrative challenges (e.g., the costs to calculate and monitor fees may exceed the fees charged to the smallest CAT Reporters).

(G) Other Alternatives Considered

In addition to the various funding model alternatives discussed above regarding discounts, number of tiers and allocation percentages, the Operating Committee also discussed other possible funding models. For example, the Operating Committee considered allocating the total CAT costs equally among each of the Participants, and then permitting each Participant to charge its own members as it deems appropriate.⁸¹ The Operating Committee

determined that such an approach raised a variety of issues, including the likely inconsistency of the ensuing charges, potential for lack of transparency, and the impracticality of multiple SROs submitting invoices for CAT charges. The Operating Committee therefore determined that the proposed funding model was preferable to this alternative.

(H) Industry Member Input

Commenters expressed concern regarding the level of Industry Member input into the development of the proposed funding model, and certain commenters have recommended a greater role in the governance of the CAT.⁸² The Participants previously addressed this concern in its letters responding to comments on the Plan and the CAT Fees.⁸³ As discussed in those letters, the Participants discussed the funding model with the Development Advisory Group (“DAG”), the advisory group formed to assist in the development of the Plan, during its original development.⁸⁴ Moreover, Industry Members currently have representation on the Operating Committee and operation of the CAT generally through the Advisory Committee established pursuant to Rule 613(b)(7) and Section 4.13 of the Plan. The Advisory Committee attends all meetings of the Operating Committee, as well as meetings of various subcommittees and working groups, and provides valuable and critical input for the Participants’ and Operating Committee’s consideration. The Operating Committee continues to believe that Industry Members have an appropriate voice regarding the funding of the Company.

(I) Conflicts of Interest

Commenters also raised concerns regarding Participant conflicts of interest in setting the CAT Fees.⁸⁵ The Participants previously responded to this concern in both the Plan Response Letter and the Fee Rule Response Letter.⁸⁶ As discussed in those letters, the Plan, as approved by the SEC, adopts various measures to protect against the potential conflicts issues

raised by the Participants’ fee-setting authority. Such measures include the operation of the Company as a not for profit business league and on a break-even basis, and the requirement that the Participants file all CAT Fees under Section 19(b) of the Exchange Act. The Operating Committee continues to believe that these measures adequately protect against concerns regarding conflicts of interest in setting fees, and that additional measures, such as an independent third party to evaluate an appropriate CAT Fee, are unnecessary.

(J) Fee Transparency

Commenters also argued that they could not adequately assess whether the CAT Fees were fair and equitable because the Operating Committee has not provided details as to what the Participants are receiving in return for the CAT Fees.⁸⁷ The Operating Committee provided a detailed discussion of the proposed funding model in the Plan, including the expenses to be covered by the CAT Fees. In addition, the agreement between the Company and the Plan Processor sets forth a comprehensive set of services to be provided to the Company with regard to the CAT. Such services include, without limitation: user support services (e.g., a help desk); tools to allow each CAT Reporter to monitor and correct their submissions; a comprehensive compliance program to monitor CAT Reporters’ adherence to Rule 613; publication of detailed Technical Specifications for Industry Members and Participants; performing data linkage functions; creating comprehensive data security and confidentiality safeguards; creating query functionality for regulatory users (i.e., the Participants, and the SEC and SEC staff); and performing billing and collection functions. The Operating Committee further notes that the services provided by the Plan Processor and the costs related thereto were subject to a bidding process.

(K) Funding Authority

Commenters also questioned the authority of the Operating Committee to impose CAT Fees on Industry Members.⁸⁸ The Participants previously responded to this same comment in the Plan Response Letter and the Fee Rule Response Letter.⁸⁹ As the Participants previously noted, SEC Rule 613 specifically contemplates broker-dealers

⁸² See Suspension Order at 31662; MFA Letter at 1–3.

⁸³ Letter from Participants to Brent J. Fields, Secretary, SEC (Sept. 23, 2016) (“Plan Response Letter”); Letter from CAT NMS Plan Participants to Brent J. Fields, Secretary, SEC (June 29, 2017) (“Fee Rule Response Letter”).

⁸⁴ Fee Rule Response Letter at 2; Plan Response Letter at 18.

⁸⁵ See Suspension Order at 31662; FIA Principal Traders Group at 3.

⁸⁶ See Plan Response Letter at 16, 18; Fee Rule Response Letter at 11–12.

⁸⁷ See FIA Principal Traders Group at 3; SIFMA Letter at 3.

⁸⁸ See Suspension Order at 31661–2; SIFMA Letter at 2.

⁸⁹ See Plan Response Letter at 9; Fee Rule Response Letter at 3–4.

⁸⁰ Suspension Order at 31667.

⁸¹ See FIA Principal Traders Group Letter at 2; Belvedere Letter at 4.

contributing to the funding of the CAT. In addition, as noted by the SEC, the CAT “substantially enhance[s] the ability of the SROs and the Commission to oversee today’s securities markets,”⁹⁰ thereby benefitting all market participants. Therefore, the Operating Committee continues to believe that it is equitable for both Participants and Industry Members to contribute to funding the cost of the CAT.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6(b)(4) of the Act,⁹¹ because it provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using its facilities. The Exchange believes the proposed rule change is also consistent with Section 6(b)(5) of the Act,⁹² which requires, among other things, that the Exchange’s 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, and not designed to permit unfair discrimination between customers, issuers, brokers and dealers. As discussed above, the SEC approved the bifurcated, tiered, fixed fee funding model in the CAT NMS Plan, finding it was reasonable and that it equitably allocated fees among Participants and Industry Members. The Exchange believes that the proposed tiered fees adopted pursuant to the funding model approved by the SEC in the CAT NMS Plan are reasonable, equitably allocated and not unfairly discriminatory.

The Exchange believes that this proposal is consistent with the Act because it implements, interprets or clarifies the provisions of the Plan, and is designed to assist the Exchange and its Industry Members in meeting regulatory obligations pursuant to the Plan. In approving the Plan, the SEC noted that the Plan “is necessary and appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanism of a national market system, or is otherwise in furtherance of the purposes of the Act.”⁹³ To the extent that this proposal implements, interprets or clarifies the Plan and applies specific requirements to Industry Members, the Exchange believes that this proposal furthers the

objectives of the Plan, as identified by the SEC, and is therefore consistent with the Act.

The Exchange believes that the proposed tiered fees are reasonable. First, the total CAT Fees to be collected would be directly associated with the costs of establishing and maintaining the CAT, where such costs include Plan Processor costs and costs related to insurance, third party services and the operational reserve. The CAT Fees would not cover Participant services unrelated to the CAT. In addition, any surplus CAT Fees cannot be distributed to the individual Participants; such surpluses must be used as a reserve to offset future fees. Given the direct relationship between the fees and the CAT costs, the Exchange believes that the total level of the CAT Fees is reasonable.

In addition, the Exchange believes that the proposed CAT Fees are reasonably designed to allocate the total costs of the CAT equitably between and among the Participants and Industry Members, and are therefore not unfairly discriminatory. As discussed in detail above, the proposed tiered fees impose comparable fees on similarly situated CAT Reporters. For example, those with a larger impact on the CAT (measured via message traffic or market share) pay higher fees, whereas CAT Reporters with a smaller impact pay lower fees. Correspondingly, the tiered structure lessens the impact on smaller CAT Reporters by imposing smaller fees on those CAT Reporters with less market share or message traffic. In addition, the fee structure takes into consideration distinctions in securities trading operations of CAT Reporters, including ATSS trading OTC Equity Securities, and equity and options market makers.

Moreover, the Exchange believes that the division of the total CAT costs between Industry Members and Execution Venues, and the division of the Execution Venue portion of total costs between Equity and Options Execution Venues, is reasonably designed to allocate CAT costs among CAT Reporters. The 75%/25% division between Industry Members (other than Execution Venue ATSSs) and Execution Venues maintains the greatest level of comparability across the funding model. For example, the cost allocation establishes fees for the largest Industry Members (*i.e.*, those Industry Members in Tier 1) that are comparable to the largest Equity Execution Venues and Options Execution Venues (*i.e.*, those Execution Venues in Tier 1). Furthermore, the allocation of total CAT cost recovery recognizes the difference in the number of CAT Reporters that are

Industry Members (other than Execution Venue ATSSs) versus CAT Reporters that are Execution Venues. Similarly, the 67%/33% division between Equity Execution Venues and Options Execution Venues also helps to provide fee comparability for the largest CAT Reporters.

Finally, the Exchange believes that the proposed fees are reasonable because they would provide ease of calculation, ease of billing and other administrative functions, and predictability of a fixed fee. Such factors are crucial to estimating a reliable revenue stream for the Company and for permitting CAT Reporters to reasonably predict their payment obligations for budgeting purposes.

For the foregoing reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization’s Statement on Burden on Competition

Section 6(b)(8) of the Act⁹⁴ require that the Exchange’s rules not impose any burden on competition that is not necessary or appropriate. The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange notes that the proposed rule change implements provisions of the CAT NMS Plan approved by the Commission, and is designed to assist the Exchange in meeting its regulatory obligations pursuant to the Plan. Similarly, all national securities exchanges and FINRA are proposing a similar proposed fee change to implement the requirements of the CAT NMS Plan. Therefore, this is not a competitive fee filing and, therefore, it does not raise competition issues between and among the exchanges and FINRA.

Moreover, as previously described, the Exchange believes that the proposed rule change fairly and equitably allocates costs among CAT Reporters. In particular, the proposed fee schedule is structured to impose comparable fees on similarly situated CAT Reporters, and lessen the impact on smaller CAT Reporters. CAT Reporters with similar levels of CAT activity will pay similar fees. For example, Industry Members (other than Execution Venue ATSSs) with higher levels of message traffic will pay higher fees, and those with lower levels of message traffic will pay lower fees. Similarly, Execution Venue ATSSs and other Execution Venues with larger market share will pay higher fees, and those with lower levels of market share

⁹⁰ Rule 613 Adopting Release at 45726.

⁹¹ 15 U.S.C. 78f(b)(4).

⁹² 15 U.S.C. 78f(b)(6).

⁹³ Approval Order at 84697.

⁹⁴ 15 U.S.C. 78f(b)(8).

will pay lower fees. Therefore, given that there is generally a relationship between message traffic and market share to the CAT Reporter's size, smaller CAT Reporters generally pay less than larger CAT Reporters. Accordingly, the Exchange does not believe that the CAT Fees would have a disproportionate effect on smaller or larger CAT Reporters. In addition, ATSS and exchanges will pay the same fees based on market share. Therefore, the Exchange does not believe that the fees will impose any burden on the competition between ATSS and exchanges. Accordingly, the Exchange believes that the proposed fees will minimize the potential for adverse effects on competition between CAT Reporters in the market.

Furthermore, the tiered, fixed fee funding model limits the disincentives to providing liquidity to the market. Therefore, the proposed fees are structured to limit burdens on competitive quoting and other liquidity provision in the market.

In addition, the Exchange believes that the proposed changes to the Original Proposal, as discussed above in detail, address certain competitive concerns raised by commenters, including concerns related to, among other things, smaller ATSS, ATSS trading OTC Equity Securities, market making quoting and fee comparability. As discussed above, the Exchange believes that this Amendment addresses the competitive concerns raised by commenters.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Solicitation of Comments on Amendment No. 1

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment No. 1 is consistent with the Act. In particular, the Commission seeks comment on the following:

Allocation of Costs

(1) Commenters' views as to whether the allocation of CAT costs is consistent with the funding principle expressed in the CAT NMS Plan that requires the Operating Committee to "avoid any disincentives such as placing an

inappropriate burden on competition and a reduction in market quality."⁹⁵

(2) Commenters' views as to whether the allocation of 25% of CAT costs to the Execution Venues (including all the Participants) and 75% to Industry Members, will incentivize or disincentivize the Participants to effectively and efficiently manage the CAT costs incurred by the Participants since they will only bear 25% of such costs.

(3) Commenters' views on the determination to allocate 75% of all costs incurred by the Participants from November 21, 2016 to November 21, 2017 to Industry Members (other than Execution Venue ATSS), when such costs are development and build costs and when Industry Member reporting is scheduled to commence a year later, including views on whether such "fees, costs and expenses . . . [are] fairly and reasonably shared among the Participants and Industry Members" in accordance with the CAT NMS Plan.⁹⁶

(4) Commenters' views on whether an analysis of the ratio of the expected Industry Member-reported CAT messages to the expected SRO-reported CAT messages should be the basis for determining the allocation of costs between Industry Members and Execution Venues.⁹⁷

(5) Any additional data analysis on the allocation of CAT costs, including any existing supporting evidence.

Comparability

(6) Commenters' views on the shift in the standard used to assess the comparability of CAT Fees, with the emphasis now on comparability of individual entities instead of affiliated entities, including views as to whether this shift is consistent with the funding principle expressed in the CAT NMS Plan that requires the Operating Committee to establish a fee structure in which the fees charged to "CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether Execution Venues and/or Industry Members)."⁹⁸

⁹⁵ Section 11.2(e) of the CAT NMS Plan.

⁹⁶ Section 11.1(c) of the CAT NMS Plan.

⁹⁷ The Notice for the CAT NMS Plan did not provide a comprehensive count of audit trail message traffic from different regulatory data sources, but the Commission did estimate the ratio of all SRO audit trail messages to OATS audit trail messages to be 1.9431. See Securities Exchange Act Release No. 77724 (April 27, 2016), 81 FR 30613, 30721 n.919 and accompanying text (May 17, 2016).

⁹⁸ Section 11.2(c) of the CAT NMS Plan.

(7) Commenters' views as to whether the reduction in the number of tiers for Industry Members (other than Execution Venue ATSS) from nine to seven, the revised allocation of CAT costs between Equity Execution Venues and Options Execution Venues from a 75%/25% split to a 67%/33% split, and the adjustment of all tier percentages and recovery allocations achieves comparability across individual entities, and whether these changes should have resulted in a change to the allocation of 75% of total CAT costs to Industry Members (other than Execution Venue ATSS) and 25% of such costs to Execution Venues.

Discounts

(8) Commenters' views as to whether the discounts for options market-makers, equities market-makers, and Equity ATSS trading OTC Equity Securities are clear, reasonable, and consistent with the funding principle expressed in the CAT NMS Plan that requires the Operating Committee to "avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality,"⁹⁹ including views as to whether the discounts for market-makers limit any potential disincentives to act as a market-maker and/or to provide liquidity due to CAT fees.

Calculation of Costs and Imposition of CAT Fees

(9) Commenters' views as to whether the amendment provides sufficient information regarding the amount of costs incurred from November 21, 2016 to November 21, 2017, particularly, how those costs were calculated, how those costs relate to the proposed CAT Fees, and how costs incurred after November 21, 2017 will be assessed upon Industry Members and Execution Venues;

(10) Commenters' views as to whether the timing of the imposition and collection of CAT Fees on Execution Venues and Industry Members is reasonably related to the timing of when the Company expects to incur such development and implementation costs.¹⁰⁰

(11) Commenters' views on dividing CAT costs equally among each of the Participants, and then each Participant charging its own members as it deems appropriate, taking into consideration the possibility of inconsistency in charges, the potential for lack of transparency, and the impracticality of multiple SROs submitting invoices for CAT charges.

⁹⁹ Section 11.2(e) of the CAT NMS Plan.

¹⁰⁰ Section 11.1(c) of the CAT NMS Plan.

Burden on Competition and Barriers to Entry

(12) Commenters' views as to whether the allocation of 75% of CAT costs to Industry Members (other than Execution Venue ATs) imposes any burdens on competition to Industry Members, including views on what baseline competitive landscape the Commission should consider when analyzing the proposed allocation of CAT costs.

(13) Commenters' views on the burdens on competition, including the relevant markets and services and the impact of such burdens on the baseline competitive landscape in those relevant markets and services.

(14) Commenters' views on any potential burdens imposed by the fees on competition between and among CAT Reporters, including views on which baseline markets and services the fees could have competitive effects on and whether the fees are designed to minimize such effects.

(15) Commenters' general views on the impact of the proposed fees on economies of scale and barriers to entry.

(16) Commenters' views on the baseline economies of scale and barriers to entry for Industry Members and Execution Venues and the relevant markets and services over which these economies of scale and barriers to entry exist.

(17) Commenters' views as to whether a tiered fee structure necessarily results in less active tiers paying more per unit than those in more active tiers, thus creating economies of scale, with supporting information if possible.

(18) Commenters' views as to how the level of the fees for the least active tiers would or would not affect barriers to entry.

(19) Commenters' views on whether the difference between the cost per unit (messages or market share) in less active tiers compared to the cost per unit in more active tiers creates regulatory economies of scale that favor larger competitors and, if so:

(a) How those economies of scale compare to operational economies of scale; and

(b) Whether those economies of scale reduce or increase the current advantages enjoyed by larger competitors or otherwise alter the competitive landscape.

(20) Commenters' views on whether the fees could affect competition between and among national securities exchanges and FINRA, in light of the fact that implementation of the fees does not require the unanimous consent of all such entities, and, specifically:

(a) Whether any of the national securities exchanges or FINRA are disadvantaged by the fees; and

(b) If so, whether any such disadvantages would be of a magnitude that would alter the competitive landscape.

(21) Commenters' views on any potential burden imposed by the fees on competitive quoting and other liquidity provision in the market, including, specifically:

(a) Commenters' views on the kinds of disincentives that discourage liquidity provision and/or disincentives that the Commission should consider in its analysis;

(b) Commenters' views as to whether the fees could disincentive the provision of liquidity; and

(c) Commenters' views as to whether the fees limit any disincentives to provide liquidity.

(22) Commenters' views as to whether the amendment adequately responds to and/or addresses comments received on related filings.

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-NYSEMKT-2017-26 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEMKT-2017-26. 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 website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for

inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEMKT-2017-26 and should be submitted on or before January 4, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁰¹

Robert W. Errett,
Deputy Secretary.

[FR Doc. 2017-27022 Filed 12-13-17; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-82238; File No. SR-MSRB-2017-08]

**Self-Regulatory Organizations;
Municipal Securities Rulemaking Board; Order Granting Approval of a Proposed Rule Change To Amend MSRB Form G-45 To Collect Additional Data About the Transactional Fees Primarily Assessed by Programs Established To Implement the ABLE Act**

December 8, 2017.

I. Introduction

On October 13, 2017, the Municipal Securities Rulemaking Board (the "MSRB" or "Board") filed with the Securities and Exchange Commission (the "SEC" or "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 amend MSRB Form G-45 under MSRB Rule G-45, on reporting of information on municipal fund securities,³ to collect additional data about the transactional fees primarily assessed by programs established to implement the Stephen Beck, Jr., Achieving a Better Life Experience Act of 2014 (the "ABLE Act" and an "ABLE program") (the "proposed rule change").⁴ The proposed rule change

¹⁰¹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Form G-45 is an electronic form on which submissions of the information required by Rule G-45 are made to the MSRB.

⁴ The ABLE Act was enacted on December 19, 2014 as part of The Tax Increase Prevention Act of 2014 (Pub. L. 113-295).

was published for comment in the **Federal Register** on October 27, 2017.⁵

The Commission received one comment letter on the proposed rule change.⁶ On December 1, 2017, the MSRB responded to the comments received by the Commission.⁷

II. Description of Proposed Rule Change

In the Notice of Filing, the MSRB stated that the proposed rule change would amend Form G-45 to collect additional information relating to fees and expenses to help ensure that the MSRB continues to receive comprehensive information regarding ABL programs and 529 college savings plans.⁸ The MSRB stated that this data would enhance the MSRB's understanding of the markets for ABL programs and 529 college savings plans, including the differences among such programs or plans.⁹ Further, the MSRB stated that the additional fee and expense information would assist the MSRB in fulfilling its investor protection mission.¹⁰ The MSRB also stated that the information about fees and expenses would continue to be submitted in a format that is consistent with the disclosure principles of the College Savings Plan Network ("CSPN"), an affiliate of the National Association of State Treasurers, which, the MSRB added, commenters on previous MSRB rulemaking proposals relating to MSRB Form G-45 have stated is the industry norm.¹¹

As further described by the MSRB in the Notice of Filing, under the proposed rule change, an underwriter to an ABL program or a 529 college savings plan would be required to submit data on Form G-45 about the following additional fees and expenses, as applicable:

- account opening fee;
- investment administration fee;
- change in account owner fee;
- cancellation/withdrawal fee;
- change in investment option/transfer fee;

- rollover fee;
- returned excess aggregate contributions fee;
- rejected ACH or EFT fee;
- overnight delivery fee;
- in-network ATM fee;
- out-of-network ATM fee;
- ATM mini statement fee;
- international POS/ATM transaction fee;
- foreign transaction fee;
- overdraft fee;
- copy of check or statement fee (per request);
- copy of check images mailed with monthly statement fee;
- check fee (*i.e.*, fee for blank checks);
- returned check fee;
- checking account option fee;
- re-issue of disbursement check fee;
- stop payment fee;
- debit card fee;
- debit card replacement fee;
- outgoing wire fee;
- expedited debit card rush delivery fee;
- paper fee; and
- miscellaneous fee (to address any miscellaneous transactional fee that is not otherwise specified on Form G-45).¹²

In addition, under the proposed rule change, the MSRB stated that it would collect data about any variance in the annual account maintenance fee due to the residency of the account owner.¹³ The MSRB also stated that the proposed rule would apply to underwriters to ABL programs as well as to underwriters to 529 college savings plans.¹⁴ The MSRB, however, stated that it anticipates that most of the data that would be collected by the proposed rule change would relate to ABL programs.¹⁵ The MSRB also noted that it believes that 529 college savings plans generally do not assess the fees and charges that are the subject of this proposed rule change.¹⁶

The MSRB requested in the Notice of Filing that the proposed rule change be approved with an effective date of June 30, 2018.¹⁷

III. Summary of Comments Received and MSRB's Responses to Comments

As noted previously, the Commission received one comment letter on the proposed rule change, as well as the MSRB Response Letter. The commenter, SIFMA, stated that it was "supportive of the MSRB's efforts to fully understand

the ABL programs and 529 college savings plans market and fulfill its mission" but believed that municipal securities dealers who underwrite ABL programs and 529 college savings plans "should only be required to submit the information required by Form G-45 to the extent it is within their possession, custody, or control".¹⁸ SIFMA also stated that the MSRB should be mindful of the possibility that additional regulatory requirements such as the proposed rule change could increase costs to investors in dealer-sold 529 college savings plans and ABL programs versus direct-sold programs that are not regulated by the MSRB.¹⁹ The MSRB stated that it believes the proposed rule change is consistent with its statutory mandate and has responded to the comments, as discussed below.²⁰

1. Submission of Information Within Custody of Dealer

SIFMA stated that some of the information about fees that underwriters would be required to submit on MSRB Form G-45, under the proposed rule change, may be contained in ABL program or 529 college savings plan disclosure documents and suggested that those underwriters could provide hyperlinks to those documents to the MSRB.²¹ The MSRB responded by stating that even if some of the information required to be submitted on MSRB Form G-45 were contained in those ABL program or 529 college savings plan disclosure documents, that the information would not be published in a uniform electronic format that would allow for the MSRB's efficient analysis or comparison of such information.²² The MSRB noted that, at this time, there is no requirement that state issuers prepare those disclosure documents in a uniform format and, unlike for 529 college savings plans, there are not even voluntary disclosure principles for state issuers in the preparation of their disclosure documents that are applicable to ABL programs.²³ As result, the MSRB stated, it is even more likely that the information in the ABL program disclosure documents would not be presented in a uniform format that would allow the MSRB to readily analyze and compare ABL programs.²⁴ In addition, the MSRB stated that referencing the ABL program or 529

⁵ Securities Exchange Act Release No. 81921 (October 23, 2017) (the "Notice of Filing"), 82 FR 49908 (October 27, 2017).

⁶ See Letter to Secretary, Commission, from Leslie Norwood, Managing Director and Associate General Counsel, and Bernard Canepa, Vice President and Assistant General Counsel, Securities Industry and Financial Markets Association ("SIFMA"), dated November 17, 2017 (the "SIFMA Letter").

⁷ See Letter to Secretary, Commission, from Pamela K. Ellis, Associate General Counsel, MSRB, dated December 1, 2017 (the "MSRB Response Letter"), available at <https://www.sec.gov/comments/sr-msrb-2017-08/msrb201708-2743045-161576.pdf>.

⁸ See Notice of Filing.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See SIFMA Letter.

¹⁹ *Id.*

²⁰ See MSRB Response Letter.

²¹ See SIFMA Letter.

²² See MSRB Response Letter.

²³ *Id.*

²⁴ *Id.*

college savings plan disclosure documents would not meet the MSRB's regulatory need because the data provided to the MSRB must be in a uniform electronic format that can be aggregated and analyzed.²⁵ The MSRB acknowledged that the proposed rule change would result in some up-front costs to underwriters due to technical changes to underwriters' reporting systems, but the MSRB stated that those costs should mostly be one-time only costs and that the cumulative benefits of receiving data in a uniform electronic format should exceed the upfront costs over time.²⁶

2. Applicability of Proposed Rule Change to Advisor-Sold and Direct-Sold ABLÉ Programs and 529 College Savings Plans

SIFMA suggested that the duty to submit information about the fees assessed by ABLÉ programs and 529 college savings plans on MSRB Form G-45 would create an undue burden because, in SIFMA's view, the MSRB's jurisdiction is limited to underwriters to dealer-sold ABLÉ programs or 529 college savings plans.²⁷ The MSRB responded by stating that such an undue burden on competition would not exist because the MSRB believes it has jurisdiction over all underwriters of ABLÉ programs and 529 college savings plans.²⁸ The MSRB stated that it has jurisdiction over underwriters to all 529 college savings plans, regardless of the marketing channel through which such plans are sold (whether sold with the advice of a dealer, *i.e.*, "advisor-sold," or without the advice of a dealer, *i.e.*, "direct-sold"), and this view has equal application to similar ABLÉ programs.²⁹ The MSRB also stated that it has previously discussed the application of Rule G-45 to dealers, and in doing so has said that the activities of an entity may cause that entity to be within the definition of dealer and/or underwriter set forth in the Act or rules thereunder and thus subject to MSRB Rule G-45.³⁰ The MSRB stated that, for example, the activities of a program manager to an ABLÉ program or 529 college savings plan, or its affiliates or contractors, could include direct contact with investors through the development and distribution of ABLÉ program or 529 college savings plan advertising sales literature, or maintaining ABLÉ program or 529 college savings plan websites,

including processing enrollment funds.³¹ The MSRB stated that those activities could, depending on the facts and circumstances, cause one or more of those entities to be underwriters under Rule G-45.³² The MSRB also noted that it believed the Commission has agreed with the MSRB that each entity must make its own determination about whether its activity would qualify as "underwriting" activity as that term is defined in SEC Rule 15c2-12(f)(8) under the Act.³³ In addition, the MSRB stated that, beginning in 2015, the MSRB has received data from underwriters to 529 college savings plans under Rule G-45.³⁴ The MSRB stated that it has every reason to believe that there is widespread compliance by those underwriters with their reporting obligations under Rule G-45.³⁵ Consequently, the MSRB stated, it does not believe that the requirement to submit fee information, as would be required under the proposed rule change, on MSRB Form G-45 would unduly burden competition between underwriters to advisor-sold ABLÉ programs or 529 college savings plans versus underwriters to direct-sold ABLÉ programs or 529 college savings plans.³⁶

3. Underwriter Reporting Obligation

SIFMA stated that it believed dealers that underwrite ABLÉ programs and 529 college savings plans should only be required to submit information required by MSRB Form G-45 to the extent that such information is within their possession, custody and control.³⁷ The MSRB stated that, under the proposed rule change, and consistent with the MSRB's previous position on this issue, an underwriter to an ABLÉ program or 529 college savings plan would not be required to submit information on MSRB Form G-45 that the underwriter neither possesses nor has the legal right to obtain.³⁸ The MSRB also noted that the legal right to obtain the information for purposes of the proposed rule change is not affected by a voluntary relinquishment, by contract or otherwise, of such right.³⁹ Therefore, the MSRB stated, an underwriter may designate an affiliate or contractor to perform activities in the underwriter's stead in connection with the underwriting, but that the underwriter

would be properly viewed as having the legal right to obtain all information.⁴⁰

IV. Discussion and Commission Findings

The Commission has carefully considered the proposed rule change, the comment letter received, and the MSRB Response Letter. The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the MSRB.

In particular, the proposed rule change is consistent with Sections 15B(b)(2)(C) of the Act.⁴¹ Section 15B(b)(2)(C) of the Act states that the MSRB's rules shall be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities and municipal financial products, to remove impediments to and perfect the mechanism of a free and open market in municipal securities and municipal financial products, and, in general, to protect investors, municipal entities, obligated persons, and the public interest.⁴² The Commission believes the proposed rule change is consistent with Section 15B(b)(2)(C) and necessary and appropriate to help the MSRB receive complete and reliable information about ABLÉ programs and 529 college savings plans which it can use to monitor such programs and plans and detect potential investor harm. The Commission believes that, for that data set to be complete and reliable, such data should include the data about the fees and expenses associated with an investment in an ABLÉ program or a 529 college savings plan that are included in the proposed rule change. In addition, the Commission believes the proposed rule change is necessary for the MSRB to gather relevant data required to ensure the MSRB's regulatory scheme is sufficient and/or to determine whether additional rulemaking is necessary to protect investors and the public interest.

The Commission believes that the proposed rule change would facilitate the MSRB's ability to better analyze the market for ABLÉ programs and 529 college savings plans as well as improve the MSRB's ability to evaluate trends and differences among ABLÉ programs and 529 college savings plans. Further,

²⁵ *Id.*

²⁶ *Id.*

²⁷ See SIFMA Letter.

²⁸ See MSRB Response Letter.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ See SIFMA Letter.

³⁸ See MSRB Response Letter.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ 15 U.S.C. 78o-4(b)(2)(C).

⁴² 15 U.S.C. 78o-4(b)(2)(C).

the Commission believes that the MSRB, as well as other financial regulators charged with enforcing the MSRB's rules, use (or will use) the information submitted on MSRB Form G-45 to enhance their understanding of, and ability to monitor, ABL programs and 529 college savings plans.

The Commission believes that the MSRB or other regulators could use the information submitted on MSRB Form G-45 to, among other things, determine if the disclosure documents or marketing materials prepared or reviewed by underwriters are consistent with the data submitted to the MSRB for regulatory purposes.

In approving the proposed rule change, the Commission also has considered the impact of the proposed rule change on efficiency, competition, and capital formation.⁴³ The Commission does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The additional data that the proposed rule change would collect is understood by the Commission to be readily available and known to the underwriters of ABL programs and 529 college savings plans. Additionally, the Commission understands that these underwriters are already required to submit certain information to the MSRB on MSRB Form G-45 on a semi-annual basis. Also, the Commission believes that the additional information required to be submitted by the proposed rule change would be submitted on an equal and non-discriminatory basis, and the requirement would apply equally to all dealers that serve as underwriters to ABL programs and/or 529 college savings plans. Furthermore, the Commission believes that the potential burdens created by the proposed rule change are to be likely outweighed by the benefits.

For the reasons noted above, the Commission believes that the proposed rule change is consistent with the Act.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,⁴⁴ that the proposed rule change (SR-MSRB-2017-08) be, and hereby is, approved.

For the Commission, pursuant to delegated authority.⁴⁵

Eduardo A. Aleman,
Assistant Secretary.

[FR Doc. 2017-26909 Filed 12-13-17; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-82251; File No. SR-CHX-2017-08]

Self-Regulatory Organizations; Chicago Stock Exchange, Inc.; Notice of Filing of Amendment No. 1 to a Proposed Rule Change To Amend the Schedule of Fees and Assessments To Adopt a Fee Schedule To Establish Fees for Industry Members Related to the National Market System Plan Governing the Consolidated Audit Trail

December 8, 2017.

On May 3, 2017, the Chicago Stock Exchange, Inc. ("CHX" or the "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² a proposed rule change to adopt a fee schedule to establish the fees for Industry Members related to the National Market System Plan Governing the Consolidated Audit Trail (the "CAT NMS Plan"). The proposed rule change was published in the **Federal Register** for comment on May 22, 2017.³ The Commission received seven comment letters on the proposed rule change,⁴

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 80691 (May 16, 2017), 82 FR 23344 (May 22, 2017) ("Original Proposal").

⁴ Since the CAT NMS Plan Participants' proposed rule changes to adopt fees to be charged to Industry Members to fund the consolidated audit trail are substantively identical, the Commission is considering all comments received on the proposed rule changes regardless of the comment file to which they were submitted. See text accompanying notes 13-16 *infra*, for a list of the CAT NMS Plan Participants. See Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, to Brent J. Fields, Secretary, Commission (dated June 6, 2017), available at: <https://www.sec.gov/comments/sr-batsbxz-2017-38/batsbxz201738-1788188-153228.pdf>; Letter from Patricia L. Cerny and Steven O'Malley, Compliance Consultants, to Brent J. Fields, Secretary, Commission (dated June 12, 2017), available at: <https://www.sec.gov/comments/sr-cboe-2017-040/cboe2017040-1799253-153675.pdf>; Letter from Daniel Zinn, General Counsel, OTC Markets Group Inc., to Eduardo A. Aleman, Assistant Secretary, Commission (dated June 13, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-1801717-153703.pdf>; Letter from Joanna Mallers, Secretary, FIA Principal Traders Group, to Brent J. Fields, Secretary, Commission (dated June 22, 2017), available at: <https://www.sec.gov/comments/sr-cboe-2017-040/cboe2017040-1819670-154195.pdf>; Letter from Stuart J. Kaswell, Executive Vice President and Managing Director, General Counsel, Managed Funds Association, to Brent J. Fields, Secretary, Commission (dated June 23, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-1822454-154283.pdf>; and Letter from Suzanne H. Shatto, Investor, to Commission (dated June 27, 2017), available at: <https://www.sec.gov/>

and a response to comments from the Participants.⁵ On June 30, 2017, the Commission temporarily suspended and initiated proceedings to determine whether to approve or disapprove the proposed rule change.⁶ The Commission thereafter received seven comment letters,⁷ and a response to comments from the CAT NMS Plan Participants.⁸ On November 9, 2017, the Exchange filed Amendment No. 1 to the proposed rule change, as described in Items I and II below, which Items have been prepared by the Exchange.⁹ On November 9, 2017, the Commission extended the time period within which to approve the proposed rule change or disapprove the proposed rule change to

[comments/sr-batsedgx-2017-22/batsedgx201722-154443.pdf](https://www.sec.gov/comments/sr-batsedgx-2017-22/batsedgx201722-154443.pdf). The Commission also received a comment letter which is not pertinent to these proposed rule changes. See Letter from Christina Crouch, Smart Ltd., to Brent J. Fields, Secretary, Commission (dated June 5, 2017), available at: <https://www.sec.gov/comments/sr-batsbxz-2017-38/batsbxz201738-1785545-153152.htm>.

⁵ See Letter from CAT NMS Plan Participants to Brent J. Fields, Secretary, Commission (dated June 29, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-1832632-154584.pdf>.

⁶ See Securities Exchange Act Release No. 81067 (June 30, 2017), 82 FR 31656 (July 7, 2017).

⁷ See Letter from W. Hardy Callcott, Partner, Sidley Austin LLP, to Brent J. Fields, Secretary, Commission (dated July 27, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2148338-157737.pdf>; Letter from Kevin Coleman, General Counsel and Chief Compliance Officer, Belvedere Trading LLC, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2148360-157740.pdf>; Letter from Joanna Mallers, Secretary, FIA Principal Traders Group, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2151228-157745.pdf>; Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2150977-157744.pdf>; Letter from Stuart J. Kaswell, Executive Vice President and Managing Director, General Counsel, Managed Funds Association, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2150818-157743.pdf>; Letter from John Kinahan, Chief Executive Officer, Group One Trading, L.P., to Brent J. Fields, Secretary, Commission (dated August 10, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-2214568-160619.pdf>; Letter from Joseph Molluso, Executive Vice President and CFO, Virtu Financial, to Brent J. Fields, Commission (dated August 18, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-2238648-160830.pdf>.

⁸ See Letter from Michael Simon, Chair, CAT NMS Plan Operating Committee, to Brent J. Fields, Commission, Secretary (dated November 2, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2674608-161412.pdf>.

⁹ Amendment No. 1 to the proposed rule change replaces and supersedes the Original Proposal in its entirety.

January 14, 2018.¹⁰ The Commission is publishing this notice to solicit comments from interested persons on Amendment No. 1.¹¹

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

On May 3, 2017, the Exchange filed with the Commission a proposed rule change SR-CHX-2017-08 (the "Original Proposal"), pursuant to which the Exchange proposed to adopt a fee schedule to establish the fees for Industry Members related to the National Market System Plan Governing the Consolidated Audit Trail (the "CAT NMS Plan" or "Plan").¹² The Exchange files this proposed rule change (the "Amendment") to amend the Original Proposal. This Amendment replaces the Original Proposal in its entirety, and also describes the changes from the Original Proposal.

The text of this proposed rule change is available on the Exchange's website at (www.chx.com) and in the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the CHX included statements concerning the purpose of and basis for the proposed rule changes and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The CHX has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

¹⁰ See Securities Exchange Act Release No. 82049 (November 9, 2017), 82 FR 53549 (November 16, 2017).

¹¹ The Commission notes that on November 30, 2017, the Exchange filed Amendment No. 2 to the proposed rule change. Amendment No. 2 is a partial amendment to the proposed rule change, as amended by Amendment No. 1. Amendment No. 2 proposes to change the parenthetical regarding the OTC Equity Securities discount in paragraph (b)(2) of the proposed fee schedule from "with a discount for Equity ATSs exclusively trading OTC Equity Securities based on the average shares per trade ratio between NMS Stocks and OTC Equity Securities" to "with a discount for OTC Equity Securities market share of Equity ATSs trading OTC Equity Securities based on the average shares per trade ratio between NMS Stocks and OTC Equity Securities." See Securities Exchange Act Release No. 82252 (December 8, 2017).

¹² Unless otherwise specified, capitalized terms used in this fee filing are defined as set forth herein, the CAT Compliance Rule Series, in the CAT NMS Plan, or the Original Proposal.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Changes

1. Purpose

The Exchange, BOX Options Exchange LLC, Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe C2 Exchange, Inc., Cboe Exchange, Inc.,¹³ Financial Industry Regulatory Authority, Inc. ("FINRA"), Investors' Exchange LLC, Miami International Securities Exchange, LLC, MIAAX PEARL, LLC, NASDAQ BX, Inc., Nasdaq GEMX, LLC, Nasdaq ISE, LLC, Nasdaq MRX, LLC,¹⁴ NASDAQ PHLX LLC, The NASDAQ Stock Market LLC, New York Stock Exchange LLC, NYSE American LLC,¹⁵ NYSE Arca, Inc. and NYSE National, Inc.¹⁶ (collectively, the "Plan Participants")¹⁷ filed with the Commission, pursuant to Section 11A of the Exchange Act¹⁸ and Rule 608 of Regulation NMS thereunder,¹⁹ the CAT NMS Plan.²⁰ The Plan Participants filed the Plan to comply with Rule 613 of Regulation NMS under the Exchange Act. The Plan was published for comment in the **Federal Register** on May 17, 2016,²¹ and approved by the

¹³ Note that Bats BYX Exchange, Inc., Bats BZX Exchange, Inc., Bats EDGA Exchange, Inc., Bats EDGX Exchange, Inc., LLC, C2 Options Exchange, Incorporated, and Chicago Board Options Exchange, Incorporated, have been renamed Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe C2 Exchange, Inc., Cboe Exchange, Inc., respectively.

¹⁴ ISE Gemini, LLC, ISE Mercury, LLC and International Securities Exchange, LLC have been renamed Nasdaq GEMX, LLC, Nasdaq MRX, LLC, and Nasdaq ISE, LLC, respectively. See Securities Exchange Act Rel. No. 80248 (Mar. 15, 2017), 82 FR 14547 (Mar. 21, 2017); Securities Exchange Act Rel. No. 80326 (Mar. 29, 2017), 82 FR 16460 (Apr. 4, 2017); and Securities Exchange Act Rel. No. 80325 (Mar. 29, 2017), 82 FR 16445 (Apr. 4, 2017).

¹⁵ NYSE MKT LLC has been renamed NYSE American LLC. See Securities Exchange Act Rel. No. 80283 (Mar. 21, 2017), 82 FR 15244 (Mar. 27, 2017).

¹⁶ National Stock Exchange, Inc. has been renamed NYSE National, Inc. See Securities Exchange Act Rel. No. 79902 (Jan. 30, 2017), 82 FR 9258 (Feb. 3, 2017).

¹⁷ A "Participant" is a "member" of the Exchange for purposes of the Act. See CHX Article 1, Rule 1(s). For clarity, the term "Plan Participant" will be used herein when referring to Participants of the Plan.

¹⁸ 15 U.S.C. 78k-1.

¹⁹ 17 CFR 242.608.

²⁰ See Letter from the Plan Participants to Brent J. Fields, Secretary, Commission, dated September 30, 2014; and Letter from Plan Participants to Brent J. Fields, Secretary, Commission, dated February 27, 2015. On December 24, 2015, the Plan Participants submitted an amendment to the CAT NMS Plan. See Letter from Plan Participants to Brent J. Fields, Secretary, Commission, dated December 23, 2015.

²¹ Securities Exchange Act Rel. No. 77724 (Apr. 27, 2016), 81 FR 30614 (May 17, 2016).

Commission, as modified, on November 15, 2016.²² The Plan is designed to create, implement and maintain a consolidated audit trail ("CAT") that would capture customer and order event information for orders in NMS Securities and OTC Equity Securities, across all markets, from the time of order inception through routing, cancellation, modification, or execution in a single consolidated data source. The Plan accomplishes this by creating CAT NMS, LLC (the "Company"), of which each Plan Participant is a member, to operate the CAT.²³ Under the CAT NMS Plan, the Operating Committee of the Company ("Operating Committee") has discretion to establish funding for the Company to operate the CAT, including establishing fees that the Plan Participants will pay, and establishing fees for Industry Members that will be implemented by the Plan Participants ("CAT Fees").²⁴ The Plan Participants are required to file with the SEC under Section 19(b) of the Exchange Act any such CAT Fees applicable to Industry Members that the Operating Committee approves.²⁵ Accordingly, the Exchange submitted the Original Proposal to propose the Consolidated Audit Trail Funding Fees, which would require Industry Members that are Exchange members to pay the CAT Fees determined by the Operating Committee.

The Commission published the Original Proposal for public comment in the **Federal Register** on May 22, 2017,²⁶ and received comments in response to the Original Proposal or similar fee filings by other Plan Participants.²⁷ On June 30, 2017, the Commission suspended, and instituted proceedings to determine whether to approve or disapprove, the Original Proposal.²⁸ The Commission received seven comment letters in response to those proceedings.²⁹

²² Securities Exchange Act Rel. No. 79318 (Nov. 15, 2016), 81 FR 84696 (Nov. 23, 2016) ("Approval Order").

²³ The Plan also serves as the limited liability company agreement for the Company.

²⁴ Section 11.1(b) of the CAT NMS Plan.

²⁵ *Id.*

²⁶ Exchange Act Rel. No. 80691 (May 16, 2017), 82 FR 23344 (May 22, 2017).

²⁷ For a summary of comments, see generally Securities Exchange Act Rel. No. 81067 (June 30, 2017), 82 FR 31656 (July 7, 2017) ("Suspension Order").

²⁸ Suspension Order.

²⁹ See Letter from Stuart J. Kaswell, Executive Vice President, Managing Director and General Counsel, Managed Funds Association, to Brent J. Fields, Secretary, SEC (July 28, 2017) ("MFA Letter"); Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA, to Brent J. Fields, Secretary, SEC (July 28, 2017) ("SIFMA Letter"); Joanna Mallers, Secretary, FIA

In response to the comments on the Original Proposal, the Operating Committee determined to make the following changes to the funding model: (1) Adds two additional CAT Fee tiers for Equity Execution Venues; (2) discounts the market share of Execution Venue ATSS exclusively trading OTC Equity Securities as well as the market share of the FINRA over-the-counter reporting facility (“ORF”) by the average shares per trade ratio between NMS Stocks and OTC Equity Securities (calculated as 0.17% based on available data from the second quarter of June 2017) when calculating the market share of Execution Venue ATS exclusively trading OTC Equity Securities and FINRA; (3) discounts the Options Market Maker quotes by the trade to quote ratio for options (calculated as 0.01% based on available data for June 2016 through June 2017) when calculating message traffic for Options Market Makers; (4) discounts equity market maker quotes by the trade to quote ratio for equities (calculated as 5.43% based on available data for June 2016 through June 2017) when calculating message traffic for equity market makers; (5) decreases the number of tiers for Industry Members (other than the Execution Venue ATSS) from nine to seven; (6) changes the allocation of CAT costs between Equity Execution Venues and Options Execution Venues from 75%/25% to 67%/33%; (7) adjusts tier percentages and recovery allocations for Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSS); (8) focuses the comparability of CAT Fees on the individual entity level, rather than primarily on the comparability of affiliated entities; (9) commences invoicing of CAT Reporters as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Plan Participants and the operative date of the CAT NMS Plan amendment adopting CAT Fees for Plan Participants; and (10) requires the proposed fees to automatically expire

Principal Traders Group, to Brent J. Fields, Secretary, SEC (July 28, 2017) (“FIA Principal Traders Group Letter”); Letter from Kevin Coleman, General Counsel & Chief Compliance Officer, Belvedere Trading LLC, to Brent J. Fields, Secretary, SEC (July 28, 2017) (“Belvedere Letter”); Letter from W. Hardy Callcott, Sidley Austin LLP, to Brent J. Fields, Secretary, SEC (July 27, 2017) (“Sidley Letter”); Letter from John Kinahan, Chief Executive Officer, Group One Trading, L.P., to Brent J. Fields, Secretary, SEC (Aug. 10, 2017) (“Group One Letter”); and Letter from Joseph Molluso, Executive Vice President, Virtu Financial, to Brent J. Fields, Secretary, SEC (Aug. 18, 2017) (“Virtu Financial Letter”).

two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for Plan Participants. As discussed in detail below, the Exchange proposes to amend the Original Proposal to reflect these changes.

(1) Executive Summary

The following provides an executive summary of the CAT funding model approved by the Operating Committee, as well as Industry Members’ rights and obligations related to the payment of CAT Fees calculated pursuant to the CAT funding model, as amended by this Amendment. A detailed description of the CAT funding model and the CAT Fees, as amended by this Amendment, as well as the changes made to the Original Proposal follows this executive summary.

(A) CAT Funding Model

- *CAT Costs.* The CAT funding model is designed to establish CAT-specific fees to collectively recover the costs of building and operating the CAT from all CAT Reporters, including Industry Members and Plan Participants. The overall CAT costs for the calculation of the CAT Fees in this fee filing are comprised of Plan Processor CAT costs and non-Plan Processor CAT costs incurred, and estimated to be incurred, from November 21, 2016 through November 21, 2017. (See Section 3(a)(2)(E) below)

- *Bifurcated Funding Model.* The CAT NMS Plan requires a bifurcated funding model, where costs associated with building and operating the CAT would be borne by (1) Plan Participants and Industry Members that are Execution Venues for Eligible Securities through fixed tier fees based on market share, and (2) Industry Members (other than alternative trading systems (“ATSS”) that execute transactions in Eligible Securities (“Execution Venue ATSS”)) through fixed tier fees based on message traffic for Eligible Securities. (See Section 3(a)(2) below)

- *Industry Member Fees.* Each Industry Member (other than Execution Venue ATSS) will be placed into one of seven tiers of fixed fees, based on “message traffic” in Eligible Securities for a defined period (as discussed below). Prior to the start of CAT reporting, “message traffic” will be comprised of historical equity and equity options orders, cancels, quotes and executions provided by each exchange and FINRA over the previous three months. After an Industry Member begins reporting to the CAT, “message traffic” will be calculated based on the Industry Member’s Reportable Events reported to the CAT. Industry Members

with lower levels of message traffic will pay a lower fee and Industry Members with higher levels of message traffic will pay a higher fee. To avoid disincentives to quoting behavior, Options Market Maker and equity market maker quotes will be discounted when calculating message traffic. (See Section 3(a)(2)(B) below)

- *Execution Venue Fees.* Each Equity Execution Venue will be placed in one of four tiers of fixed fees based on market share, and each Options Execution Venue will be placed in one of two tiers of fixed fees based on market share. Equity Execution Venue market share will be determined by calculating each Equity Execution Venue’s proportion of the total volume of NMS Stock and OTC Equity shares reported by all Equity Execution Venues during the relevant time period. For purposes of calculating market share, the market share of Execution Venue ATSS exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF will be discounted. Similarly, market share for Options Execution Venues will be determined by calculating each Options Execution Venue’s proportion of the total volume of Listed Options contracts reported by all Options Execution Venues during the relevant time period. Equity Execution Venues with a larger market share will pay a larger CAT Fee than Equity Execution Venues with a smaller market share. Similarly, Options Execution Venues with a larger market share will pay a larger CAT Fee than Options Execution Venues with a smaller market share. (See Section 3(a)(2)(C) below)

- *Cost Allocation.* For the reasons discussed below, in designing the model, the Operating Committee determined that 75 percent of total costs recovered would be allocated to Industry Members (other than Execution Venue ATSS) and 25 percent would be allocated to Execution Venues. In addition, the Operating Committee determined to allocate 67 percent of Execution Venue costs recovered to Equity Execution Venues and 33 percent to Options Execution Venues. (See Section 3(a)(2)(D) below)

- *Comparability of Fees.* The CAT funding model charges CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) comparable CAT Fees. (See Section 3(a)(2)(F) below)

(B) CAT Fees for Industry Members

- *Fee Schedule.* The quarterly CAT Fees for each tier for Industry Members are set forth in the two fee schedules in

the Consolidated Audit Trail Funding Fees, one for Equity ATs and one for Industry Members other than Equity ATs. (See Section 3(a)(3)(B) below)

- *Quarterly Invoices.* Industry Members will be billed quarterly for CAT Fees, with the invoices payable within 30 days. The quarterly invoices will identify within which tier the Industry Member falls. (See Section 3(a)(3)(C) below)

- *Centralized Payment.* Each Industry Member will receive from the Company one invoice for its applicable CAT Fees, not separate invoices from each Participant of which it is a member. Each Industry Member will pay its CAT Fees to the Company via the centralized system for the collection of CAT Fees established by the Operating Committee. (See Section 3(a)(3)(C) below)

- *Billing Commencement.* Industry Members will begin to receive invoices for CAT Fees as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Plan Participants and the operative date of the Plan amendment adopting CAT Fees for Plan Participants. (See Section 3(a)(2)(G) below)

- *Sunset Provision.* The Consolidated Audit Trail Funding Fees will sunset automatically two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for Plan Participants. (See Section 3(a)(2)(f) below)

(2) Description of the CAT Funding Model

Article XI of the CAT NMS Plan requires the Operating Committee to approve the operating budget, including projected costs of developing and operating the CAT for the upcoming year. In addition to a budget, Article XI of the CAT NMS Plan provides that the Operating Committee has discretion to establish funding for the Company, consistent with a bifurcated funding model, where costs associated with building and operating the Central Repository would be borne by (1) Plan Participants and Industry Members that are Execution Venues through fixed tier fees based on market share, and (2) Industry Members (other than Execution Venue ATs) through fixed tier fees based on message traffic. In its order approving the CAT NMS Plan, the Commission determined that the proposed funding model was “reasonable”³⁰ and “reflects a reasonable exercise of the Participants’ funding authority to recover the

Participants’ costs related to the CAT.”³¹

More specifically, the Commission stated in approving the CAT NMS Plan that “[t]he Commission believes that the proposed funding model is reasonably designed to allocate the costs of the CAT between the Participants and Industry Members.”³² The Commission further noted the following:

The Commission believes that the proposed funding model reflects a reasonable exercise of the Participants’ funding authority to recover the Participants’ costs related to the CAT. The CAT is a regulatory facility jointly owned by the Participants and . . . the Exchange Act specifically permits the Participants to charge their members fees to fund their self-regulatory obligations. The Commission further believes that the proposed funding model is designed to impose fees reasonably related to the Participants’ self-regulatory obligations because the fees would be directly associated with the costs of establishing and maintaining the CAT, and not unrelated Exchange services.³³

Accordingly, the funding model approved by the Operating Committee imposes fees on both Plan Participants and Industry Members.

As discussed in Appendix C of the CAT NMS Plan, in developing and approving the approved funding model, the Operating Committee considered the advantages and disadvantages of a variety of alternative funding and cost allocation models before selecting the proposed model.³⁴ After analyzing the various alternatives, the Operating Committee determined that the proposed tiered, fixed fee funding model provides a variety of advantages in comparison to the alternatives.

In particular, the fixed fee model, as opposed to a variable fee model, provides transparency, ease of calculation, ease of billing and other administrative functions, and predictability of a fixed fee. Such factors are crucial to estimating a reliable revenue stream for the Company and for permitting CAT Reporters to reasonably predict their payment obligations for budgeting purposes. Additionally, a strictly variable or metered funding model based on message volume would be far more likely to affect market behavior and place an inappropriate burden on competition.

In addition, reviews from varying time periods of current broker-dealer order and trading data submitted under existing reporting requirements showed

a wide range in activity among broker-dealers, with a number of broker-dealers submitting fewer than 1,000 orders per month and other broker-dealers submitting millions and even billions of orders in the same period. Accordingly, the CAT NMS Plan includes a tiered approach to fees. The tiered approach helps ensure that fees are equitably allocated among similarly situated CAT Reporters and furthers the goal of lessening the impact on smaller firms.³⁵ In addition, in choosing a tiered fee structure, the Operating Committee concluded that the variety of benefits offered by a tiered fee structure, discussed above, outweighed the fact that CAT Reporters in any particular tier would pay different rates per message traffic order event or per market share (e.g., an Industry Member with the largest amount of message traffic in one tier would pay a smaller amount per order event than an Industry Member in the same tier with the least amount of message traffic). Such variation is the natural result of a tiered fee structure.³⁶ The Operating Committee considered several approaches to developing a tiered model, including defining fee tiers based on such factors as size of firm, message traffic or trading dollar volume. After analyzing the alternatives, it was concluded that the tiering should be based on message traffic which will reflect the relative impact of CAT Reporters on the CAT System.

Accordingly, the CAT NMS Plan contemplates that costs will be allocated across the CAT Reporters on a tiered basis in order to allocate higher costs to those CAT Reporters that contribute more to the costs of creating, implementing and maintaining the CAT and lower costs to those that contribute less.³⁷ The fees to be assessed at each tier are calculated so as to recoup a proportion of costs appropriate to the message traffic or market share (as applicable) from CAT Reporters in each tier. Therefore, Industry Members generating the most message traffic will be in the higher tiers, and will be charged a higher fee. Industry Members with lower levels of message traffic will be in lower tiers and will be assessed a smaller fee for the CAT.³⁸ Correspondingly, Execution Venues with the highest market shares will be in the top tier, and will be charged

³⁵ Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85006.

³⁶ Moreover, as the SEC noted in approving the CAT NMS Plan, “[t]he Participants also have offered a reasonable basis for establishing a funding model based on broad tiers, in that it may be easier to implement.” Approval Order at 84796.

³⁷ Approval Order at 85005.

³⁸ *Id.*

³¹ *Id.* at 84794.

³² *Id.* at 84795.

³³ *Id.* at 84794.

³⁴ Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85006.

³⁰ Approval Order at 84796.

higher fees. Execution Venues with the lowest market shares will be in the lowest tier and will be assessed smaller fees for the CAT.³⁹

The CAT NMS Plan states that Industry Members (other than Execution Venue ATs) will be charged based on message traffic, and that Execution Venues will be charged based on market share.⁴⁰ While there are multiple factors that contribute to the cost of building, maintaining and using the CAT, processing and storage of incoming message traffic is one of the most significant cost drivers for the CAT.⁴¹ Thus, the CAT NMS Plan provides that the fees payable by Industry Members (other than Execution Venue ATs) will be based on the message traffic generated by such Industry Member.⁴²

In contrast to Industry Members, which determine the degree to which they produce message traffic that constitute CAT Reportable Events, the CAT Reportable Events of the Execution Venues are largely derivative of quotations and orders received from Industry Members that they are required to display. The business model for Execution Venues (other than FINRA), however, is focused on executions in their markets. As a result, the Operating Committee believes that it is more equitable to charge Execution Venues based on their market share rather than their message traffic.

Focusing on message traffic would make it more difficult to draw distinctions between large and small Execution Venues and, in particular, between large and small options exchanges. For instance, the Operating Committee analyzed the message traffic of Execution Venues and Industry Members for the period of April 2017 to June 2017 and placed all CAT Reporters into a nine-tier framework (*i.e.*, a single tier may include both Execution Venues and Industry Members). The Operating Committee's analysis found that the majority of exchanges (15 total) were grouped in Tiers 1 and 2. Moreover, virtually all of the options exchanges were in Tiers 1 and 2.⁴³ Given the resulting concentration of options exchanges in Tiers 1 and 2 under this approach, the analysis shows that a funding model for Execution Venues based on message traffic would make it more difficult to distinguish between

large and small options exchanges, as compared to the proposed fee approach that bases fees for Execution Venues on market share.

The CAT NMS Plan's funding model also is structured to avoid a "reduction in market quality."⁴⁴ The tiered, fixed fee funding model is designed to limit the disincentives to providing liquidity to the market. For example, the Operating Committee expects that a firm that has a large volume of quotes would likely be categorized in one of the upper tiers, and would not be assessed a fee for this traffic directly as they would under a more directly metered model. In contrast, strictly variable or metered funding models based on message volume are far more likely to affect market behavior. In approving the CAT NMS Plan, the SEC stated that "[t]he Participants also offered a reasonable basis for establishing a funding model based on broad tiers, in that it may be . . . less likely to have an incremental deterrent effect on liquidity provision."⁴⁵

The funding model also is structured to avoid a reduction market quality because it discounts Options Market Maker and equity market maker quotes when calculating message traffic for Options Market Makers and equity market makers, respectively. As discussed in more detail below, the Operating Committee determined to discount the Options Market Maker quotes by the trade to quote ratio for options when calculating message traffic for Options Market Makers. Similarly, to avoid disincentives to quoting behavior on the equities side as well, the Operating Committee determined to discount equity market maker quotes by the trade to quote ratio for equities when calculating message traffic for equity market makers. The proposed discounts recognize the value of the market makers' quoting activity to the market as a whole.

The CAT NMS Plan is further structured to avoid potential conflicts raised by the Operating Committee determining fees applicable to its own members—the Plan Participants. First, the Company will operate on a "break-even" basis, with fees imposed to cover costs and an appropriate reserve. Any surpluses will be treated as an operational reserve to offset future fees and will not be distributed to the Plan Participants as profits.⁴⁶ To ensure that the Plan Participants' operation of the CAT will not contribute to the funding of their other operations, Section 11.1(c)

of the CAT NMS Plan specifically states that "[a]ny surplus of the Company's revenues over its expenses shall be treated as an operational reserve to offset future fees." In addition, as set forth in Article VIII of the CAT NMS Plan, the Company "intends to operate in a manner such that it qualifies as a 'business league' within the meaning of Section 501(c)(6) of the [Internal Revenue] Code." To qualify as a business league, an organization must "not [be] organized for profit and no part of the net earnings of [the organization can] inure[] to the benefit of any private shareholder or individual."⁴⁷ As the SEC stated when approving the CAT NMS Plan, "the Commission believes that the Company's application for Section 501(c)(6) business league status addresses issues raised by commenters about the Plan's proposed allocation of profit and loss by mitigating concerns that the Company's earnings could be used to benefit individual Plan Participants."⁴⁸ The Internal Revenue Service recently has determined that the Company is exempt from federal income tax under Section 501(c)(6) of the Internal Revenue Code.

The funding model also is structured to take into account distinctions in the securities trading operations of Plan Participants and Industry Members. For example, the Operating Committee designed the model to address the different trading characteristics in the OTC Equity Securities market. Specifically, the Operating Committee proposes to discount the market share of Execution Venue ATs exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF by the average shares per trade ratio between NMS Stocks and OTC Equity Securities to adjust for the greater number of shares being traded in the OTC Equity Securities market, which is generally a function of a lower per share price for OTC Equity Securities when compared to NMS Stocks. In addition, the Operating Committee also proposes to discount Options Market Maker and equity market maker message traffic in recognition of their role in the securities markets. Furthermore, the funding model creates separate tiers for Equity and Options Execution Venues due to the different trading characteristics of those markets.

Finally, by adopting a CAT-specific fee, the Operating Committee will be fully transparent regarding the costs of the CAT. Charging a general regulatory fee, which would be used to cover CAT

³⁹ *Id.*

⁴⁰ Section 11.3(a) and (b) of the CAT NMS Plan.

⁴¹ Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85005.

⁴² Section 11.3(b) of the CAT NMS Plan.

⁴³ The Operating Committee notes that this analysis did not place MIAx PEARL in Tier 1 or Tier 2 since the exchange commenced trading on February 6, 2017.

⁴⁴ Section 11.2(e) of the CAT NMS Plan.

⁴⁵ Approval Order at 84796.

⁴⁶ *Id.* at 84792.

⁴⁷ 26 U.S.C. 501(c)(6).

⁴⁸ Approval Order at 84793.

costs as well as other regulatory costs, would be less transparent than the selected approach of charging a fee designated to cover CAT costs only.

A full description of the funding model is set forth below. This description includes the framework for the funding model as set forth in the CAT NMS Plan, as well as the details as to how the funding model will be applied in practice, including the number of fee tiers and the applicable fees for each tier. The complete funding model is described below, including those fees that are to be paid by the Plan Participants. The proposed Consolidated Audit Trail Funding Fees, however, do not apply to the Plan Participants; the proposed Consolidated Audit Trail Funding Fees only apply to Industry Members. The CAT Fees for Plan Participants will be imposed separately by the Operating Committee pursuant to the CAT NMS Plan.

(A) Funding Principles

Section 11.2 of the CAT NMS Plan sets forth the principles that the Operating Committee applied in establishing the funding for the Company. The Operating Committee has considered these funding principles as well as the other funding requirements set forth in the CAT NMS Plan and in Rule 613 in developing the proposed funding model. The following are the funding principles in Section 11.2 of the CAT NMS Plan:

- To create transparent, predictable revenue streams for the Company that are aligned with the anticipated costs to build, operate and administer the CAT and other costs of the Company;
- To establish an allocation of the Company's related costs among Plan Participants and Industry Members that is consistent with the Exchange Act, taking into account the timeline for implementation of the CAT and distinctions in the securities trading operations of Plan Participants and Industry Members and their relative impact upon the Company's resources and operations;
- To establish a tiered fee structure in which the fees charged to: (i) CAT Reporters that are Execution Venues, including ATSs, are based upon the level of market share; (ii) Industry Members' non-ATS activities are based upon message traffic; (iii) the CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT

Reporters, whether Execution Venue and/or Industry Members);

- To provide for ease of billing and other administrative functions;
- To avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality; and
- To build financial stability to support the Company as a going concern.

(B) Industry Member Tiering

Under Section 11.3(b) of the CAT NMS Plan, the Operating Committee is required to establish fixed fees to be payable by Industry Members, based on message traffic generated by such Industry Member, with the Operating Committee establishing at least five and no more than nine tiers.

The CAT NMS Plan clarifies that the fixed fees payable by Industry Members pursuant to Section 11.3(b) shall, in addition to any other applicable message traffic, include message traffic generated by: (i) an ATS that does not execute orders that is sponsored by such Industry Member; and (ii) routing orders to and from any ATS sponsored by such Industry Member. In addition, the Industry Member fees will apply to Industry Members that act as routing broker-dealers for exchanges. The Industry Member fees will not be applicable, however, to an ATS that qualifies as an Execution Venue, as discussed in more detail in the section on Execution Venue tiering.

In accordance with Section 11.3(b), the Operating Committee approved a tiered fee structure for Industry Members (other than Execution Venue ATSs) as described in this section. In determining the tiers, the Operating Committee considered the funding principles set forth in Section 11.2 of the CAT NMS Plan, seeking to create funding tiers that take into account the relative impact on CAT System resources of different Industry Members, and that establish comparable fees among the CAT Reporters with the most Reportable Events. The Operating Committee has determined that establishing seven tiers results in an allocation of fees that distinguishes between Industry Members with differing levels of message traffic. Thus, each such Industry Member will be placed into one of seven tiers of fixed fees, based on "message traffic" for a defined period (as discussed below).

A seven tier structure was selected to provide a wide range of levels for tiering Industry Members such that Industry Members submitting significantly less message traffic to the CAT would be adequately differentiated from Industry

Members submitting substantially more message traffic. The Operating Committee considered historical message traffic from multiple time periods, generated by Industry Members across all exchanges and as submitted to FINRA's Order Audit Trail System ("OATS"), and considered the distribution of firms with similar levels of message traffic, grouping together firms with similar levels of message traffic. Based on this, the Operating Committee determined that seven tiers would group firms with similar levels of message traffic, charging those firms with higher impact on the CAT more, while lowering the burden on Industry Members that have less CAT-related activity. Furthermore, the selection of seven tiers establishes comparable fees among the largest CAT Reporters.

Each Industry Member (other than Execution Venue ATSs) will be ranked by message traffic and tiered by predefined Industry Member percentages (the "Industry Member Percentages"). The Operating Committee determined to use predefined percentages rather than fixed volume thresholds to ensure that the total CAT Fees collected recover the expected CAT costs regardless of changes in the total level of message traffic. To determine the fixed percentage of Industry Members in each tier, the Operating Committee analyzed historical message traffic generated by Industry Members across all exchanges and as submitted to OATS, and considered the distribution of firms with similar levels of message traffic, grouping together firms with similar levels of message traffic. Based on this, the Operating Committee identified seven tiers that would group firms with similar levels of message traffic.

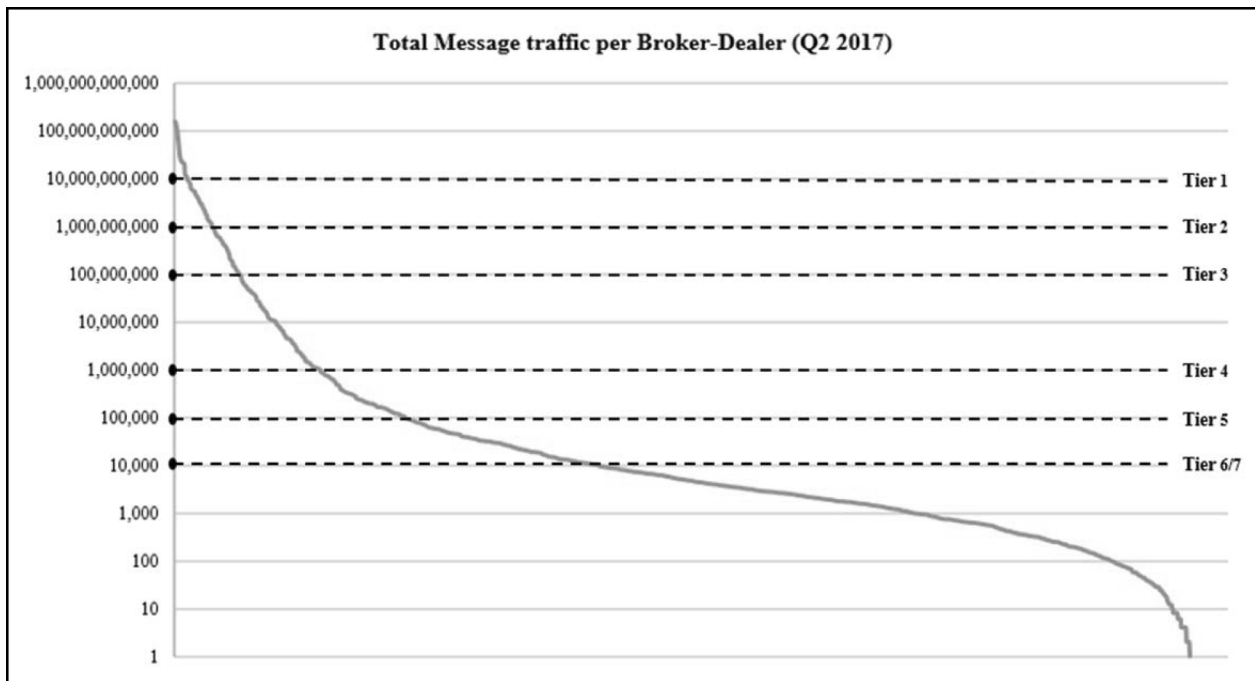
The percentage of costs recovered by each Industry Member tier will be determined by predefined percentage allocations (the "Industry Member Recovery Allocation"). In determining the fixed percentage allocation of costs recovered for each tier, the Operating Committee considered the impact of CAT Reporter message traffic on the CAT System as well as the distribution of total message volume across Industry Members while seeking to maintain comparable fees among the largest CAT Reporters. Accordingly, following the determination of the percentage of Industry Members in each tier, the Operating Committee identified the percentage of total market volume for each tier based on the historical message traffic upon which Industry Members had been initially ranked. Taking this into account along with the resulting percentage of total recovery, the

percentage allocation of costs recovered for each tier were assigned, allocating higher percentages of recovery to tiers with higher levels of message traffic while avoiding any inappropriate burden on competition. Furthermore, by using percentages of Industry Members and costs recovered per tier, the Operating Committee sought to include elasticity within the funding model, allowing the funding model to respond to changes in either the total number of Industry Members or the total level of message traffic.

The following chart illustrates the breakdown of seven Industry Member tiers across the monthly average of total equity and equity options orders, cancels, quotes and executions in the

second quarter of 2017 as well as message traffic thresholds between the largest of Industry Member message traffic gaps. The Operating Committee referenced similar distribution illustrations to determine the appropriate division of Industry Member percentages in each tier by considering the grouping of firms with similar levels of message traffic and seeking to identify relative breakpoints in the message traffic between such groupings. In reviewing the chart and its corresponding table, note that while these distribution illustrations were referenced to help differentiate between Industry Member tiers, the proposed funding model is driven by fixed percentages of Industry Members across

tiers to account for fluctuating levels of message traffic over time. This approach also provides financial stability for the CAT by ensuring that the funding model will recover the required amounts regardless of changes in the number of Industry Members or the amount of message traffic. Actual messages in any tier will vary based on the actual traffic in a given measurement period, as well as the number of firms included in the measurement period. The Industry Member Percentages and Industry Member Recovery Allocation for each tier will remain fixed with each Industry Member's tier to be reassigned periodically, as described below in Section 3(a)(2)(I).



Industry Member tier	Approximate message traffic per Industry Member (Q2 2017) (orders, quotes, cancels and executions)
Tier 1	> 10,000,000,000
Tier 2	1,000,000,000–10,000,000,000
Tier 3	100,000,000–1,000,000,000
Tier 4	1,000,000–100,000,000
Tier 5	100,000–1,000,000
Tier 6	10,000–100,000
Tier 7	< 10,000

Based on the above analysis, the Operating Committee approved the following Industry Member Percentages

and Industry Member Recovery Allocations:

Industry Member tier	Percentage of Industry Members	Percentage of Industry Member recovery	Percentage of total recovery
Tier 1	0.900	12.00	9.00

Industry Member tier	Percentage of Industry Members	Percentage of Industry Member recovery	Percentage of total recovery
Tier 2	2.150	20.50	15.38
Tier 3	2.800	18.50	13.88
Tier 4	7.750	32.00	24.00
Tier 5	8.300	10.00	7.50
Tier 6	18.800	6.00	4.50
Tier 7	59.300	1.00	0.75
Total	100	100	75

For the purposes of creating these tiers based on message traffic, the Operating Committee determined to define the term “message traffic” separately for the period before the commencement of CAT reporting and for the period after the start of CAT reporting. The different definition for message traffic is necessary as there will be no Reportable Events as defined in the Plan, prior to the commencement of CAT reporting. Accordingly, prior to the start of CAT reporting, “message traffic” will be comprised of historical equity and equity options orders, cancels, quotes and executions provided by each exchange and FINRA over the previous three months. Prior to the start of CAT reporting, orders would be comprised of the total number of equity and equity options orders received and originated by a member of an exchange or FINRA over the previous three-month period, including principal orders, cancel/replace orders, market maker orders originated by a member of an exchange, and reserve (iceberg) orders as well as executions originated by a member of FINRA, and excluding order rejects, system-modified orders, order routes and implied orders.⁴⁹ In addition, prior to the start of CAT reporting, cancels would be comprised of the total number of equity and equity option cancels received and originated by a member of an exchange or FINRA over a three-month period, excluding order modifications (e.g., order updates, order splits, partial cancels) and multiple cancels of a complex order. Furthermore, prior to the start of CAT reporting, quotes would be comprised of information readily available to the exchanges and FINRA, such as the total number of historical equity and equity options quotes received and originated by a member of an exchange or FINRA over the prior three-month period. Additionally, prior to the start of CAT

⁴⁹ Consequently, firms that do not have “message traffic” reported to an exchange or OATS before they are reporting to the CAT would not be subject to a fee until they begin to report information to CAT.

reporting, executions would be comprised of the total number of equity and equity option executions received or originated by a member of an exchange or FINRA over a three-month period.

After an Industry Member begins reporting to the CAT, “message traffic” will be calculated based on the Industry Member’s Reportable Events reported to the CAT as will be defined in the Technical Specifications.⁵⁰

Quotes of Options Market Makers and equity market makers will be included in the calculation of total message traffic for those market makers for purposes of tiering under the CAT funding model both prior to CAT reporting and once CAT reporting commences.⁵¹ To address potential concerns regarding burdens on competition or market quality of including quotes in the calculation of message traffic, however, the Operating Committee determined to discount the Options Market Maker quotes by the trade to quote ratio for options when calculating message traffic for Options Market Makers. Based on available data for June 2016 through June 2017, the trade to quote ratio for options is 0.01%. Similarly, to avoid disincentives to quoting behavior on the equities side, the Operating Committee determined to discount equity market maker quotes by the trade to quote ratio

⁵⁰ If an Industry Member (other than an Execution Venue ATS) has no orders, cancels, quotes and executions prior to the commencement of CAT Reporting, or no Reportable Events after CAT reporting commences, then the Industry Member would not have a CAT Fee obligation.

⁵¹ The SEC approved exemptive relief permitting Options Market Maker quotes to be reported to the Central Repository by the relevant Options Exchange in lieu of requiring that such reporting be done by both the Options Exchange and the Options Market Maker, as required by Rule 613 of Regulation NMS. See Securities Exchange Act Rel. No. 77265 (Mar. 1, 2017, 81 FR 11856 (Mar. 7, 2016)). This exemption applies to Options Market Maker quotes for CAT reporting purposes only. Therefore, notwithstanding the reporting exemption provided for Options Market Maker quotes, Options Market Maker quotes will be included in the calculation of total message traffic for Options Market Makers for purposes of tiering under the CAT funding model both prior to CAT reporting and once CAT reporting commences.

for equities. Based on available data for June 2016 through June 2017, the trade to quote ratio for equities is 5.43%.⁵² The trade to quote ratio for options and the trade to quote ratio for equities will be calculated every three months when tiers are recalculated (as discussed below).

The Operating Committee has determined to calculate fee tiers every three months, on a calendar quarter basis, based on message traffic from the prior three months. Based on its analysis of historical data, the Operating Committee believes that calculating tiers based on three months of data will provide the best balance between reflecting changes in activity by Industry Members while still providing predictability in the tiering for Industry Members. Because fee tiers will be calculated based on message traffic from the prior three months, the Operating Committee will begin calculating message traffic based on an Industry Member’s Reportable Events reported to the CAT once the Industry Member has been reporting to the CAT for three months. Prior to that, fee tiers will be calculated as discussed above with regard to the period prior to CAT reporting.

(C) Execution Venue Tiering

Under Section 11.3(a) of the CAT NMS Plan, the Operating Committee is required to establish fixed fees payable by Execution Venues. Section 1.1 of the CAT NMS Plan defines an Execution Venue as “a Participant or an alternative trading system (“ATS”) (as defined in Rule 300 of Regulation ATS) that operates pursuant to Rule 301 of Regulation ATS (excluding any such ATS that does not execute orders).”⁵³

⁵² The trade to quote ratios were calculated based on the inverse of the average of the monthly equity SIP and OPRA quote to trade ratios from June 2016–June 2017 that were compiled by the Financial Information Forum using data from NASDAQ and SIAC.

⁵³ Although FINRA does not operate an execution venue, because it is a Participant, it is considered an “Execution Venue” under the Plan for purposes of determining fees.

The Operating Committee determined that ATSS should be included within the definition of Execution Venue. The Operating Committee believes that it is appropriate to treat ATSS as Execution Venues under the proposed funding model since ATSS have business models that are similar to those of exchanges, and ATSS also compete with exchanges.

Given the differences between Execution Venues that trade NMS Stocks and/or OTC Equity Securities and Execution Venues that trade Listed Options, Section 11.3(a) addresses Execution Venues that trade NMS Stocks and/or OTC Equity Securities separately from Execution Venues that trade Listed Options. Equity and Options Execution Venues are treated separately for two reasons. First, the differing quoting behavior of Equity and Options Execution Venues makes comparison of activity between such Execution Venues difficult. Second, Execution Venue tiers are calculated based on market share of share volume, and it is therefore difficult to compare market share between asset classes (*i.e.*, equity shares versus options contracts). Discussed below is how the funding model treats the two types of Execution Venues.

(I) NMS Stocks and OTC Equity Securities

Section 11.3(a)(i) of the CAT NMS Plan states that each Execution Venue that (i) executes transactions or, (ii) in the case of a national securities association, has trades reported by its members to its trade reporting facility or facilities for reporting transactions effected otherwise than on an exchange, in NMS Stocks or OTC Equity Securities will pay a fixed fee depending on the market share of that Execution Venue in NMS Stocks and OTC Equity Securities, with the Operating Committee establishing at least two and not more than five tiers of fixed fees, based on an Execution Venue's NMS Stocks and OTC Equity Securities market share. For these purposes, market share for Execution Venues that execute transactions will be calculated by share volume, and market share for a national securities association that has trades reported by its members to its trade reporting facility or facilities for reporting transactions effected otherwise than on an exchange in NMS Stocks or OTC Equity Securities will be calculated based on share volume of trades reported, provided, however, that the share volume reported to such national securities association by an Execution Venue shall not be included in the calculation of such national security association's market share.

In accordance with Section 11.3(a)(i) of the CAT NMS Plan, the Operating Committee approved a tiered fee structure for Equity Execution Venues and Option Execution Venues. In determining the Equity Execution Venue Tiers, the Operating Committee considered the funding principles set forth in Section 11.2 of the CAT NMS Plan, seeking to create funding tiers that take into account the relative impact on system resources of different Equity Execution Venues, and that establish comparable fees among the CAT Reporters with the most Reportable Events. Each Equity Execution Venue will be placed into one of four tiers of fixed fees, based on the Execution Venue's NMS Stocks and OTC Equity Securities market share. In choosing four tiers, the Operating Committee performed an analysis similar to that discussed above with regard to the non-Execution Venue Industry Members to determine the number of tiers for Equity Execution Venues. The Operating Committee determined to establish four tiers for Equity Execution Venues, rather than a larger number of tiers as established for non-Execution Venue Industry Members, because the four tiers were sufficient to distinguish between the smaller number of Equity Execution Venues based on market share. Furthermore, the selection of four tiers serves to help establish comparability among the largest CAT Reporters.

Each Equity Execution Venue will be ranked by market share and tiered by predefined Execution Venue percentages, (the "Equity Execution Venue Percentages"). In determining the fixed percentage of Equity Execution Venues in each tier, the Operating Committee reviewed historical market share of share volume for Execution Venues. Equity Execution Venue market shares of share volume were sourced from market statistics made publicly-available by Bats Global Markets, Inc. ("Bats"). ATS market shares of share volume was sourced from market statistics made publicly-available by FINRA. FINRA trade reporting facility ("TRF") and ORF market share of share volume was sourced from market statistics made publicly available by FINRA. Based on data from FINRA and *otcmartets.com*, ATSS accounted for 39.12% of the share volume across the TRFs and ORFs during the recent tiering period. A 39.12/60.88 split was applied to the ATS and non-ATS breakdown of FINRA market share, with FINRA tiered based only on the non-ATS portion of its market share of share volume.

The Operating Committee determined to discount the market share of

Execution Venue ATSS exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF in recognition of the different trading characteristics of the OTC Equity Securities market as compared to the market in NMS Stocks. Many OTC Equity Securities are priced at less than one dollar—and a significant number at less than one penny—per share and low-priced shares tend to trade in larger quantities. Accordingly, a disproportionately large number of shares are involved in transactions involving OTC Equity Securities versus NMS Stocks. Because the proposed fee tiers are based on market share calculated by share volume, Execution Venue ATSS exclusively trading OTC Equity Securities and FINRA would likely be subject to higher tiers than their operations may warrant. To address this potential concern, the Operating Committee determined to discount the market share of Execution Venue ATSS exclusively trading OTC Equity Securities and the market share of the FINRA ORF by multiplying such market share by the average shares per trade ratio between NMS Stocks and OTC Equity Securities in order to adjust for the greater number of shares being traded in the OTC Equity Securities market. Based on available data for the second quarter of 2017, the average shares per trade ratio between NMS Stocks and OTC Equity Securities is 0.17%.⁵⁴ The average shares per trade ratio between NMS Stocks and OTC Equity Securities will be recalculated every three months when tiers are recalculated.⁵⁵

Based on this, the Operating Committee considered the distribution of Execution Venues, and grouped together Execution Venues with similar levels of market share. The percentage of costs recovered by each Equity Execution Venue tier will be determined by predefined percentage allocations (the "Equity Execution Venue Recovery Allocation"). In determining the fixed percentage allocation of costs to be recovered from each tier, the Operating Committee considered the impact of CAT Reporter market share activity on the CAT System as well as the

⁵⁴ The average shares per trade ratio for both NMS Stocks and OTC Equity Securities from the second quarter of 2017 was calculated using publicly available market volume data from Bats and OTC Markets Group, and the totals were divided to determine the average number of shares per trade between NMS Stocks and OTC Equity Securities.

⁵⁵ The discount is only applied to the market share of Execution Venue ATSS exclusively trading OTC Equity Securities. Accordingly, FINRA's market share, which includes market share from the OTC Reporting Facility, is not discounted as a result of its OTC Equity Securities activity.

distribution of total market volume across Equity Execution Venues while seeking to maintain comparable fees among the largest CAT Reporters. Accordingly, following the determination of the percentage of Execution Venues in each tier, the Operating Committee identified the percentage of total market volume for each tier based on the historical market share upon which Execution Venues

had been initially ranked. Taking this into account along with the resulting percentage of total recovery, the percentage allocation of cost recovery for each tier were assigned, allocating higher percentages of recovery to the tier with a higher level of market share while avoiding any inappropriate burden on competition. Furthermore, by using percentages of Equity Execution Venues and cost recovery per tier, the

Operating Committee sought to include elasticity within the funding model, allowing the funding model to respond to changes in either the total number of Equity Execution Venues or changes in market share.

Based on this analysis, the Operating Committee approved the following Equity Execution Venue Percentages and Recovery Allocations:

Equity Execution Venue tier	Percentage of Equity Execution Venues	Percentage of Execution Venue recovery	Percentage of total recovery
Tier 1	25.00	33.25	8.31
Tier 2	42.00	25.73	6.43
Tier 3	23.00	8.00	2.00
Tier 4	10.00	0.02	0.01
Total	100	67	16.75

(II) Listed Options

Section 11.3(a)(ii) of the CAT NMS Plan states that each Execution Venue that executes transactions in Listed Options will pay a fixed fee depending on the Listed Options market share of that Execution Venue, with the Operating Committee establishing at least two and no more than five tiers of fixed fees, based on an Execution Venue's Listed Options market share. For these purposes, market share will be calculated by contract volume.

In accordance with Section 11.3(a)(ii) of the CAT NMS Plan, the Operating Committee approved a tiered fee structure for Options Execution Venues. In determining the tiers, the Operating Committee considered the funding principles set forth in Section 11.2 of the CAT NMS Plan, seeking to create funding tiers that take into account the relative impact on system resources of different Options Execution Venues, and that establish comparable fees among the CAT Reporters with the most Reportable Events. Each Options Execution Venue will be placed into one of two tiers of fixed fees, based on the Execution Venue's Listed Options market share. In choosing two tiers, the Operating Committee performed an analysis similar to that discussed above with regard to Industry Members (other than Execution Venue ATSS) to

determine the number of tiers for Options Execution Venues. The Operating Committee determined to establish two tiers for Options Execution Venues, rather than a larger number, because the two tiers were sufficient to distinguish between the smaller number of Options Execution Venues based on market share. Furthermore, due to the smaller number of Options Execution Venues, the incorporation of additional Options Execution Venue tiers would result in significantly higher fees for Tier 1 Options Execution Venues and reduce comparability between Execution Venues and Industry Members. Furthermore, the selection of two tiers served to establish comparable fees among the largest CAT Reporters.

Each Options Execution Venue will be ranked by market share and tiered by predefined Execution Venue percentages, (the "Options Execution Venue Percentages"). To determine the fixed percentage of Options Execution Venues in each tier, the Operating Committee analyzed the historical and publicly available market share of Options Execution Venues to group Options Execution Venues with similar market shares across the tiers. Options Execution Venue market share of share volume were sourced from market statistics made publicly-available by

Bats. The process for developing the Options Execution Venue Percentages was the same as discussed above with regard to Equity Execution Venues.

The percentage of costs to be recovered from each Options Execution Venue tier will be determined by predefined percentage allocations (the "Options Execution Venue Recovery Allocation"). In determining the fixed percentage allocation of cost recovery for each tier, the Operating Committee considered the impact of CAT Reporter market share activity on the CAT System as well as the distribution of total market volume across Options Execution Venues while seeking to maintain comparable fees among the largest CAT Reporters. Furthermore, by using percentages of Options Execution Venues and cost recovery per tier, the Operating Committee sought to include elasticity within the funding model, allowing the funding model to respond to changes in either the total number of Options Execution Venues or changes in market share. The process for developing the Options Execution Venue Recovery Allocation was the same as discussed above with regard to Equity Execution Venues.

Based on this analysis, the Operating Committee approved the following Options Execution Venue Percentages and Recovery Allocations:

Options Execution Venue tier	Percentage of Options Execution Venues	Percentage of Execution Venue recovery	Percentage of total recovery
Tier 1	75.00	28.25	7.06
Tier 2	25.00	4.75	1.19
Total	100	33	8.25

(III) Market Share/Tier Assignments

The Operating Committee determined that, prior to the start of CAT reporting, market share for Execution Venues would be sourced from publicly-available market data. Options and equity volumes for Plan Participants will be sourced from market data made publicly available by Bats while Execution Venue ATS volumes will be sourced from market data made publicly available by FINRA and OTC Markets. Set forth in the Appendix are two charts, one listing the current Equity Execution Venues, each with its rank and tier, and one listing the current Options Execution Venues, each with its rank and tier.

After the commencement of CAT reporting, market share for Execution Venues will be sourced from data reported to the CAT. Equity Execution Venue market share will be determined by calculating each Equity Execution Venue's proportion of the total volume of NMS Stock and OTC Equity shares reported by all Equity Execution Venues during the relevant time period (with the discounting of market share of Execution Venue ATSs exclusively trading OTC Equity Securities, as described above). Similarly, market share for Options Execution Venues will be determined by calculating each Options Execution Venue's proportion of the total volume of Listed Options contracts reported by all Options Execution Venues during the relevant time period.

The Operating Committee has determined to calculate fee tiers for Execution Venues every three months based on market share from the prior three months. Based on its analysis of historical data, the Operating Committee believes calculating tiers based on three months of data will provide the best balance between reflecting changes in activity by Execution Venues while still providing predictability in the tiering for Execution Venues.

(D) Allocation of Costs

In addition to the funding principles discussed above, including comparability of fees, Section 11.1(c) of the CAT NMS Plan also requires expenses to be fairly and reasonably shared among the Plan Participants and Industry Members. Accordingly, in developing the proposed fee schedules pursuant to the funding model, the Operating Committee calculated how the CAT costs would be allocated between Industry Members and Execution Venues, and how the portion of CAT costs allocated to Execution Venues would be allocated between

Equity Execution Venues and Options Execution Venues. These determinations are described below.

(I) Allocation Between Industry Members and Execution Venues

In determining the cost allocation between Industry Members (other than Execution Venue ATSs) and Execution Venues, the Operating Committee analyzed a range of possible splits for revenue recovery from such Industry Members and Execution Venues, including 80%/20%, 75%/25%, 70%/30% and 65%/35% allocations. Based on this analysis, the Operating Committee determined that 75 percent of total costs recovered would be allocated to Industry Members (other than Execution Venue ATSs) and 25 percent would be allocated to Execution Venues. The Operating Committee determined that this 75%/25% division maintained the greatest level of comparability across the funding model. For example, the cost allocation establishes fees for the largest Industry Members (*i.e.*, those Industry Members in Tiers 1) that are comparable to the largest Equity Execution Venues and Options Execution Venues (*i.e.*, those Execution Venues in Tier 1).

Furthermore, the allocation of total CAT cost recovery recognizes the difference in the number of CAT Reporters that are Industry Members versus CAT Reporters that are Execution Venues. Specifically, the cost allocation takes into consideration that there are approximately 23 times more Industry Members expected to report to the CAT than Execution Venues (*e.g.*, an estimated 1541 Industry Members versus 67 Execution Venues as of June 2017).

(II) Allocation Between Equity Execution Venues and Options Execution Venues

The Operating Committee also analyzed how the portion of CAT costs allocated to Execution Venues would be allocated between Equity Execution Venues and Options Execution Venues. In considering this allocation of costs, the Operating Committee analyzed a range of alternative splits for revenue recovered between Equity and Options Execution Venues, including a 70%/30%, 67%/33%, 65%/35%, 50%/50% and 25%/75% split. Based on this analysis, the Operating Committee determined to allocate 67 percent of Execution Venue costs recovered to Equity Execution Venues and 33 percent to Options Execution Venues. The Operating Committee determined that a 67%/33% allocation between Equity and Options Execution Venues

maintained the greatest level of fee equitability and comparability based on the current number of Equity and Options Execution Venues. For example, the allocation establishes fees for the larger Equity Execution Venues that are comparable to the larger Options Execution Venues. Specifically, Tier 1 Equity Execution Venues would pay a quarterly fee of \$81,047 and Tier 1 Options Execution Venues would pay a quarterly fee of \$81,379. In addition to fee comparability between Equity Execution Venues and Options Execution Venues, the allocation also establishes equitability between larger (Tier 1) and smaller (Tier 2) Execution Venues based upon the level of market share. Furthermore, the allocation is intended to reflect the relative levels of current equity and options order events.

(E) Fee Levels

The Operating Committee determined to establish a CAT-specific fee to collectively recover the costs of building and operating the CAT. Accordingly, under the funding model, the sum of the CAT Fees is designed to recover the total cost of the CAT. The Operating Committee has determined overall CAT costs to be comprised of Plan Processor costs and non-Plan Processor costs, which are estimated to be \$50,700,000 in total for the year beginning November 21, 2016.⁵⁶

The Plan Processor costs relate to costs incurred and to be incurred through November 21, 2017 by the Plan Processor and consist of the Plan Processor's current estimates of average yearly ongoing costs, including development costs, which total \$37,500,000. This amount is based upon the fees due to the Plan Processor pursuant to the Company's agreement with the Plan Processor.

The non-Plan Processor estimated costs incurred and to be incurred by the Company through November 21, 2017 consist of three categories of costs. The first category of such costs are third party support costs, which include legal fees, consulting fees and audit fees from November 21, 2016 until the date of filing as well as estimated third party support costs for the rest of the year. These amount to an estimated \$5,200,000. The second category of non-Plan Processor costs are estimated cyber-insurance costs for the year. Based on discussions with potential cyber-insurance providers, assuming \$2–5 million cyber-insurance premium on \$100 million coverage, the Company has

⁵⁶ It is anticipated that CAT-related costs incurred prior to November 21, 2016 will be addressed via a separate filing.

estimated \$3,000,000 for the annual cost. The final cost figures will be determined following receipt of final underwriter quotes. The third category of non-Plan Processor costs is the CAT operational reserve, which is comprised of three months of ongoing Plan Processor costs (\$9,375,000), third party support costs (\$1,300,000) and cyber-

insurance costs (\$750,000). The Operating Committee aims to accumulate the necessary funds to establish the three-month operating reserve for the Company through the CAT Fees charged to CAT Reporters for the year. On an ongoing basis, the Operating Committee will account for any potential need to replenish the

operating reserve or other changes to total cost during its annual budgeting process. The following table summarizes the Plan Processor and non-Plan Processor cost components which comprise the total estimated CAT costs of \$50,700,000 for the covered period.

Cost category	Cost component	Amount
Plan Processor	Operational Costs	\$37,500,000
Non-Plan Processor	Third Party Support Costs	5,200,000
	Operational Reserve	⁵⁷ 5,000,000
	Cyber-insurance Costs	3,000,000
Estimated Total		50,700,000

Based on these estimated costs and the calculations for the funding model described above, the Operating Committee determined to impose the following fees:⁵⁸

For Industry Members (other than Execution Venue ATSS):

Tier	Percentage of Industry Members	Quarterly CAT Fee
1	0.900	\$81,483
2	2.150	59,055
3	2.800	40,899
4	7.750	25,566
5	8.300	7,428
6	18.800	1,968
7	59.300	105

For Execution Venues for NMS Stocks and OTC Equity Securities:

Tier	Percentage of Equity Execution Venues	Quarterly CAT Fee
1	25.00	\$81,048
2	42.00	37,062
3	23.00	21,126
4	10.00	129

Tier	Percentage of Options Execution Venues	Quarterly CAT Fee
1	75.00	\$81,381
2	25.00	37,629

For Execution Venues for Listed Options:

The Operating Committee has calculated the schedule of effective fees for Industry Members (other than Execution Venue ATSS) and Execution Venues in the following manner. Note that the calculation of CAT Fees assumes 52 Equity Execution Venues, 15 Options Execution Venues and 1,541 Industry Members (other than Execution Venue ATSS) as of June 2017.

CALCULATION OF ANNUAL TIER FEES FOR INDUSTRY MEMBERS (“IM”)

Industry Member tier	Percentage of Industry Members	Percentage of Industry Member recovery	Percentage of total recovery
Tier 1	0.900	12.00	9.00
Tier 2	2.150	20.50	15.38
Tier 3	2.800	18.50	13.88
Tier 4	7.750	32.00	24.00
Tier 5	8.300	10.00	7.50
Tier 6	18.800	6.00	4.50
Tier 7	59.300	1.00	0.75
Total	100	100	75

Industry Member tier	Estimated number of Industry Members
Tier 1	14
Tier 2	33
Tier 3	43
Tier 4	119
Tier 5	128
Tier 6	290

⁵⁷ This \$5,000,000 represents the gradual accumulation of the funds for a target operating reserve of \$11,425,000.

⁵⁸ Note that all monthly, quarterly and annual CAT Fees have been rounded to the nearest dollar.

Industry Member tier	Estimated number of Industry Members
Tier 7	914
Total	1,541

Calculation 1.1 (Calculation of a Tier 1 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 0.9\% \text{ [% of Tier 1 IMs]} = 14 \text{ [Estimated Tier 1 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 12\% \text{ [% of Tier 1 IM Recovery]}}{14 \text{ [Estimated Tier 1 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$27,161}$$

Calculation 1.2 (Calculation of a Tier 2 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 2.15\% \text{ [% of Tier 2 IMs]} = 33 \text{ [Estimated Tier 2 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 20.5\% \text{ [% of Tier 2 IM Recovery]}}{33 \text{ [Estimated Tier 2 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$19,685}$$

Calculation 1.3 (Calculation of a Tier 3 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 2.125\% \text{ [% of Tier 3 IMs]} = 43 \text{ [Estimated Tier 3 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 18.5\% \text{ [% of Tier 3 IM Recovery]}}{43 \text{ [Estimated Tier 3 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$13,633}$$

Calculation 1.4 (Calculation of a Tier 4 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 7.75\% \text{ [% of Tier 4 IMs]} = 119 \text{ [Estimated Tier 4 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 32\% \text{ [% of Tier 4 IM Recovery]}}{119 \text{ [Estimated Tier 4 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$8,522}$$

Calculation 1.5 (Calculation of a Tier 5 Industry Member Annual Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 8.3\% \text{ [% of Tier 5 IMs]} = 128 \text{ [Estimated Tier 5 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 7.75\% \text{ [% of Tier 5 IM Recovery]}}{128 \text{ [Estimated Tier 5 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$2476}$$

Calculation 1.6 (Calculation of a Tier 6 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 18.8\% \text{ [% of Tier 6 IMs]} = 290 \text{ [Estimated Tier 6 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 6\% \text{ [% of Tier 6 IM Recovery]}}{290 \text{ [Estimated Tier 6 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$656}$$

Calculation 1.7 (Calculation of a Tier 7 Industry Member Monthly Fee)

$$1,541 \text{ [Estimated Tot. IMs]} \times 59.3\% \text{ [% of Tier 7 IMs]} = 914 \text{ [Estimated Tier 7 IMs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann. CAT Costs]} \times 75\% \text{ [IM \% of Tot. Ann. CAT Costs]} \times 1\% \text{ [% of Tier 7 IM Recovery]}}{914 \text{ [Estimated Tier 7 IMs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$35}$$

CALCULATION OF ANNUAL TIER FEES FOR EQUITY EXECUTION VENUES (“EV”)

Equity Execution Venue tier	Percentage of Equity Execution Venues	Percentage of Execution Venue recovery	Percentage of total recovery
Tier 1	25.00	33.25	8.31
Tier 2	42.00	25.73	6.43
Tier 3	23.00	8.00	2.00
Tier 4	10.00	49.00	0.01
Total	100	67	16.75

Equity Execution Venue tier	Estimated Number of Equity Execution Venues
Tier 1	13
Tier 2	22
Tier 3	12
Tier 4	5
Total	52

Calculation 2.1 (Calculation of a Tier 1 Equity Execution Venue Monthly Fee)

$$52 \text{ [Estimated Tot. Equity EVs]} \times 25\% \text{ [% of Tier 1 Equity EVs]} = 13 \text{ [Estimated Tier 1 Equity EVs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann.CAT Costs]} \times 33.25\% \text{ [EV \% of Tot.Ann.CAT Costs]} \times 26\% \text{ [% of Tier 1 Equity EV Recovery]}}{13 \text{ [Estimated Tier 1 Equity EVs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$27,016}$$

Calculation 2.2 (Calculation of a Tier 2 Equity Execution Venue Monthly Fee)

$$52 \text{ [Estimated Tot. Equity EVs]} \times 42\% \text{ [% of Tier 2 Equity EVs]} = 22 \text{ [Estimated Tier 2 Equity EVs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann.CAT Costs]} \times 25\% \text{ [EV \% of Tot.Ann.CAT Costs]} \times 25.73\% \text{ [% of Tier 2 Equity EV Recovery]}}{22 \text{ [Estimated Tier 2 Equity EVs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$12,353}$$

Calculation 2.3 (Calculation of a Tier 3 Equity Execution Venue Monthly Fee)

$$52 \text{ [Estimated Tot. Equity EVs]} \times 23\% \text{ [% of Tier 2 Equity EVs]} = 12 \text{ [Estimated Tier 2 Equity EVs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann.CAT Costs]} \times 25\% \text{ [EV \% of Tot.Ann.CAT Costs]} \times 8\% \text{ [% of Tier 2 Equity EV Recovery]}}{12 \text{ [Estimated Tier 2 Equity EVs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$7,042}$$

Calculation 2.4 (Calculation of a Tier 4 Equity Execution Venue Monthly Fee)

$$52 \text{ [Estimated Tot. Equity EVs]} \times 10\% \text{ [% of Tier 2 Equity EVs]} = 5 \text{ [Estimated Tier 2 Equity EVs]}$$

$$\left(\frac{\$50,700,000 \text{ [Tot. Ann.CAT Costs]} \times 25\% \text{ [EV \% of Tot.Ann.CAT Costs]} \times 0.02\% \text{ [% of Tier 2 Equity EV Recovery]}}{5 \text{ [Estimated Tier 2 Equity EVs]}} \right) \div 12 \text{ [Months per year]} = \mathbf{\$42}$$

CALCULATION OF ANNUAL TIER FEES FOR OPTIONS EXECUTION VENUES (“EV”)

Options Execution Venue tier	Percentage of Options Execution Venues	Percentage of Execution Venue recovery	Percentage of total recovery
Tier 1	75.00	28.25	7.06
Tier 2	25.00	4.75	1.19
Total	100	33	8.25

Options Execution Venue tier	Estimated number of Options Execution Venues
Tier 1	11
Tier 2	4
Total	15

Calculation 3.1 (Calculation of a Tier 1 Options Execution Venue Monthly Fee)

15 [Estimated Tot. Options EVs] × 75% [% of Tier 1 Options EVs] = 11 [Estimated Tier 1 Options EVs]

$$\left(\frac{\$50,700,000 [\text{Tot. Ann. CAT Costs}] \times 25\% [\text{EV \% of Tot. Ann. CAT Costs}] \times 28.25\% [\text{\% of Tier 1 Options EV Recovery}]}{11 [\text{Estimated Tier 1 Options EVs}]} \right) \div 12 [\text{Months per year}] = \$27,127$$

Calculation 3.2 (Calculation of a Tier 2 Options Execution Venue Annual Fee)

15 [Estimated Tot. Options EVs] × 25% [% of Tier 2 Options EVs] = 4 [Estimated Tier 2 Options EVs]

$$\left(\frac{\$50,700,000 [\text{Tot. Ann. CAT Costs}] \times 25\% [\text{EV \% of Tot. Ann. CAT Costs}] \times 4.75\% [\text{\% of Tier 2 Options EV Recovery}]}{4 [\text{Estimated Tier 2 Options EVs}]} \right) \div 12 [\text{Months per year}] = \$12,543$$

TRACEABILITY OF TOTAL CAT FEES

Type	Industry Member tier	Estimated number of members	CAT fees paid annually	Total recovery
Industry Members	Tier 1	14	\$325,932	\$4,563,048
	Tier 2	33	236,220	7,795,260
	Tier 3	43	163,596	7,034,628
	Tier 4	119	102,264	12,169,416
	Tier 5	128	29,712	3,803,136
	Tier 6	290	7,872	2,282,880
	Tier 7	914	420	383,880
Total .....	.....	1,541	.....	38,032,248
Equity Execution Venues	Tier 1	13	324,192	4,214,496
	Tier 2	22	148,248	3,261,456
	Tier 3	12	84,504	1,014,048
	Tier 4	5	516	2,580
Total .....	.....	52	.....	8,492,580
Options Execution Venues	Tier 1	11	325,524	3,580,764
	Tier 2	4	150,516	602,064
Total .....	.....	15	.....	4,182,828
Total .....	.....	.....	.....	50,700,000
Excess ⁵⁹ .....	.....	.....	.....	7,656

(F) Comparability of Fees

The funding principles require a funding model in which the fees charged to the CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes

⁵⁹The amount in excess of the total CAT costs will contribute to the gradual accumulation of the target operating reserve of \$11.425 million.

into consideration affiliations between or among CAT Reporters, whether Execution Venue and/or Industry Members). Accordingly, in creating the model, the Operating Committee sought to establish comparable fees for the top tier of Industry Members (other than Execution Venue ATSS), Equity Execution Venues and Options Execution Venues. Specifically, each Tier 1 CAT Reporter would be required to pay a quarterly fee of approximately \$81,000.

(G) Billing Onset

Under Section 11.1(c) of the CAT NMS Plan, to fund the development and implementation of the CAT, the Company shall time the imposition and collection of all fees on Plan Participants and Industry Members in a manner reasonably related to the timing when the Company expects to incur such development and implementation costs. The Company is currently incurring such development and implementation costs and will continue

to do so prior to the commencement of CAT reporting and thereafter. In accordance with the CAT NMS Plan, all CAT Reporters, including both Industry Members and Execution Venues (including Plan Participants), will be invoiced as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Plan Participants and the operative date of the Plan amendment adopting CAT Fees for Plan Participants.

(H) Changes to Fee Levels and Tiers

Section 11.3(d) of the CAT NMS Plan states that “[t]he Operating Committee shall review such fee schedule on at least an annual basis and shall make any changes to such fee schedule that it deems appropriate. The Operating Committee is authorized to review such fee schedule on a more regular basis, but shall not make any changes on more than a semi-annual basis unless, pursuant to a Supermajority Vote, the Operating Committee concludes that such change is necessary for the adequate funding of the Company.” With such reviews, the Operating Committee will review the distribution of Industry Members and Execution Venues across tiers, and make any updates to the percentage of CAT Reporters allocated to each tier as may be necessary. In addition, the reviews will evaluate the estimated ongoing CAT costs and the level of the operating reserve. To the extent that the total CAT costs decrease, the fees would be adjusted downward, and to the extent that the total CAT costs increase, the

fees would be adjusted upward.⁶⁰ Furthermore, any surplus of the Company’s revenues over its expenses is to be included within the operational reserve to offset future fees. The limitations on more frequent changes to the fee, however, are intended to provide budgeting certainty for the CAT Reporters and the Company.⁶¹ To the extent that the Operating Committee approves changes to the number of tiers in the funding model or the fees assigned to each tier, then the Operating Committee will file such changes with the SEC pursuant to Rule 608 of the Exchange Act, and any such changes will become effective in accordance with the requirements of Rule 608.

(I) Initial and Periodic Tier Reassignments

The Operating Committee has determined to calculate fee tiers every three months based on market share or message traffic, as applicable, from the prior three months. For the initial tier assignments, the Company will calculate the relevant tier for each CAT Reporter using the three months of data prior to the commencement date. As with the initial tier assignment, for the tri-monthly reassignments, the Company will calculate the relevant tier using the three months of data prior to the relevant tri-monthly date. Any movement of CAT Reporters between tiers will not change the criteria for each tier or the fee amount corresponding to each tier.

In performing the tri-monthly reassignments, the assignment of CAT Reporters in each assigned tier is

relative. Therefore, a CAT Reporter’s assigned tier will depend, not only on its own message traffic or market share, but also on the message traffic/market share across all CAT Reporters. For example, the percentage of Industry Members (other than Execution Venue ATs) in each tier is relative such that such Industry Member’s assigned tier will depend on message traffic generated across all CAT Reporters as well as the total number of CAT Reporters. The Operating Committee will inform CAT Reporters of their assigned tier every three months following the periodic tiering process, as the funding model will compare an individual CAT Reporter’s activity to that of other CAT Reporters in the marketplace.

The following demonstrates a tier reassignment. In accordance with the funding model, the top 75% of Options Execution Venues in market share are categorized as Tier 1 while the bottom 25% of Options Execution Venues in market share are categorized as Tier 2. In the sample scenario below, Options Execution Venue L is initially categorized as a Tier 2 Options Execution Venue in Period A due to its market share. When market share is recalculated for Period B, the market share of Execution Venue L increases, and it is therefore subsequently reranked and reassigned to Tier 1 in Period B. Correspondingly, Options Execution Venue K, initially a Tier 1 Options Execution Venue in Period A, is reassigned to Tier 2 in Period B due to decreases in its market share.

Period A			Period B		
Options Execution Venue	Market share rank	Tier	Options Execution Venue	Market share rank	Tier
Options Execution Venue A	1	1	Options Execution Venue A	1	1
Options Execution Venue B	2	1	Options Execution Venue B	2	1
Options Execution Venue C	3	1	Options Execution Venue C	3	1
Options Execution Venue D	4	1	Options Execution Venue D	4	1
Options Execution Venue E	5	1	Options Execution Venue E	5	1
Options Execution Venue F	6	1	Options Execution Venue F	6	1
Options Execution Venue G	7	1	Options Execution Venue I	7	1
Options Execution Venue H	8	1	Options Execution Venue H	8	1
Options Execution Venue I	9	1	Options Execution Venue G	9	1
Options Execution Venue J	10	1	Options Execution Venue J	10	1
Options Execution Venue K	11	1	Options Execution Venue L	11	1
Options Execution Venue L	12	2	Options Execution Venue K	12	2
Options Execution Venue M	13	2	Options Execution Venue N	13	2
Options Execution Venue N	14	2	Options Execution Venue M	14	2
Options Execution Venue O	15	2	Options Execution Venue O	15	2

⁶⁰The CAT Fees are designed to recover the costs associated with the CAT. Accordingly, CAT Fees would not be affected by increases or decreases in other non-CAT expenses incurred by the Plan

Participants, such as any changes in costs related to the retirement of existing regulatory systems, such as OATS.

⁶¹Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85006.

For each periodic tier reassignment, the Operating Committee will review the new tier assignments, particularly those assignments for CAT Reporters that shift from the lowest tier to a higher tier. This review is intended to evaluate whether potential changes to the market or CAT Reporters (e.g., dissolution of a large CAT Reporter) adversely affect the tier reassignments.

(J) Sunset Provision

The Operating Committee developed the proposed funding model by analyzing currently available historical data. Such historical data, however, is not as comprehensive as data that will be submitted to the CAT. Accordingly, the Operating Committee believes that it will be appropriate to revisit the funding model once CAT Reporters have actual experience with the funding model. Accordingly, the Operating Committee determined to include an automatic sunset provision for the proposed fees. Specifically, the Operating Committee determined that the CAT Fees should automatically expire two years after the operative date of the CAT NMS Plan amendment adopting CAT Fees for Plan Participants. The Operating Committee intends to monitor the operation of the funding model during this two year period and to evaluate its effectiveness during that period. Such a process will inform the Operating Committee's approach to funding the CAT after the two year period.

(3) Proposed CAT Fee Schedule

The Exchange proposes the Consolidated Audit Trail Funding Fees to impose the CAT Fees determined by the Operating Committee on the Exchange's members. The proposed fee schedule (i.e., proposed Section R of the CHX Fee Schedule) has four sections, covering definitions, the fee schedule for CAT Fees, the timing and manner of payments, and the automatic sunset of the CAT Fees. Each of these sections is discussed in detail below.

(A) Definitions

Paragraph (a) of the proposed fee schedule sets forth the definitions for the proposed fee schedule. Paragraph (a)(1) states that, for purposes of the Consolidated Audit Trail Funding Fees, the terms "CAT", "CAT NMS Plan," "Industry Member," "NMS Stock," "OTC Equity Security", "Options Market Maker", and "Participant" are defined under Article 23, Rule 1 (Consolidated Audit Trail—Definitions).

The proposed fee schedule imposes different fees on Equity ATSs and Industry Members that are not Equity

ATSs. Accordingly, the proposed fee schedule defines the term "Equity ATS." First, paragraph (a)(2) defines an "ATS" to mean an alternative trading system as defined in Rule 300(a) of Regulation ATS under the Securities Exchange Act of 1934, as amended, that operates pursuant to Rule 301 of Regulation ATS. This is the same definition of an ATS as set forth in Section 1.1 of the CAT NMS Plan in the definition of an "Execution Venue." Then, paragraph (a)(4) defines an "Equity ATS" as an ATS that executes transactions in NMS Stocks and/or OTC Equity Securities.

Paragraph (a)(3) of the proposed fee schedule defines the term "CAT Fee" to mean the Consolidated Audit Trail Funding Fee(s) to be paid by Industry Members as set forth in paragraph (b) in the proposed fee schedule.

Finally, Paragraph (a)(6) defines an "Execution Venue" as a Participant or an ATS (excluding any such ATS that does not execute orders). This definition is the same substantive definition as set forth in Section 1.1 of the CAT NMS Plan. Paragraph (a)(5) defines an "Equity Execution Venue" as an Execution Venue that trades NMS Stocks and/or OTC Equity Securities.

(B) Fee Schedule

The Exchange proposes to impose the CAT Fees applicable to its Industry Members through paragraph (b) of the proposed fee schedule. Paragraph (b)(1) of the proposed fee schedule sets forth the CAT Fees applicable to Industry Members other than Equity ATSs. Specifically, paragraph (b)(1) states that the Company will assign each Industry Member (other than an Equity ATS) to a fee tier once every quarter, where such tier assignment is calculated by ranking each Industry Member based on its total message traffic (with discounts for equity market maker quotes and Options Market Maker quotes based on the trade to quote ratio for equities and options, respectively) for the three months prior to the quarterly tier calculation day and assigning each Industry Member to a tier based on that ranking and predefined Industry Member percentages. The Industry Members with the highest total quarterly message traffic will be ranked in Tier 1, and the Industry Members with lowest quarterly message traffic will be ranked in Tier 7. Each quarter, each Industry Member (other than an Equity ATS) shall pay the following CAT Fee corresponding to the tier assigned by the Company for such Industry Member for that quarter:

Tier	Percentage of Industry Members	Quarterly CAT fee
1	0.900	\$81,483
2	2.150	59,055
3	2.800	40,899
4	7.750	25,566
5	8.300	7,428
6	18.800	1,968
7	59.300	105

Paragraph (b)(2) of the proposed fee schedule sets forth the CAT Fees applicable to Equity ATSs.⁶² These are the same fees that Plan Participants that trade NMS Stocks and/or OTC Equity Securities will pay. Specifically, paragraph (b)(2) states that the Company will assign each Equity ATS to a fee tier once every quarter, where such tier assignment is calculated by ranking each Equity Execution Venue based on its total market share of NMS Stocks and OTC Equity Securities (with a discount for Equity ATSs exclusively trading OTC Equity Securities based on the average shares per trade ratio between NMS Stocks and OTC Equity Securities) for the three months prior to the quarterly tier calculation day and assigning each Equity ATS to a tier based on that ranking and predefined Equity Execution Venue percentages. The Equity ATSs with the higher total quarterly market share will be ranked in Tier 1, and the Equity ATSs with the lowest quarterly market share will be ranked in Tier 4. Specifically, paragraph (b)(2) states that, each quarter, each Equity ATS shall pay the following CAT Fee corresponding to the tier assigned by the Company for such Equity ATS for that quarter:

Tier	Percentage of Equity Execution Venues	Quarterly CAT fee
1	25.00	\$81,048
2	42.00	37,062
3	23.00	21,126
4	10.00	129

(C) Timing and Manner of Payment

Section 11.4 of the CAT NMS Plan states that the Operating Committee shall establish a system for the collection of fees authorized under the CAT NMS Plan. The Operating Committee may include such collection responsibility as a function of the Plan Processor or another administrator. To implement the payment process to be

⁶² Note that no fee schedule is provided for Execution Venue ATSs that execute transactions in Listed Options, as no such Execution Venue ATSs currently exist due to trading restrictions related to Listed Options.

adopted by the Operating Committee, paragraph (c)(1) of the proposed fee schedule states that the Company will provide each Industry Member with one invoice each quarter for its CAT Fees as determined pursuant to paragraph (b) of the proposed fee schedule, regardless of whether the Industry Member is a member of multiple self-regulatory organizations. Paragraph (c)(1) further states that each Industry Member will pay its CAT Fees to the Company via the centralized system for the collection of CAT Fees established by the Company in the manner prescribed by the Company. The Exchange will provide Industry Members with details regarding the manner of payment of CAT Fees by Information Memorandum.

All CAT fees will be billed and collected centrally through the Company via the Plan Processor. Although each Plan Participant will adopt its own fee schedule regarding CAT Fees, no CAT Fees or portion thereof will be collected by the individual Plan Participants. Each Industry Member will receive from the Company one invoice for its applicable CAT fees, not separate invoices from each Participant of which it is a member. The Industry Members will pay the CAT Fees to the Company via the centralized system for the collection of CAT fees established by the Company.⁶³

Section 11.4 of the CAT NMS Plan also states that Plan Participants shall require each Industry Member to pay all applicable authorized CAT Fees within thirty days after receipt of an invoice or other notice indicating payment is due (unless a longer payment period is otherwise indicated). Section 11.4 further states that, if an Industry Member fails to pay any such fee when due, such Industry Member shall pay interest on the outstanding balance from such due date until such fee is paid at a per annum rate equal to the lesser of: (i) The Prime Rate plus 300 basis points; or (ii) the maximum rate permitted by applicable law. Therefore, in accordance with Section 11.4 of the CAT NMS Plan, the Exchange proposed to adopt paragraph (c)(2) of the proposed fee schedule. Paragraph (c)(2) of the proposed fee schedule states that each Industry Member shall pay CAT Fees within thirty days after receipt of an invoice or other notice indicating payment is due (unless a longer payment period is otherwise indicated). If an Industry Member fails to pay any such fee when due, such Industry Member shall pay interest on the outstanding balance from such due date

until such fee is paid at a per annum rate equal to the lesser of: (i) the Prime Rate plus 300 basis points; or (ii) the maximum rate permitted by applicable law.

(D) Sunset Provision

The Operating Committee has determined to require that the CAT Fees automatically sunset two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for Plan Participants. Accordingly, the Exchange proposes paragraph (d) of the fee schedule, which states that “[t]hese Consolidated Audit Trailing Funding Fees will automatically expire two years after the operative date of the amendment of the CAT NMS Plan that adopts CAT fees for the Participants.”

(4) Changes to Prior CAT Fee Plan Amendment

The proposed funding model set forth in this Amendment is a revised version of the Original Proposal. The Commission received a number of comment letters in response to the Original Proposal.⁶⁴ The SEC suspended the Original Proposal and instituted proceedings to determine whether to approve or disapprove it.⁶⁵ Pursuant to those proceedings, additional comment letters were submitted regarding the proposed funding model.⁶⁶ In developing this Amendment, the Operating Committee carefully considered these comments and made a number of changes to the Original Proposal to address these comments where appropriate.

This Amendment makes the following changes to the Original Proposal: (1) Adds two additional CAT Fee tiers for Equity Execution Venues; (2) discounts the market share of Execution Venue ATs exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF by the average shares per trade ratio between NMS Stocks and OTC Equity Securities (calculated as 0.17% based on available data from the second quarter of June 2017) when calculating the market share of Execution Venue ATs exclusively trading OTC Equity Securities and FINRA; (3) discounts the Options Market Maker quotes by the trade to quote ratio for options (calculated as 0.01% based on available data for June 2016 through June 2017) when calculating message traffic for Options

Market Makers; (4) discounts equity market maker quotes by the trade to quote ratio for equities (calculated as 5.43% based on available data for June 2016 through June 2017) when calculating message traffic for equity market makers; (5) decreases the number of tiers for Industry Members (other than the Execution Venue ATs) from nine to seven; (6) changes the allocation of CAT costs between Equity Execution Venues and Options Execution Venues from 75%/25% to 67%/33%; (7) adjusts tier percentages and recovery allocations for Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATs); (8) focuses the comparability of CAT Fees on the individual entity level, rather than primarily on the comparability of affiliated entities; (9) commences invoicing of CAT Reporters as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Plan Participants and the operative date of the CAT NMS Plan amendment adopting CAT Fees for Plan Participants; and (10) requires the proposed fees to automatically expire two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for the Plan Participants.

(A) Equity Execution Venues

(i) Small Equity Execution Venues

In the Original Proposal, the Operating Committee proposed to establish two fee tiers for Equity Execution Venues. The Commission and commenters raised the concern that, by establishing only two tiers, smaller Equity Execution Venues (e.g., those Equity ATs representing less than 1% of NMS market share) would be placed in the same fee tier as larger Equity Execution Venues, thereby imposing an undue or inappropriate burden on competition.⁶⁷ To address this concern, the Operating Committee proposes to add two additional tiers for Equity Execution Venues, a third tier for smaller Equity Execution Venues and a fourth tier for the smallest Equity Execution Venues.

Specifically, the Original Proposal had two tiers of Equity Execution Venues. Tier 1 required the largest Equity Execution Venues to pay a quarterly fee of \$63,375. Based on available data, these largest Equity Execution Venues were those that had equity market share of share volume

⁶⁴ For a description of the comments submitted in response to the Original Proposal, see Suspension Order.

⁶⁵ Suspension Order.

⁶⁶ See MFA Letter; SIFMA Letter; FIA Principal Traders Group Letter; Belvedere Letter; Sidley Letter; Group One Letter; and Virtu Financial Letter.

⁶⁷ See Suspension Order at 31664; SIFMA Letter at 3.

⁶³ Section 11.4 of the CAT NMS Plan.

greater than or equal to 1%.⁶⁸ Tier 2 required the remaining smaller Equity Execution Venues to pay a quarterly fee of \$38,820.

To address concerns about the potential for the \$38,820 quarterly fee to impose an undue burden on smaller Equity Execution Venues, the Operating Committee determined to move to a four tier structure for Equity Execution Venues. Tier 1 would continue to include the largest Equity Execution Venues by share volume (that is, based on currently available data, those with market share of equity share volume greater than or equal to one percent), and these Equity Execution Venues would be required to pay a quarterly fee of \$81,048. The Operating Committee determined to divide the original Tier 2 into three tiers. The new Tier 2 Equity Execution Venues, which would include the next largest Equity Execution Venues by equity share volume, would be required to pay a quarterly fee of \$37,062. The new Tier 3 Equity Execution Venues would be required to pay a quarterly fee of \$21,126. The new Tier 4 Equity Execution Venues, which would include the smallest Equity Execution Venues by share volume, would be required to pay a quarterly fee of \$129.

In developing the proposed four tier structure, the Operating Committee considered keeping the existing two tiers, as well as shifting to three, four or five Equity Execution Venue tiers (the maximum number of tiers permitted under the Plan), to address the concerns regarding small Equity Execution Venues. For each of the two, three, four and five tier alternatives, the Operating Committee considered the assignment of various percentages of Equity Execution Venues to each tier as well as various percentage of Equity Execution Venue recovery allocations for each alternative. As discussed below in more detail, each of these options was considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined that the four tier alternative addressed the spectrum of different Equity Execution Venues. The

⁶⁸ Note that while these equity market share thresholds were referenced as data points to help differentiate between Equity Execution Venue tiers, the proposed funding model is directly driven not by market share thresholds, but rather by fixed percentages of Equity Execution Venues across tiers to account for fluctuating levels of market share across time. Actual market share in any tier will vary based on the actual market activity in a given measurement period, as well as the number of Equity Execution Venues included in the measurement period.

Operating Committee determined that neither a two tier structure nor a three tier structure sufficiently accounted for the range of market shares of smaller Equity Execution Venues. The Operating Committee also determined that, given the limited number of Equity Execution Venues, that a fifth tier was unnecessary to address the range of market shares of the Equity Execution Venues.

By increasing the number of tiers for Equity Execution Venues and reducing the proposed CAT Fees for the smaller Equity Execution Venues, the Operating Committee believes that the proposed fees for Equity Execution Venues would not impose an undue or inappropriate burden on competition under Section 6 or Section 15A of the Exchange Act. Moreover, the Operating Committee believes that the proposed fees appropriately take into account the distinctions in the securities trading operations of different Equity Execution Venues, as required under the funding principles of the CAT NMS Plan.⁶⁹ The larger number of tiers more closely tracks the variety of sizes of equity share volume of Equity Execution Venues. In addition, the reduction in the fees for the smaller Equity Execution Venues recognizes the potential burden of larger fees on smaller entities. In particular, the very small quarterly fee of \$129 for Tier 4 Equity Execution Venues reflects the fact that certain Equity Execution Venues have a very small share volume due to their typically more focused business models.

Accordingly, with this Amendment, the Exchange proposes to amend paragraph (b)(2) of the proposed fee schedule to add the two additional tiers for Equity Execution Venues, to establish the percentages and fees for Tiers 3 and 4 as described, and to revise the percentages and fees for Tiers 1 and 2 as described.

(ii) Execution Venues for OTC Equity Securities

In the Original Proposal, the Operating Committee proposed to group Execution Venues for OTC Equity Securities and Execution Venues for NMS Stocks in the same tier structure. The Commission and commenters raised concerns as to whether this determination to place Execution Venues for OTC Equity Securities in the same tier structure as Execution Venues for NMS Stocks would result in an undue or inappropriate burden on competition, recognizing that the application of share volume may lead to different outcomes as applied to OTC

Equity Securities and NMS Stocks.⁷⁰ To address this concern, the Operating Committee proposes to discount the market share of Execution Venue ATSS exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF by the average shares per trade ratio between NMS Stocks and OTC Equity Securities (0.17% for the second quarter of 2017) in order to adjust for the greater number of shares being traded in the OTC Equity Securities market, which is generally a function of a lower per share price for OTC Equity Securities when compared to NMS Stocks.

As commenters noted, many OTC Equity Securities are priced at less than one dollar—and a significant number at less than one penny—and low-priced shares tend to trade in larger quantities. Accordingly, a disproportionately large number of shares are involved in transactions involving OTC Equity Securities versus NMS Stocks, which has the effect of overstating an Execution Venue's true market share when the Execution Venue is involved in the trading of OTC Equity Securities. Because the proposed fee tiers are based on market share calculated by share volume, Execution Venue ATSS trading OTC Equity Securities and FINRA may be subject to higher tiers than their operations may warrant.⁷¹ The Operating Committee proposes to address this concern in two ways. First, the Operating Committee proposes to increase the number of Equity Execution Venue tiers, as discussed above. Second, the Operating Committee determined to discount the market share of Execution Venue ATSS exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF when calculating their tier placement. Because the disparity in share volume between Execution Venues trading in OTC Equity Securities and NMS Stocks is based on the different number of shares per trade for OTC Equity Securities and NMS Stocks, the Operating Committee believes that discounting the share volume of such Execution Venue ATSS as well as the market share of the FINRA ORF would address the difference in shares per trade for OTC Equity Securities and NMS Stocks. Specifically, the Operating Committee proposes to impose a discount based on the objective measure of the average shares per trade ratio between NMS Stocks and OTC Equity Securities. Based on available data from the second quarter of 2017, the average shares per

⁷⁰ See Suspension Order at 31664–5.

⁷¹ Suspension Order at 31664–5.

⁶⁹ Section 11.2(b) of the CAT NMS Plan.

trade ratio between NMS Stocks and OTC Equity Securities is 0.17%.

The practical effect of applying such a discount for trading in OTC Equity Securities is to shift Execution Venue ATSS exclusively trading OTC Equity Securities to tiers for smaller Execution Venues and with lower fees. For example, under the Original Proposal, one Execution Venue ATS exclusively trading OTC Equity Securities was placed in the first CAT Fee tier, which had a quarterly fee of \$63,375. With the imposition of the proposed tier changes and the discount, this ATS would be ranked in Tier 3 and would owe a quarterly fee of \$21,126.

In developing the proposed discount for Equity Execution Venue ATSS exclusively trading OTC Equity Securities and FINRA, the Operating Committee evaluated different alternatives to address the concerns related to OTC Equity Securities, including creating a separate tier structure for Execution Venues trading OTC Equity Securities (like the separate tier for Options Execution Venues) as well as the proposed discounting method for Execution Venue ATSS exclusively trading OTC Equity Securities and FINRA. For these alternatives, the Operating Committee considered how each alternative would affect the recovery allocations. In addition, each of these options was considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee did not adopt a separate tier structure for Equity Execution Venues trading OTC Equity Securities as they determined that the proposed discount approach appropriately addresses the concern. The Operating Committee determined to adopt the proposed discount because it directly relates to the concern regarding the trading patterns and operations in the OTC Equity Securities markets, and is an objective discounting method.

By increasing the number of tiers for Equity Execution Venues and imposing a discount on the market share of share volume calculation for trading in OTC Equity Securities, the Operating Committee believes that the proposed fees for Equity Execution Venues would not impose an undue or inappropriate burden on competition under Section 6 or Section 15A of the Exchange Act. Moreover, the Operating Committee believes that the proposed fees appropriately take into account the distinctions in the securities trading operations of different Equity Execution Venues, as required under the funding

principles of the CAT NMS Plan.⁷² As discussed above, the larger number of tiers more closely tracks the variety of sizes of equity share volume of Equity Execution Venues. In addition, the proposed discount recognizes the different types of trading operations at Equity Execution Venues trading OTC Equity Securities versus those trading NMS Stocks, thereby more closely matching the relative revenue generation by Equity Execution Venues trading OTC Equity Securities to their CAT Fees.

Accordingly, with this Amendment, the Exchange proposes to amend paragraph (b)(2) of the proposed fee schedule to indicate that the market share for Equity ATSS exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF would be discounted. In addition, as discussed above, to address concerns related to smaller ATSS, including those that exclusively trade OTC Equity Securities, the Exchange proposes to amend paragraph (b)(2) of the proposed fee schedule to add two additional tiers for Equity Execution Venues, to establish the percentages and fees for Tiers 3 and 4 as described, and to revise the percentages and fees for Tiers 1 and 2 as described.

(B) Market Makers

In the Original Proposal, the Operating Committee proposed to include both Options Market Maker quotes and equities market maker quotes in the calculation of total message traffic for such market makers for purposes of tiering for Industry Members (other than Execution Venue ATSS). The Commission and commenters raised questions as to whether the proposed treatment of Options Market Maker quotes may result in an undue or inappropriate burden on competition or may lead to a reduction in market quality.⁷³ To address this concern, the Operating Committee determined to discount the Options Market Maker quotes by the trade to quote ratio for options when calculating message traffic for Options Market Makers. Similarly, to avoid disincentives to quoting behavior on the equities side as well, the Operating Committee determined to discount equity market maker quotes by the trade to quote ratio for equities when calculating message traffic for equities market makers.

In the Original Proposal, market maker quotes were treated the same as other message traffic for purposes of tiering for Industry Members (other than Execution Venue ATSS). Commenters noted, however, that charging Industry Members on the basis of message traffic will impact market makers disproportionately because of their continuous quoting obligations. Moreover, in the context of options market makers, message traffic would include bids and offers for every listed options strikes and series, which are not an issue for equities.⁷⁴ The Operating Committee proposes to address this concern in two ways. First, the Operating Committee proposes to discount Options Market Maker quotes when calculating the Options Market Makers' tier placement. Specifically, the Operating Committee proposes to impose a discount based on the objective measure of the trade to quote ratio for options. Based on available data from June 2016 through June 2017, the trade to quote ratio for options is 0.01%. Second, the Operating Committee proposes to discount equities market maker quotes when calculating the equities market makers' tier placement. Specifically, the Operating Committee proposes to impose a discount based on the objective measure of the trade to quote ratio for equities. Based on available data for June 2016 through June 2017, this trade to quote ratio for equities is 5.43%.

The practical effect of applying such discounts for quoting activity is to shift market makers' calculated message traffic lower, leading to the potential shift to tiers for lower message traffic and reduced fees. Such an approach would move sixteen Industry Member CAT Reporters that are market makers to a lower tier than in the Original Proposal. For example, under the Original Proposal, Broker-Dealer Firm ABC was placed in the first CAT Fee tier, which had a quarterly fee of \$101,004. With the imposition of the proposed tier changes and the discount, Broker-Dealer Firm ABC, an options market maker, would be ranked in Tier 3 and would owe a quarterly fee of \$40,899.

In developing the proposed market maker discounts, the Operating Committee considered various discounts for Options Market Makers and equity market makers, including discounts of 50%, 25%, 0.00002%, as well as the 5.43% for option market makers and 0.01% for equity market makers. Each of these options were

⁷² Section 11.2(b) of the CAT NMS Plan.

⁷³ See Suspension Order at 31663-4; SIFMA Letter at 4-6; FIA Principal Traders Group Letter at 3; Sidley Letter at 2-6; Group One Letter at 2-6; and Belvedere Letter at 2.

⁷⁴ Suspension Order at 31664.

considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined to adopt the proposed discount because it directly relates to the concern regarding the quoting requirement, is an objective discounting method, and has the desired potential to shift market makers to lower fee tiers.

By imposing a discount on Options Market Makers and equities market makers' quoting traffic for the calculation of message traffic, the Operating Committee believes that the proposed fees for market makers would not impose an undue or inappropriate burden on competition under Section 6 or Section 15A of the Exchange Act. Moreover, the Operating Committee believes that the proposed fees appropriately take into account the distinctions in the securities trading operations of different Industry Members, and avoid disincentives, such as a reduction in market quality, as required under the funding principles of the CAT NMS Plan.⁷⁵ The proposed discounts recognize the different types of trading operations presented by Options Market Makers and equities market makers, as well as the value of the market makers' quoting activity to the market as a whole. Accordingly, the Operating Committee believes that the proposed discounts will not impact the ability of small Options Market Makers or equities market makers to provide liquidity.

Accordingly, with this Amendment, the Exchange proposes to amend paragraph (b)(1) of the proposed fee schedule to indicate that the message traffic related to equity market maker quotes and Options Market Maker quotes would be discounted. In addition, the Exchange proposes to define the term "Options Market Maker" in paragraph (a)(1) of the proposed fee schedule.

(C) Comparability/Allocation of Costs

Under the Original Proposal, 75% of CAT costs were allocated to Industry Members (other than Execution Venue ATSS) and 25% of CAT costs were allocated to Execution Venues. This cost allocation sought to maintain the greatest level of comparability across the funding model, where comparability considered affiliations among or between CAT Reporters. The Commission and commenters expressed concerns regarding whether the proposed 75%/25% allocation of CAT

costs is consistent with the Plan's funding principles and the Exchange Act, including whether the allocation places a burden on competition or reduces market quality. The Commission and commenters also questioned whether the approach of accounting for affiliations among CAT Reporters in setting CAT Fees disadvantages non-affiliated CAT Reporters or otherwise burdens competition in the market for trading services.⁷⁶

In response to these concerns, the Operating Committee determined to revise the proposed funding model to focus the comparability of CAT Fees on the individual entity level, rather than primarily on the comparability of affiliated entities. In light of the interconnected nature of the various aspects of the funding model, the Operating Committee determined to revise various aspects of the model to enhance comparability at the individual entity level. Specifically, to achieve such comparability, the Operating Committee determined to (1) decrease the number of tiers for Industry Members (other than Execution Venue ATSS) from nine to seven; (2) change the allocation of CAT costs between Equity Execution Venues and Options Execution Venues from 75%/25% to 67%/33%; and (3) adjust tier percentages and recovery allocations for Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSS). With these changes, the proposed funding model provides fee comparability for the largest individual entities, with the largest Industry Members (other than Execution Venue ATSS), Equity Execution Venues and Options Execution Venues each paying a CAT Fee of approximately \$81,000 each quarter.

(i) Number of Industry Member Tiers

In the Original Proposal, the proposed funding model had nine tiers for Industry Members (other than Execution Venue ATSS). The Operating Committee determined that reducing the number of tiers from nine tiers to seven tiers (and adjusting the predefined Industry Member Percentages as well) continues to provide a fair allocation of fees among Industry Members and appropriately distinguishes between Industry Members with differing levels of message traffic. In reaching this conclusion, the Operating Committee considered historical message traffic

generated by Industry Members across all exchanges and as submitted to FINRA's OATS, and considered the distribution of firms with similar levels of message traffic, grouping together firms with similar levels of message traffic. Based on this, the Operating Committee determined that seven tiers would group firms with similar levels of message traffic, while also achieving greater comparability in the model for the individual CAT Reporters with the greatest market share or message traffic.

In developing the proposed seven tier structure, the Operating Committee considered remaining at nine tiers, as well as reducing the number of tiers down to seven when considering how to address the concerns raised regarding comparability. For each of the alternatives, the Operating Committee considered the assignment of various percentages of Industry Members to each tier as well as various percentages of Industry Member recovery allocations for each alternative. Each of these options was considered in the context of its effects on the full funding model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined that the seven tier alternative provided the most fee comparability at the individual entity level for the largest CAT Reporters, while both providing logical breaks in tiering for Industry Members with different levels of message traffic and a sufficient number of tiers to provide for the full spectrum of different levels of message traffic for all Industry Members.

(ii) Allocation of CAT Costs Between Equity and Options Execution Venues

The Operating Committee also determined to adjust the allocation of CAT costs between Equity Execution Venues and Options Execution Venues to enhance comparability at the individual entity level. In the Original Proposal, 75% of Execution Venue CAT costs were allocated to Equity Execution Venues, and 25% of Execution Venue CAT costs were allocated to Options Execution Venues. To achieve the goal of increased comparability at the individual entity level, the Operating Committee analyzed a range of alternative splits for revenue recovery between Equity and Options Execution Venues, along with other changes in the proposed funding model. Based on this analysis, the Operating Committee determined to allocate 67 percent of Execution Venue costs recovered to Equity Execution Venues and 33 percent to Options Execution Venues. The

⁷⁵ See Suspension Order at 31662-3; SIFMA Letter at 3; Sidley Letter at 6-7; Group One Letter at 2; and Belvedere Letter at 2.

⁷⁶ Section 11.2(b) of the CAT NMS Plan.

Operating Committee determined that a 67/33 allocation between Equity and Options Execution Venues enhances the level of fee comparability for the largest CAT Reporters. Specifically, the largest Equity and Options Execution Venues would pay a quarterly CAT Fee of approximately \$81,000.

In developing the proposed allocation of CAT costs between Equity and Options Execution Venues, the Operating Committee considered various different options for such allocation, including keeping the original 75%/25% allocation, as well as shifting to a 70%/30%, 67%/33%, or 57.75%/42.25% allocation. For each of the alternatives, the Operating Committee considered the effect each allocation would have on the assignment of various percentages of Equity Execution Venues to each tier as well as various percentages of Equity Execution Venue recovery allocations for each alternative. Moreover, each of these options was considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined that the 67%/33% allocation between Equity and Options Execution Venues provided the greatest level of fee comparability at the individual entity level for the largest CAT Reporters, while still providing for appropriate fee levels across all tiers for all CAT Reporters.

(iii) Allocation of Costs Between Execution Venues and Industry Members

The Operating Committee determined to allocate 25% of CAT costs to Execution Venues and 75% to Industry Members (other than Execution Venue ATSSs), as it had in the Original Proposal. The Operating Committee determined that this 75%/25% allocation, along with the other changes proposed above, led to the most comparable fees for the largest Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSSs). The largest Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSSs) would each pay a quarterly CAT Fee of approximately \$81,000.

As a preliminary matter, the Operating Committee determined that it is appropriate to allocate most of the costs to create, implement and maintain the CAT to Industry Members for several reasons. First, there are many more broker-dealers expected to report to the CAT than Plan Participants (*i.e.*,

1,541 broker-dealer CAT Reporters versus 22 Plan Participants). Second, since most of the costs to process CAT reportable data is generated by Industry Members, Industry Members could be expected to contribute toward such costs. Finally, as noted by the SEC, the CAT “substantially enhance[s] the ability of the SROs and the Commission to oversee today’s securities markets,”⁷⁷ thereby benefitting all market participants. After making this determination, the Operating Committee analyzed several different cost allocations, as discussed further below, and determined that an allocation where 75% of the CAT costs should be borne by the Industry Members (other than Execution Venue ATSSs) and 25% should be paid by Execution Venues was most appropriate and led to the greatest comparability of CAT Fees for the largest CAT Reporters.

In developing the proposed allocation of CAT costs between Execution Venues and Industry Members (other than Execution Venue ATSSs), the Operating Committee considered various different options for such allocation, including keeping the original 75%/25% allocation, as well as shifting to an 80%/20%, 70%/30%, or 65%/35% allocation. Each of these options was considered in the context of the full model, including the effect on each of the changes discussed above, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. In particular, for each of the alternatives, the Operating Committee considered the effect each allocation had on the assignment of various percentages of Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSSs) to each relevant tier as well as various percentages of recovery allocations for each tier. The Operating Committee determined that the 75%/25% allocation between Execution Venues and Industry Members (other than Execution Venue ATSSs) provided the greatest level of fee comparability at the individual entity level for the largest CAT Reporters, while still providing for appropriate fee levels across all tiers for all CAT Reporters.

(iv) Affiliations

The funding principles set forth in Section 11.2 of the Plan require that the fees charged to CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as

applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether Execution Venue and/or Industry Members). The proposed funding model satisfies this requirement. As discussed above, under the proposed funding model, the largest Equity Execution Venues, Options Execution Venues, and Industry Members (other than Execution Venue ATSSs) pay approximately the same fee. Moreover, the Operating Committee believes that the proposed funding model takes into consideration affiliations between or among CAT Reporters as complexes with multiple CAT Reporters will pay the appropriate fee based on the proposed fee schedule for each of the CAT Reporters in the complex. For example, a complex with a Tier 1 Equity Execution Venue and Tier 2 Industry Member will pay the same as another complex with a Tier 1 Equity Execution Venue and Tier 2 Industry Member.

(v) Fee Schedule Changes

Accordingly, with this Amendment, the Exchange proposes to amend paragraphs (b)(1) and (2) of the proposed fee schedule to reflect the changes discussed in this section. Specifically, the Exchange proposes to amend paragraph (b)(1) and (2) of the proposed fee schedule to update the number of tiers, and the fees and percentages assigned to each tier to reflect the described changes.

(D) Market Share/Message Traffic

In the Original Proposal, the Operating Committee proposed to charge Execution Venues based on market share and Industry Members (other than Execution Venue ATSSs) based on message traffic. Commenters questioned the use of the two different metrics for calculating CAT Fees.⁷⁸ The Operating Committee continues to believe that the proposed use of market share and message traffic satisfies the requirements of the Exchange Act and the funding principles set forth in the CAT NMS Plan. Accordingly, the proposed funding model continues to charge Execution Venues based on market share and Industry Members (other than Execution Venue ATSSs) based on message traffic.

In drafting the Plan and the Original Proposal, the Operating Committee expressed the view that the correlation between message traffic and size does not apply to Execution Venues, which

⁷⁷ Securities Exchange Act Rel. No. 67457 (Jul 18, 2012), 77 FR 45722, 45726 (Aug. 1, 2012) (“Rule 613 Adopting Release”).

⁷⁸ Suspension Order at 31663; FIA Principal Traders Group Letter at 2.

they described as producing similar amounts of message traffic regardless of size. The Operating Committee believed that charging Execution Venues based on message traffic would result in both large and small Execution Venues paying comparable fees, which would be inequitable, so the Operating Committee determined that it would be more appropriate to treat Execution Venues differently from Industry Members in the funding model. Upon a more detailed analysis of available data, however, the Operating Committee noted that Execution Venues have varying levels of message traffic. Nevertheless, the Operating Committee continues to believe that a bifurcated funding model—where Industry Members (other than Execution Venue ATSS) are charged fees based on message traffic and Execution Venues are charged based on market share—complies with the Plan and meets the standards of the Exchange Act for the reasons set forth below.

Charging Industry Members based on message traffic is the most equitable means for establishing fees for Industry Members (other than Execution Venue ATSS). This approach will assess fees to Industry Members that create larger volumes of message traffic that are relatively higher than those fees charged to Industry Members that create smaller volumes of message traffic. Since message traffic, along with fixed costs of the Plan Processor, is a key component of the costs of operating the CAT, message traffic is an appropriate criterion for placing Industry Members in a particular fee tier.

The Operating Committee also believes that it is appropriate to charge Execution Venues CAT Fees based on their market share. In contrast to Industry Members (other than Execution Venue ATSS), which determine the degree to which they produce the message traffic that constitutes CAT Reportable Events, the CAT Reportable Events of Execution Venues are largely derivative of quotations and orders received from Industry Members that the Execution Venues are required to display. The business model for Execution Venues, however, is focused on executions in their markets. As a result, the Operating Committee believes that it is more equitable to charge Execution Venues based on their market share rather than their message traffic.

Similarly, focusing on message traffic would make it more difficult to draw distinctions between large and small exchanges, including options exchanges in particular. For instance, the Operating Committee analyzed the

message traffic of Execution Venues and Industry Members for the period of April 2017 to June 2017 and placed all CAT Reporters into a nine-tier framework (*i.e.*, a single tier may include both Execution Venues and Industry Members). The Operating Committee's analysis found that the majority of exchanges (15 total) were grouped in Tiers 1 and 2. Moreover, virtually all of the options exchanges were in Tiers 1 and 2.⁷⁹ Given the concentration of options exchanges in Tiers 1 and 2, the Operating Committee believes that using a funding model based purely on message traffic would make it more difficult to distinguish between large and small options exchanges, as compared to the proposed bifurcated fee approach.

In addition, the Operating Committee also believes that it is appropriate to treat ATSS as Execution Venues under the proposed funding model since ATSS have business models that are similar to those of exchanges, and ATSS also compete with exchanges. For these reasons, the Operating Committee believes that charging Execution Venues based on market share is more appropriate and equitable than charging Execution Venues based on message traffic.

(E) Time Limit

In the Original Proposal, the Operating Committee did not impose any time limit on the application of the proposed CAT Fees. As discussed above, the Operating Committee developed the proposed funding model by analyzing currently available historical data. Such historical data, however, is not as comprehensive as data that will be submitted to the CAT. Accordingly, the Operating Committee believes that it will be appropriate to revisit the funding model once CAT Reporters have actual experience with the funding model. Accordingly, the Operating Committee proposes to include a sunset provision in the proposed fee model. The proposed CAT Fees will sunset two years after the operative date of the CAT NMS Plan amendment adopting CAT Fees for Plan Participants. Specifically, the Exchange proposes to add paragraph (d) of the proposed fee schedule to include this sunset provision. Such a provision will provide the Operating Committee and other market participants with the opportunity to reevaluate the

⁷⁹ The Plan Participants note that this analysis did not place MIAx PEARL in Tier 1 or Tier 2 since the exchange commenced trading on February 6, 2017.

performance of the proposed funding model.

(F) Tier Structure/Decreasing Cost per Unit

In the Original Proposal, the Operating Committee determined to use a tiered fee structure. The Commission and commenters questioned whether the decreasing cost per additional unit (of message traffic in the case of Industry Members, or of share volume in the case of Execution Venues) in the proposed fee schedules burdens competition by disadvantaging small Industry Members and Execution Venues and/or by creating barriers to entry in the market for trading services and/or the market for broker-dealer services.⁸⁰

The Operating Committee does not believe that decreasing cost per additional unit in the proposed fee schedules places an unfair competitive burden on Small Industry Members and Execution Venues. While the cost per unit of message traffic or share volume necessarily will decrease as volume increases in any tiered fee model using fixed fee percentages and, as a result, Small Industry Members and small Execution Venues may pay a larger fee per message or share, this comment fails to take account of the substantial differences in the absolute fees paid by Small Industry Members and small Execution Venues as opposed to large Industry Members and large Execution Venues. For example, under the fee proposals, Tier 7 Industry Members would pay a quarterly fee of \$105, while Tier 1 Industry Members would pay a quarterly fee of \$81,483. Similarly, a Tier 4 Equity Execution Venue would pay a quarterly fee of \$129, while a Tier 1 Equity Execution Venue would pay a quarterly fee of \$81,048. Thus, Small Industry Members and small Execution Venues are not disadvantaged in terms of the total fees that they actually pay. In contrast to a tiered model using fixed fee percentages, the Operating Committee believes that strictly variable or metered funding models based on message traffic or share volume would be more likely to affect market behavior and may present administrative challenges (*e.g.*, the costs to calculate and monitor fees may exceed the fees charged to the smallest CAT Reporters).

(G) Other Alternatives Considered

In addition to the various funding model alternatives discussed above regarding discounts, number of tiers and allocation percentages, the Operating Committee also discussed other possible

⁸⁰ Suspension Order at 31667.

funding models. For example, the Operating Committee considered allocating the total CAT costs equally among each of the Plan Participants, and then permitting each Participant to charge its own members as it deems appropriate.⁸¹ The Operating Committee determined that such an approach raised a variety of issues, including the likely inconsistency of the ensuing charges, potential for lack of transparency, and the impracticality of multiple SROs submitting invoices for CAT charges. The Operating Committee therefore determined that the proposed funding model was preferable to this alternative.

(H) Industry Member Input

Commenters expressed concern regarding the level of Industry Member input into the development of the proposed funding model, and certain commenters have recommended a greater role in the governance of the CAT.⁸² The Plan Participants previously addressed this concern in its letters responding to comments on the Plan and the CAT Fees.⁸³ As discussed in those letters, the Plan Participants discussed the funding model with the Development Advisory Group (“DAG”), the advisory group formed to assist in the development of the Plan, during its original development.⁸⁴ Moreover, Industry Members currently have a voice in the affairs of the Operating Committee and operation of the CAT generally through the Advisory Committee established pursuant to Rule 613(b)(7) and Section 4.13 of the Plan. The Advisory Committee attends all meetings of the Operating Committee, as well as meetings of various subcommittees and working groups, and provides valuable and critical input for the Plan Participants’ and Operating Committee’s consideration. The Operating Committee continues to believe that that Industry Members have an appropriate voice regarding the funding of the Company.

(I) Conflicts of Interest

Commenters also raised concerns regarding Participant conflicts of interest in setting the CAT Fees.⁸⁵ The

Plan Participants previously responded to this concern in both the Plan Response Letter and the Fee Rule Response Letter.⁸⁶ As discussed in those letters, the Plan, as approved by the SEC, adopts various measures to protect against the potential conflicts issues raised by the Plan Participants’ fee-setting authority. Such measures include the operation of the Company as a not for profit business league and on a break-even basis, and the requirement that the Plan Participants file all CAT Fees under Section 19(b) of the Exchange Act. The Operating Committee continues to believe that these measures adequately protect against concerns regarding conflicts of interest in setting fees, and that additional measures, such as an independent third party to evaluate an appropriate CAT Fee, are unnecessary.

(J) Fee Transparency

Commenters also argued that they could not adequately assess whether the CAT Fees were fair and equitable because the Operating Committee has not provided details as to what the Plan Participants are receiving in return for the CAT Fees.⁸⁷ The Operating Committee provided a detailed discussion of the proposed funding model in the Plan, including the expenses to be covered by the CAT Fees. In addition, the agreement between the Company and the Plan Processor sets forth a comprehensive set of services to be provided to the Company with regard to the CAT. Such services include, without limitation: User support services (e.g., a help desk); tools to allow each CAT Reporter to monitor and correct their submissions; a comprehensive compliance program to monitor CAT Reporters’ adherence to Rule 613; publication of detailed Technical Specifications for Industry Members and Plan Participants; performing data linkage functions; creating comprehensive data security and confidentiality safeguards; creating query functionality for regulatory users (i.e., the Plan Participants, and the SEC and SEC staff); and performing billing and collection functions. The Operating Committee further notes that the services provided by the Plan Processor and the costs related thereto were subject to a bidding process.

(K) Funding Authority

Commenters also questioned the authority of the Operating Committee to

impose CAT Fees on Industry Members.⁸⁸ The Plan Participants previously responded to this same comment in the Plan Response Letter and the Fee Rule Response Letter.⁸⁹ As the Plan Participants previously noted, SEC Rule 613 specifically contemplates broker-dealers contributing to the funding of the CAT. In addition, as noted by the SEC, the CAT “substantially enhance[s] the ability of the SROs and the Commission to oversee today’s securities markets,”⁹⁰ thereby benefitting all market participants. Therefore, the Operating Committee continues to believe that it is equitable for both Plan Participants and Industry Members to contribute to funding the cost of the CAT.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6(b)(5) of the Act⁹¹, which require, among other things, that the Exchange rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest, and not designed to permit unfair discrimination between customers, issuers, brokers and dealer, and Section 6(b)(4) of the Act⁹², which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using its facilities. As discussed above, the SEC approved the bifurcated, tiered, fixed fee funding model in the CAT NMS Plan, finding it was reasonable and that it equitably allocated fees among Plan Participants and Industry Members. The Exchange believes that the proposed tiered fees adopted pursuant to the funding model approved by the SEC in the CAT NMS Plan are reasonable, equitably allocated and not unfairly discriminatory.

The Exchange believes that this proposal is consistent with the Act because it implements, interprets or clarifies the provisions of the Plan, and is designed to assist the Exchange and its Industry Members in meeting regulatory obligations pursuant to the Plan. In approving the Plan, the SEC noted that the Plan “is necessary and appropriate in the public interest, for the protection of investors and the

⁸¹ See FIA Principal Traders Group Letter at 2; Belvedere Letter at 4.

⁸² See Suspension Order at 31662; MFA Letter at 1–2.

⁸³ Letter from Plan Participants to Brent J. Fields, Secretary, SEC (Sept. 23, 2016) (“Plan Response Letter”); Letter from CAT NMS Plan Participants to Brent J. Fields, Secretary, SEC (June 29, 2017) (“Fee Rule Response Letter”).

⁸⁴ Fee Rule Response Letter at 2; Plan Response Letter at 18.

⁸⁵ See Suspension Order at 31662; FIA Principal Traders Group at 3.

⁸⁶ See Plan Response Letter at 16, 17; Fee Rule Response Letter at 10–12.

⁸⁷ See FIA Principal Traders Group at 3; SIFMA Letter at 3.

⁸⁸ See Suspension Order at 31661–2; SIFMA Letter at 2.

⁸⁹ See Plan Response Letter at 9–10; Fee Rule Response Letter at 3–4.

⁹⁰ Rule 613 Adopting Release at 45726.

⁹¹ 15 U.S.C. 78f(b)(5).

⁹² 15 U.S.C. 78f(b)(4).

maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanism of a national market system, or is otherwise in furtherance of the purposes of the Act.”⁹³ To the extent that this proposal implements, interprets or clarifies the Plan and applies specific requirements to Industry Members, the Exchange believes that this proposal furthers the objectives of the Plan, as identified by the SEC, and is therefore consistent with the Act.

The Exchange believes that the proposed tiered fees are reasonable. First, the total CAT Fees to be collected would be directly associated with the costs of establishing and maintaining the CAT, where such costs include Plan Processor costs and costs related to insurance, third party services and the operational reserve. The CAT Fees would not cover Participant services unrelated to the CAT. In addition, any surplus CAT Fees cannot be distributed to the individual Plan Participants; such surpluses must be used as a reserve to offset future fees. Given the direct relationship between the fees and the CAT costs, the Exchange believes that the total level of the CAT Fees is reasonable.

In addition, the Exchange believes that the proposed CAT Fees are reasonably designed to allocate the total costs of the CAT equitably between and among the Plan Participants and Industry Members, and are therefore not unfairly discriminatory. As discussed in detail above, the proposed tiered fees impose comparable fees on similarly situated CAT Reporters. For example, those with a larger impact on the CAT (measured via message traffic or market share) pay higher fees, whereas CAT Reporters with a smaller impact pay lower fees. Correspondingly, the tiered structure lessens the impact on smaller CAT Reporters by imposing smaller fees on those CAT Reporters with less market share or message traffic. In addition, the fee structure takes into consideration distinctions in securities trading operations of CAT Reporters, including ATSS trading OTC Equity Securities, and equity and options market makers.

Moreover, the Exchange believes that the division of the total CAT costs between Industry Members and Execution Venues, and the division of the Execution Venue portion of total costs between Equity and Options Execution Venues, is reasonably designed to allocate CAT costs among CAT Reporters. The 75%/25% division between Industry Members (other than

Execution Venue ATSS) and Execution Venues maintains the greatest level of comparability across the funding model. For example, the cost allocation establishes fees for the largest Industry Members (*i.e.*, those Industry Members in Tiers 1) that are comparable to the largest Equity Execution Venues and Options Execution Venues (*i.e.*, those Execution Venues in Tier 1).

Furthermore, the allocation of total CAT cost recovery recognizes the difference in the number of CAT Reporters that are Industry Members (other than Execution Venue ATSS) versus CAT Reporters that are Execution Venues. Similarly, the 67%/33% allocation between Equity and Options Execution Venues also helps to provide fee comparability for the largest CAT Reporters.

Finally, the Exchange believes that the proposed fees are reasonable because they would provide ease of calculation, ease of billing and other administrative functions, and predictability of a fixed fee. Such factors are crucial to estimating a reliable revenue stream for the Company and for permitting CAT Reporters to reasonably predict their payment obligations for budgeting purposes.

B. Self-Regulatory Organization's Statement of Burden on Competition

Section 6(b)(8) of the Act⁹⁴ require that Exchange rules not impose any burden on competition that is not necessary or appropriate. The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange notes that the proposed rule change implements provisions of the CAT NMS Plan approved by the Commission, and is designed to assist the Exchange in meeting its regulatory obligations pursuant to the Plan. Similarly, all national securities exchanges and FINRA are proposing this proposed fee schedule to implement the requirements of the CAT NMS Plan. Therefore, this is not a competitive fee filing and, therefore, it does not raise competition issues between and among the exchanges and FINRA.

Moreover, as previously described, the Exchange believes that the proposed rule change fairly and equitably allocates costs among CAT Reporters. In particular, the proposed fee schedule is structured to impose comparable fees on similarly situated CAT Reporters, and lessen the impact on smaller CAT Reporters. CAT Reporters with similar levels of CAT activity will pay similar

fees. For example, Industry Members (other than Execution Venue ATSS) with higher levels of message traffic will pay higher fees, and those with lower levels of message traffic will pay lower fees. Similarly, Execution Venue ATSS and other Execution Venues with larger market share will pay higher fees, and those with lower levels of market share will pay lower fees. Therefore, given that there is generally a relationship between message traffic and/or market share to the CAT Reporter's size, smaller CAT Reporters generally pay less than larger CAT Reporters. Accordingly, the Exchange does not believe that the CAT Fees would have a disproportionate effect on smaller or larger CAT Reporters. In addition, ATSS and exchanges will pay the same fees based on market share. Therefore, the Exchange does not believe that the fees will impose any burden on the competition between ATSS and exchanges. Accordingly, the Exchange believes that the proposed fees will minimize the potential for adverse effects on competition between CAT Reporters in the market.

Furthermore, the tiered, fixed fee funding model limits the disincentives to providing liquidity to the market. Therefore, the proposed fees are structured to limit burdens on competitive quoting and other liquidity provision in the market.

In addition, the Operating Committee believes that the proposed changes to the Original Proposal, as discussed above in detail, address certain competitive concerns raised by commenters, including concerns related to, among other things, smaller ATSS, ATSS trading OTC Equity Securities, market making quoting and fee comparability. As discussed above, the Operating Committee believes that the proposals address the competitive concerns raised by commenters.

C. Self-Regulatory Organization's Statement on Comments Regarding the Proposed Rule Changes Received From Members, Participants or Others

No written comments were either solicited or received.

III. Solicitation of Comments on Amendment No. 1

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment No. 1 is consistent with the Act. In particular, the Commission seeks comment on the following:

⁹³ Approval Order at 84697.

⁹⁴ 15 U.S.C. 78f(b)(8).

Allocation of Costs

(1) Commenters' views as to whether the allocation of CAT costs is consistent with the funding principle expressed in the CAT NMS Plan that requires the Operating Committee to "avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality."⁹⁵

(2) Commenters' views as to whether the allocation of 25% of CAT costs to the Execution Venues (including all the Participants) and 75% to Industry Members, will incentivize or disincentivize the Participants to effectively and efficiently manage the CAT costs incurred by the Participants since they will only bear 25% of such costs.

(3) Commenters' views on the determination to allocate 75% of all costs incurred by the Participants from November 21, 2016 to November 21, 2017 to Industry Members (other than Execution Venue ATSs), when such costs are development and build costs and when Industry Member reporting is scheduled to commence a year later, including views on whether such "fees, costs and expenses . . . [are] fairly and reasonably shared among the Participants and Industry Members" in accordance with the CAT NMS Plan.⁹⁶

(4) Commenters' views on whether an analysis of the ratio of the expected Industry Member-reported CAT messages to the expected SRO-reported CAT messages should be the basis for determining the allocation of costs between Industry Members and Execution Venues.⁹⁷

(5) Any additional data analysis on the allocation of CAT costs, including any existing supporting evidence.

Comparability

(6) Commenters' views on the shift in the standard used to assess the comparability of CAT Fees, with the emphasis now on comparability of individual entities instead of affiliated entities, including views as to whether this shift is consistent with the funding principle expressed in the CAT NMS Plan that requires the Operating Committee to establish a fee structure in which the fees charged to "CAT Reporters with the most CAT-related activity (measured by market share and/

or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether Execution Venues and/or Industry Members)."⁹⁸

(7) Commenters' views as to whether the reduction in the number of tiers for Industry Members (other than Execution Venue ATSs) from nine to seven, the revised allocation of CAT costs between Equity Execution Venues and Options Execution Venues from a 75%/25% split to a 67%/33% split, and the adjustment of all tier percentages and recovery allocations achieves comparability across individual entities, and whether these changes should have resulted in a change to the allocation of 75% of total CAT costs to Industry Members (other than Execution Venue ATSs) and 25% of such costs to Execution Venues.

Discounts

(8) Commenters' views as to whether the discounts for options market-makers, equities market-makers, and Equity ATSs trading OTC Equity Securities are clear, reasonable, and consistent with the funding principle expressed in the CAT NMS Plan that requires the Operating Committee to "avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality,"⁹⁹ including views as to whether the discounts for market-makers limit any potential disincentives to act as a market-maker and/or to provide liquidity due to CAT fees.

Calculation of Costs and Imposition of CAT Fees

(9) Commenters' views as to whether the amendment provides sufficient information regarding the amount of costs incurred from November 21, 2016 to November 21, 2017, particularly, how those costs were calculated, how those costs relate to the proposed CAT Fees, and how costs incurred after November 21, 2017 will be assessed upon Industry Members and Execution Venues;

(10) Commenters' views as to whether the timing of the imposition and collection of CAT Fees on Execution Venues and Industry Members is reasonably related to the timing of when the Company expects to incur such development and implementation costs.¹⁰⁰

(11) Commenters' views on dividing CAT costs equally among each of the

Participants, and then each Participant charging its own members as it deems appropriate, taking into consideration the possibility of inconsistency in charges, the potential for lack of transparency, and the impracticality of multiple SROs submitting invoices for CAT charges.

Burden on Competition and Barriers to Entry

(12) Commenters' views as to whether the allocation of 75% of CAT costs to Industry Members (other than Execution Venue ATSs) imposes any burdens on competition to Industry Members, including views on what baseline competitive landscape the Commission should consider when analyzing the proposed allocation of CAT costs.

(13) Commenters' views on the burdens on competition, including the relevant markets and services and the impact of such burdens on the baseline competitive landscape in those relevant markets and services.

(14) Commenters' views on any potential burdens imposed by the fees on competition between and among CAT Reporters, including views on which baseline markets and services the fees could have competitive effects on and whether the fees are designed to minimize such effects.

(15) Commenters' general views on the impact of the proposed fees on economies of scale and barriers to entry.

(16) Commenters' views on the baseline economies of scale and barriers to entry for Industry Members and Execution Venues and the relevant markets and services over which these economies of scale and barriers to entry exist.

(17) Commenters' views as to whether a tiered fee structure necessarily results in less active tiers paying more per unit than those in more active tiers, thus creating economies of scale, with supporting information if possible.

(18) Commenters' views as to how the level of the fees for the least active tiers would or would not affect barriers to entry.

(19) Commenters' views on whether the difference between the cost per unit (messages or market share) in less active tiers compared to the cost per unit in more active tiers creates regulatory economies of scale that favor larger competitors and, if so:

(a) How those economies of scale compare to operational economies of scale; and

(b) Whether those economies of scale reduce or increase the current advantages enjoyed by larger competitors or otherwise alter the competitive landscape.

⁹⁵ Section 11.2(e) of the CAT NMS Plan.

⁹⁶ Section 11.1(c) of the CAT NMS Plan.

⁹⁷ The Notice for the CAT NMS Plan did not provide a comprehensive count of audit trail message traffic from different regulatory data sources, but the Commission did estimate the ratio of all SRO audit trail messages to OATS audit trail messages to be 1.9431. See Securities Exchange Act Release No. 77724 (April 27, 2016), 81 FR 30613, 30721 n.919 and accompanying text (May 17, 2016).

⁹⁸ Section 11.2(c) of the CAT NMS Plan.

⁹⁹ Section 11.2(e) of the CAT NMS Plan.

¹⁰⁰ Section 11.1(c) of the CAT NMS Plan.

(20) Commenters' views on whether the fees could affect competition between and among national securities exchanges and FINRA, in light of the fact that implementation of the fees does not require the unanimous consent of all such entities, and, specifically:

(a) Whether any of the national securities exchanges or FINRA are disadvantaged by the fees; and

(b) If so, whether any such disadvantages would be of a magnitude that would alter the competitive landscape.

(21) Commenters' views on any potential burden imposed by the fees on competitive quoting and other liquidity provision in the market, including, specifically:

(a) Commenters' views on the kinds of disincentives that discourage liquidity provision and/or disincentives that the Commission should consider in its analysis;

(b) Commenters' views as to whether the fees could disincentivize the provision of liquidity; and

(c) Commenters' views as to whether the fees limit any disincentives to provide liquidity.

(22) Commenters' views as to whether the amendment adequately responds to and/or addresses comments received on related filings.

Electronic Comments:

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-CHX-2017-08 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090. All submissions should refer to File Number SR-CHX-2017-08. 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 website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be

available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-CHX-2017-08, and should be submitted on or before January 4, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁰¹

Eduardo A. Aleman,
Assistant Secretary.

[FR Doc. 2017-26918 Filed 12-13-17; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-82274; File No. SR-BatsBYX-2017-11]

Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Notice of Filing of Amendment No. 1 to a Proposed Rule Change To Establish the Fees for Industry Members Related to the National Market System Plan Governing the Consolidated Audit Trail

December 11, 2017.

On May 16, 2017, Bats BYX Exchange Inc., n/k/a Cboe BYX Exchange, Inc., ("Exchange" or "SRO") 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 adopt a fee schedule to establish the fees for Industry Members related to the National Market System Plan Governing the Consolidated Audit Trail ("CAT NMS Plan"). The proposed rule change was published in the **Federal Register** for comment on June 5, 2017.³ The Commission received seven comment letters on the proposed rule change,⁴

¹⁰¹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 80809 (May 30, 2017), 82 FR 25837 (June 5, 2017) ("Original Proposal").

⁴ Since the CAT NMS Plan Participants' proposed rule changes to adopt fees to be charged to Industry

and a response to comments from the Participants.⁵ On June 30, 2017, the Commission temporarily suspended and initiated proceedings to determine whether to approve or disapprove the proposed rule change.⁶ The Commission thereafter received seven comment letters,⁷ and a response to comments

Members to fund the consolidated audit trail are substantively identical, the Commission is considering all comments received on the proposed rule changes regardless of the comment file to which they were submitted. See text accompanying notes 13-16 *infra*, for a list of the CAT NMS Plan Participants. See Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, to Brent J. Fields, Secretary, Commission (dated June 6, 2017), available at: <https://www.sec.gov/comments/sr-batsbzx-2017-38/batsbzx201738-1788188-153228.pdf>; Letter from Patricia L. Cerny and Steven O'Malley, Compliance Consultants, to Brent J. Fields, Secretary, Commission (dated June 12, 2017), available at: <https://www.sec.gov/comments/sr-cboe-2017-040/cboe2017040-1799253-153675.pdf>; Letter from Daniel Zinn, General Counsel, OTC Markets Group Inc., to Eduardo A. Aleman, Assistant Secretary, Commission (dated June 13, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-1801717-153703.pdf>; Letter from Joanna Mallers, Secretary, FIA Principal Traders Group, to Brent J. Fields, Secretary, Commission (dated June 22, 2017), available at: <https://www.sec.gov/comments/sr-cboe-2017-040/cboe2017040-1819670-154195.pdf>; Letter from Stuart J. Kaswell, Executive Vice President and Managing Director, General Counsel, Managed Funds Association, to Brent J. Fields, Secretary, Commission (dated June 23, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-1822454-154283.pdf>; and Letter from Suzanne H. Shatto, Investor, to Commission (dated June 27, 2017), available at: <https://www.sec.gov/comments/sr-batsedgx-2017-22/batsedgx201722-154443.pdf>. The Commission also received a comment letter which is not pertinent to these proposed rule changes. See Letter from Christina Crouch, Smart Ltd., to Brent J. Fields, Secretary, Commission (dated June 5, 2017), available at: <https://www.sec.gov/comments/sr-batsbzx-2017-38/batsbzx201738-1785545-153152.htm>.

⁵ See Letter from CAT NMS Plan Participants to Brent J. Fields, Secretary, Commission (dated June 29, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-1832632-154584.pdf>.

⁶ See Securities Exchange Act Release No. 81067 (June 30, 2017), 82 FR 31656 (July 7, 2017).

⁷ See Letter from W. Hardy Callcott, Partner, Sidley Austin LLP, to Brent J. Fields, Secretary, Commission (dated July 27, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2148338-157737.pdf>; Letter from Kevin Coleman, General Counsel and Chief Compliance Officer, Belvedere Trading LLC, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2148360-157740.pdf>; Letter from Joanna Mallers, Secretary, FIA Principal Traders Group, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2151228-157745.pdf>; Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2150977-157744.pdf>; Letter from Stuart J. Kaswell, Executive Vice President and

Continued

from the Participants.⁸ On November 3, 2017, the Exchange filed Amendment No. 1 to the proposed rule change, as described in Items I and II below, which Items have been prepared by the Exchange.⁹ On November 9, 2017, the Commission extended the time period within which to approve the proposed rule change or disapprove the proposed rule change to January 14, 2018.¹⁰ The Commission is publishing this notice to solicit comments from interested persons on Amendment No. 1.¹¹

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposed rule change SR-BatsBYX-2017-11 (the "Original Proposal"), pursuant to which SRO proposed to amend its Fee Schedule to establish the fees for Industry Members related to the National Market System Plan Governing the Consolidated Audit Trail (the "CAT NMS Plan" or "Plan").¹² SRO files this proposed rule change (the "Amendment") to amend the Original Proposal. This Amendment replaces the Original Proposal in its

Managing Director, General Counsel, Managed Funds Association, to Brent J. Fields, Secretary, Commission (dated July 28, 2017), available at: <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2150818-157743.pdf>; Letter from John Kinahan, Chief Executive Officer, Group One Trading, L.P., to Brent J. Fields, Secretary, Commission (dated August 10, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-2214568-160619.pdf>; Letter from Joseph Molluso, Executive Vice President and CFO, Virtu Financial, to Brent J. Fields, Commission (dated August 18, 2017), available at: <https://www.sec.gov/comments/sr-finra-2017-011/finra2017011-2238648-160830.pdf>.

⁸ See Letter from Michael Simon, Chair, CAT NMS Plan Operating Committee, to Brent J. Fields, Commission, Secretary (dated November 2, 2017), available at <https://www.sec.gov/comments/sr-batsbyx-2017-11/batsbyx201711-2674608-161412.pdf>.

⁹ Amendment No. 1 to the proposed rule change replaces and supersedes the Original Proposal in its entirety.

¹⁰ See Securities Exchange Act Release No. 82049 (November 9, 2017), 82 FR 53549 (November 16, 2017).

¹¹ The Commission notes that on December 7, 2017, the Exchange filed Amendment No. 2 to the proposed rule change. Amendment No. 2 is a partial amendment to the proposed rule change, as amended by Amendment No. 1. Amendment No. 2 proposes to change the parenthetical regarding the OTC Equity Securities discount in paragraph (b)(2) of the proposed fee schedule from "with a discount for Equity ATSS exclusively trading OTC Equity Securities based on the average shares per trade ratio between NMS Stocks and OTC Equity Securities" to "with a discount for OTC Equity Securities market share of Equity ATSS trading OTC Equity Securities based on the average shares per trade ratio between NMS Stocks and OTC Equity Securities." See Securities Exchange Act Release No. 34-82275 (December 11, 2017).

¹² Unless otherwise specified, capitalized terms used in this fee filing are defined as set forth herein, the CAT Compliance Rule Series, in the CAT NMS Plan, or the Original Proposal.

entirety, and also describes the changes from the Original Proposal.

The text of the proposed rule change is available at the Exchange's website at www.markets.cboe.com, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

BOX Options Exchange LLC, Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe C2 Exchange, Inc., Cboe Exchange, Inc.,¹³ Chicago Stock Exchange, Inc., Financial Industry Regulatory Authority, Inc. ("FINRA"), Investors' Exchange LLC, Miami International Securities Exchange, LLC, MIA X PEARL, LLC, NASDAQ BX, Inc., Nasdaq GEMX, LLC, Nasdaq ISE, LLC, Nasdaq MRX, LLC,¹⁴ NASDAQ PHLX LLC, The NASDAQ Stock Market LLC, New York Stock Exchange LLC, NYSE American LLC,¹⁵ NYSE Arca, Inc. and NYSE National, Inc.¹⁶ (collectively, the

"Participants") filed with the Commission, pursuant to Section 11A of the Exchange Act¹⁷ and Rule 608 of Regulation NMS thereunder,¹⁸ the CAT NMS Plan.¹⁹ The Participants filed the Plan to comply with Rule 613 of Regulation NMS under the Exchange Act. The Plan was published for comment in the **Federal Register** on May 17, 2016,²⁰ and approved by the Commission, as modified, on November 15, 2016.²¹ The Plan is designed to create, implement and maintain a consolidated audit trail ("CAT") that would capture customer and order event information for orders in NMS Securities and OTC Equity Securities, across all markets, from the time of order inception through routing, cancellation, modification, or execution in a single consolidated data source. The Plan accomplishes this by creating CAT NMS, LLC (the "Company"), of which each Participant is a member, to operate the CAT.²² Under the CAT NMS Plan, the Operating Committee of the Company ("Operating Committee") has discretion to establish funding for the Company to operate the CAT, including establishing fees that the Participants will pay, and establishing fees for Industry Members that will be implemented by the Participants ("CAT Fees").²³ The Participants are required to file with the SEC under Section 19(b) of the Exchange Act any such CAT Fees applicable to Industry Members that the Operating Committee approves.²⁴ Accordingly, SRO submitted the Original Proposal to propose the Consolidated Audit Trail Funding Fees, which would require Industry Members that are SRO members to pay the CAT Fees determined by the Operating Committee.

The Commission published the Original Proposal for public comment in the **Federal Register** on June 5, 2017,²⁵

Exchange Act Rel. No. 79902 (Jan. 30, 2017), 82 FR 9258 (Feb. 3, 2017).

¹⁷ 15 U.S.C. 78k-1.

¹⁸ 17 CFR 242.608.

¹⁹ See Letter from the Participants to Brent J. Fields, Secretary, Commission, dated September 30, 2014; and Letter from Participants to Brent J. Fields, Secretary, Commission, dated February 27, 2015. On December 24, 2015, the Participants submitted an amendment to the CAT NMS Plan. See Letter from Participants to Brent J. Fields, Secretary, Commission, dated December 23, 2015.

²⁰ Securities Exchange Act Rel. No. 77724 (Apr. 27, 2016), 81 FR 30614 (May 17, 2016).

²¹ Securities Exchange Act Rel. No. 79318 (Nov. 15, 2016), 81 FR 84696 (Nov. 23, 2016) ("Approval Order").

²² The Plan also serves as the limited liability company agreement for the Company.

²³ Section 11.1(b) of the CAT NMS Plan.

²⁴ *Id.*

²⁵ Securities Exchange Act Rel. No. 80809 (May 30, 2017), 82 FR 25837 (June 5, 2017) (SR-BatsBYX-2017-11).

¹³ Note that Bats BYX Exchange, Inc., Bats BZX Exchange, Inc., Bats EDGA Exchange, Inc., Bats EDGX Exchange, Inc., LLC, C2 Options Exchange, Incorporated, and Chicago Board Options Exchange, Incorporated, have been renamed Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe C2 Exchange, Inc., Cboe Exchange, Inc., respectively.

¹⁴ ISE Gemini, LLC, ISE Mercury, LLC and International Securities Exchange, LLC have been renamed Nasdaq GEMX, LLC, Nasdaq MRX, LLC, and Nasdaq ISE, LLC, respectively. See Securities Exchange Act Rel. No. 80248 (Mar. 15, 2017), 82 FR 14547 (Mar. 21, 2017); Securities Exchange Act Rel. No. 80326 (Mar. 29, 2017), 82 FR 16460 (Apr. 4, 2017); and Securities Exchange Act Rel. No. 80325 (Mar. 29, 2017), 82 FR 16445 (Apr. 4, 2017).

¹⁵ NYSE MKT LLC has been renamed NYSE American LLC. See Securities Exchange Act Rel. No. 80283 (Mar. 21, 2017), 82 FR 15244 (Mar. 27, 2017).

¹⁶ National Stock Exchange, Inc. has been renamed NYSE National, Inc. See Securities

and received comments in response to the Original Proposal or similar fee filings by other Participants.²⁶ On June 30, 2017, the Commission suspended, and instituted proceedings to determine whether to approve or disapprove, the Original Proposal.²⁷ The Commission received seven comment letters in response to those proceedings.²⁸

In response to the comments on the Original Proposal, the Operating Committee determined to make the following changes to the funding model: (1) Adds two additional CAT Fee tiers for Equity Execution Venues; (2) discounts the market share of Execution Venue ATSs exclusively trading OTC Equity Securities as well as the market share of the FINRA over-the-counter reporting facility (“ORF”) by the average shares per trade ratio between NMS Stocks and OTC Equity Securities (calculated as 0.17% based on available data from the second quarter of 2017) when calculating the market share of Execution Venue ATS exclusively trading OTC Equity Securities and FINRA; (3) discounts the Options Market Maker quotes by the trade to quote ratio for options (calculated as 0.01% based on available data for June 2016 through June 2017) when calculating message traffic for Options Market Makers; (4) discounts equity market maker quotes by the trade to quote ratio for equities (calculated as 5.43% based on available data for June 2016 through June 2017) when calculating message traffic for equity market makers; (5) decreases the number of tiers for Industry Members (other than the Execution Venue ATSs) from nine to seven; (6) changes the allocation of CAT costs between Equity Execution Venues and Options

Execution Venues from 75%/25% to 67%/33%; (7) adjusts tier percentages and recovery allocations for Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSs); (8) focuses the comparability of CAT Fees on the individual entity level, rather than primarily on the comparability of affiliated entities; (9) commences invoicing of CAT Reporters as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Participants and the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants; and (10) requires the proposed fees to automatically expire two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. As discussed in detail below, SRO proposes to amend the Original Proposal to reflect these changes.

(1) Executive Summary

The following provides an executive summary of the CAT funding model approved by the Operating Committee, as well as Industry Members’ rights and obligations related to the payment of CAT Fees calculated pursuant to the CAT funding model, as amended by this Amendment. A detailed description of the CAT funding model and the CAT Fees, as amended by this Amendment, as well as the changes made to the Original Proposal follows this executive summary.

(A) CAT Funding Model

- *CAT Costs.* The CAT funding model is designed to establish CAT-specific fees to collectively recover the costs of building and operating the CAT from all CAT Reporters, including Industry Members and Participants. The overall CAT costs used in calculating the CAT Fees in this fee filing are comprised of Plan Processor CAT costs and non-Plan Processor CAT costs incurred, and estimated to be incurred, from November 21, 2016 through November 21, 2017. Although the CAT costs from November 21, 2016 through November 21, 2017 were used in calculating the CAT Fees, the CAT Fees set forth in this fee filing would be in effect until the automatic sunset date, as discussed below. (See Section 3(a)(2)(E) below)

- *Bifurcated Funding Model.* The CAT NMS Plan requires a bifurcated funding model, where costs associated with building and operating the CAT would be borne by (1) Participants and Industry Members that are Execution Venues for Eligible Securities through fixed tier fees based on market share,

and (2) Industry Members (other than alternative trading systems (“ATSs”) that execute transactions in Eligible Securities (“Execution Venue ATSs”)) through fixed tier fees based on message traffic for Eligible Securities. (See Section 3(a)(2) below)

- *Industry Member Fees.* Each Industry Member (other than Execution Venue ATSs) will be placed into one of seven tiers of fixed fees, based on “message traffic” in Eligible Securities for a defined period (as discussed below). Prior to the start of CAT reporting, “message traffic” will be comprised of historical equity and equity options orders, cancels, quotes and executions provided by each exchange and FINRA over the previous three months. After an Industry Member begins reporting to the CAT, “message traffic” will be calculated based on the Industry Member’s Reportable Events reported to the CAT. Industry Members with lower levels of message traffic will pay a lower fee and Industry Members with higher levels of message traffic will pay a higher fee. To avoid disincentives to quoting behavior, Options Market Maker and equity market maker quotes will be discounted when calculating message traffic. (See Section 3(a)(2)(B) below)

- *Execution Venue Fees.* Each Equity Execution Venue will be placed in one of four tiers of fixed fees based on market share, and each Options Execution Venue will be placed in one of two tiers of fixed fees based on market share. Equity Execution Venue market share will be determined by calculating each Equity Execution Venue’s proportion of the total volume of NMS Stock and OTC Equity shares reported by all Equity Execution Venues during the relevant time period. For purposes of calculating market share, the market share of Execution Venue ATSs exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF will be discounted. Similarly, market share for Options Execution Venues will be determined by calculating each Options Execution Venue’s proportion of the total volume of Listed Options contracts reported by all Options Execution Venues during the relevant time period. Equity Execution Venues with a larger market share will pay a larger CAT Fee than Equity Execution Venues with a smaller market share. Similarly, Options Execution Venues with a larger market share will pay a larger CAT Fee than Options Execution Venues with a smaller market share. (See Section 3(a)(2)(C) below)

- *Cost Allocation.* For the reasons discussed below, in designing the

²⁶ For a summary of comments, see generally Securities Exchange Act Rel. No. 81067 (June 30, 2017), 82 FR 31656 (July 7, 2017) (“Suspension Order”).

²⁷ Suspension Order.

²⁸ See Letter from Stuart J. Kaswell, Executive Vice President, Managing Director and General Counsel, Managed Funds Association, to Brent J. Fields, Secretary, SEC (July 28, 2017) (“MFA Letter”); Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA, to Brent J. Fields, Secretary, SEC (July 28, 2017) (“SIFMA Letter”); Joanna Mallers, Secretary, FIA Principal Traders Group, to Brent J. Fields, Secretary, SEC (July 28, 2017) (“FIA Principal Traders Group Letter”); Letter from Kevin Coleman, General Counsel & Chief Compliance Officer, Belvedere Trading LLC, to Brent J. Fields, Secretary, SEC (July 28, 2017) (“Belvedere Letter”); Letter from W. Hardy Callcott, Sidley Austin LLP, to Brent J. Fields, Secretary, SEC (July 27, 2017) (“Sidley Letter”); Letter from John Kinahan, Chief Executive Officer, Group One Trading, L.P., to Brent J. Fields, Secretary, SEC (Aug. 10, 2017) (“Group One Letter”); and Letter from Joseph Molluso, Executive Vice President, Virtu Financial, to Brent J. Fields, Secretary, SEC (Aug. 18, 2017) (“Virtu Financial Letter”).

model, the Operating Committee determined that 75 percent of total costs recovered would be allocated to Industry Members (other than Execution Venue ATSS) and 25 percent would be allocated to Execution Venues. In addition, the Operating Committee determined to allocate 67 percent of Execution Venue costs recovered to Equity Execution Venues and 33 percent to Options Execution Venues. (See Section 3(a)(2)(D) below)

- *Comparability of Fees.* The CAT funding model charges CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) comparable CAT Fees. (See Section 3(a)(2)(F) below)

(B) CAT Fees for Industry Members

- *Fee Schedule.* The quarterly CAT Fees for each tier for Industry Members are set forth in the two fee schedules in the Consolidated Audit Trail Funding Fees, one for Equity ATSS and one for Industry Members other than Equity ATSS. (See Section 3(a)(3)(B) below)

- *Quarterly Invoices.* Industry Members will be billed quarterly for CAT Fees, with the invoices payable within 30 days. The quarterly invoices will identify within which tier the Industry Member falls. (See Section 3(a)(3)(C) below)

- *Centralized Payment.* Each Industry Member will receive from the Company one invoice for its applicable CAT Fees, not separate invoices from each Participant of which it is a member. Each Industry Member will pay its CAT Fees to the Company via the centralized system for the collection of CAT Fees established by the Operating Committee. (See Section 3(a)(3)(C) below)

- *Billing Commencement.* Industry Members will begin to receive invoices for CAT Fees as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Participants and the operative date of the Plan amendment adopting CAT Fees for Participants. (See Section 3(a)(2)(G) below)

- *Sunset Provision.* The Consolidated Audit Trail Funding Fees will sunset automatically two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. (See Section 3(a)(2)(J) below)

(2) Description of the CAT Funding Model

Article XI of the CAT NMS Plan requires the Operating Committee to approve the operating budget, including projected costs of developing and operating the CAT for the upcoming

year. In addition to a budget, Article XI of the CAT NMS Plan provides that the Operating Committee has discretion to establish funding for the Company, consistent with a bifurcated funding model, where costs associated with building and operating the Central Repository would be borne by (1) Participants and Industry Members that are Execution Venues through fixed tier fees based on market share, and (2) Industry Members (other than Execution Venue ATSS) through fixed tier fees based on message traffic. In its order approving the CAT NMS Plan, the Commission determined that the proposed funding model was “reasonable”²⁹ and “reflects a reasonable exercise of the Participants’ funding authority to recover the Participants’ costs related to the CAT.”³⁰

More specifically, the Commission stated in approving the CAT NMS Plan that “[t]he Commission believes that the proposed funding model is reasonably designed to allocate the costs of the CAT between the Participants and Industry Members.”³¹ The Commission further noted the following:

The Commission believes that the proposed funding model reflects a reasonable exercise of the Participants’ funding authority to recover the Participants’ costs related to the CAT. The CAT is a regulatory facility jointly owned by the Participants and . . . the Exchange Act specifically permits the Participants to charge their members fees to fund their self-regulatory obligations. The Commission further believes that the proposed funding model is designed to impose fees reasonably related to the Participants’ self-regulatory obligations because the fees would be directly associated with the costs of establishing and maintaining the CAT, and not unrelated SRO services.³²

Accordingly, the funding model approved by the Operating Committee imposes fees on both Participants and Industry Members.

As discussed in Appendix C of the CAT NMS Plan, in developing and approving the approved funding model, the Operating Committee considered the advantages and disadvantages of a variety of alternative funding and cost allocation models before selecting the proposed model.³³ After analyzing the various alternatives, the Operating Committee determined that the proposed tiered, fixed fee funding

model provides a variety of advantages in comparison to the alternatives.

In particular, the fixed fee model, as opposed to a variable fee model, provides transparency, ease of calculation, ease of billing and other administrative functions, and predictability of a fixed fee. Such factors are crucial to estimating a reliable revenue stream for the Company and for permitting CAT Reporters to reasonably predict their payment obligations for budgeting purposes. Additionally, a strictly variable or metered funding model based on message volume would be far more likely to affect market behavior and place an inappropriate burden on competition.

In addition, reviews from varying time periods of current broker-dealer order and trading data submitted under existing reporting requirements showed a wide range in activity among broker-dealers, with a number of broker-dealers submitting fewer than 1,000 orders per month and other broker-dealers submitting millions and even billions of orders in the same period. Accordingly, the CAT NMS Plan includes a tiered approach to fees. The tiered approach helps ensure that fees are equitably allocated among similarly situated CAT Reporters and furthers the goal of lessening the impact on smaller firms.³⁴ In addition, in choosing a tiered fee structure, the Operating Committee concluded that the variety of benefits offered by a tiered fee structure, discussed above, outweighed the fact that CAT Reporters in any particular tier would pay different rates per message traffic order event or per market share (e.g., an Industry Member with the largest amount of message traffic in one tier would pay a smaller amount per order event than an Industry Member in the same tier with the least amount of message traffic). Such variation is the natural result of a tiered fee structure.³⁵ The Operating Committee considered several approaches to developing a tiered model, including defining fee tiers based on such factors as size of firm, message traffic or trading dollar volume. After analyzing the alternatives, it was concluded that the tiering should be based on message traffic which will reflect the relative impact of CAT Reporters on the CAT System.

Accordingly, the CAT NMS Plan contemplates that costs will be allocated across the CAT Reporters on a tiered

²⁹ Approval Order at 84796.

³⁰ *Id.* at 84794.

³¹ *Id.* at 84795.

³² *Id.* at 84794.

³³ Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85006.

³⁴ Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85006.

³⁵ Moreover, as the SEC noted in approving the CAT NMS Plan, “[t]he Participants also have offered a reasonable basis for establishing a funding model based on broad tiers, in that it may be easier to implement.” Approval Order at 84796.

basis in order to allocate higher costs to those CAT Reporters that contribute more to the costs of creating, implementing and maintaining the CAT and lower costs to those that contribute less.³⁶ The fees to be assessed at each tier are calculated so as to recoup a proportion of costs appropriate to the message traffic or market share (as applicable) from CAT Reporters in each tier. Therefore, Industry Members generating the most message traffic will be in the higher tiers, and will be charged a higher fee. Industry Members with lower levels of message traffic will be in lower tiers and will be assessed a smaller fee for the CAT.³⁷ Correspondingly, Execution Venues with the highest market shares will be in the top tier, and will be charged higher fees. Execution Venues with the lowest market shares will be in the lowest tier and will be assessed smaller fees for the CAT.³⁸

The CAT NMS Plan states that Industry Members (other than Execution Venue ATSS) will be charged based on message traffic, and that Execution Venues will be charged based on market share.³⁹ While there are multiple factors that contribute to the cost of building, maintaining and using the CAT, processing and storage of incoming message traffic is one of the most significant cost drivers for the CAT.⁴⁰ Thus, the CAT NMS Plan provides that the fees payable by Industry Members (other than Execution Venue ATSS) will be based on the message traffic generated by such Industry Member.⁴¹

In contrast to Industry Members, which determine the degree to which they produce message traffic that constitute CAT Reportable Events, the CAT Reportable Events of the Execution Venues are largely derivative of quotations and orders received from Industry Members that they are required to display. The business model for Execution Venues (other than FINRA), however, is focused on executions in their markets. As a result, the Operating Committee believes that it is more equitable to charge Execution Venues based on their market share rather than their message traffic.

Focusing on message traffic would make it more difficult to draw distinctions between large and small Execution Venues and, in particular, between large and small options

exchanges. For instance, the Operating Committee analyzed the message traffic of Execution Venues and Industry Members for the period of April 2017 to June 2017 and placed all CAT Reporters into a nine-tier framework (*i.e.*, a single tier may include both Execution Venues and Industry Members). The Operating Committee's analysis found that the majority of exchanges (15 total) were grouped in Tiers 1 and 2. Moreover, virtually all of the options exchanges were in Tiers 1 and 2.⁴² Given the resulting concentration of options exchanges in Tiers 1 and 2 under this approach, the analysis shows that a funding model for Execution Venues based on message traffic would make it more difficult to distinguish between large and small options exchanges, as compared to the proposed fee approach that bases fees for Execution Venues on market share.

The CAT NMS Plan's funding model also is structured to avoid a "reduction in market quality."⁴³ The tiered, fixed fee funding model is designed to limit the disincentives to providing liquidity to the market. For example, the Operating Committee expects that a firm that has a large volume of quotes would likely be categorized in one of the upper tiers, and would not be assessed a fee for this traffic directly as they would under a more directly metered model. In contrast, strictly variable or metered funding models based on message volume are far more likely to affect market behavior. In approving the CAT NMS Plan, the SEC stated that "[t]he Participants also offered a reasonable basis for establishing a funding model based on broad tiers, in that it may be . . . less likely to have an incremental deterrent effect on liquidity provision."⁴⁴

The funding model also is structured to avoid a reduction market quality because it discounts Options Market Maker and equity market maker quotes when calculating message traffic for Options Market Makers and equity market makers, respectively. As discussed in more detail below, the Operating Committee determined to discount the Options Market Maker quotes by the trade to quote ratio for options when calculating message traffic for Options Market Makers. Similarly, to avoid disincentives to quoting behavior on the equities side as well, the Operating Committee determined to discount equity market maker quotes by

the trade to quote ratio for equities when calculating message traffic for equity market makers. The proposed discounts recognize the value of the market makers' quoting activity to the market as a whole.

The CAT NMS Plan is further structured to avoid potential conflicts raised by the Operating Committee determining fees applicable to its own members—the Participants. First, the Company will operate on a "break-even" basis, with fees imposed to cover costs and an appropriate reserve. Any surpluses will be treated as an operational reserve to offset future fees and will not be distributed to the Participants as profits.⁴⁵ To ensure that the Participants' operation of the CAT will not contribute to the funding of their other operations, Section 11.1(c) of the CAT NMS Plan specifically states that "[a]ny surplus of the Company's revenues over its expenses shall be treated as an operational reserve to offset future fees." In addition, as set forth in Article VIII of the CAT NMS Plan, the Company "intends to operate in a manner such that it qualifies as a 'business league' within the meaning of Section 501(c)(6) of the [Internal Revenue] Code." To qualify as a business league, an organization must "not [be] organized for profit and no part of the net earnings of [the organization can] inure[] to the benefit of any private shareholder or individual."⁴⁶ As the SEC stated when approving the CAT NMS Plan, "the Commission believes that the Company's application for Section 501(c)(6) business league status addresses issues raised by commenters about the Plan's proposed allocation of profit and loss by mitigating concerns that the Company's earnings could be used to benefit individual Participants."⁴⁷ The Internal Revenue Service recently has determined that the Company is exempt from federal income tax under Section 501(c)(6) of the Internal Revenue Code.

The funding model also is structured to take into account distinctions in the securities trading operations of Participants and Industry Members. For example, the Operating Committee designed the model to address the different trading characteristics in the OTC Equity Securities market. Specifically, the Operating Committee proposes to discount the market share of Execution Venue ATSS exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF by

³⁶ Approval Order at 85005.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Section 11.3(a) and (b) of the CAT NMS Plan.

⁴⁰ Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85005.

⁴¹ Section 11.3(b) of the CAT NMS Plan.

⁴² The Operating Committee notes that this analysis did not place MIAX PEARL in Tier 1 or Tier 2 since the exchange commenced trading on February 6, 2017.

⁴³ Section 11.2(e) of the CAT NMS Plan.

⁴⁴ Approval Order at 84796.

⁴⁵ *Id.* at 84792.

⁴⁶ 26 U.S.C. 501(c)(6).

⁴⁷ Approval Order at 84793.

the average shares per trade ratio between NMS Stocks and OTC Equity Securities to adjust for the greater number of shares being traded in the OTC Equity Securities market, which is generally a function of a lower per share price for OTC Equity Securities when compared to NMS Stocks. In addition, the Operating Committee also proposes to discount Options Market Maker and equity market maker message traffic in recognition of their role in the securities markets. Furthermore, the funding model creates separate tiers for Equity and Options Execution Venues due to the different trading characteristics of those markets.

Finally, by adopting a CAT-specific fee, the Operating Committee will be fully transparent regarding the costs of the CAT. Charging a general regulatory fee, which would be used to cover CAT costs as well as other regulatory costs, would be less transparent than the selected approach of charging a fee designated to cover CAT costs only.

A full description of the funding model is set forth below. This description includes the framework for the funding model as set forth in the CAT NMS Plan, as well as the details as to how the funding model will be applied in practice, including the number of fee tiers and the applicable fees for each tier. The complete funding model is described below, including those fees that are to be paid by the Participants. The proposed Consolidated Audit Trail Funding Fees, however, do not apply to the Participants; the proposed Consolidated Audit Trail Funding Fees only apply to Industry Members. The CAT Fees for Participants will be imposed separately by the Operating Committee pursuant to the CAT NMS Plan.

(A) Funding Principles

Section 11.2 of the CAT NMS Plan sets forth the principles that the Operating Committee applied in establishing the funding for the Company. The Operating Committee has considered these funding principles as well as the other funding requirements set forth in the CAT NMS Plan and in Rule 613 in developing the proposed funding model. The following are the funding principles in Section 11.2 of the CAT NMS Plan:

- To create transparent, predictable revenue streams for the Company that are aligned with the anticipated costs to build, operate and administer the CAT and other costs of the Company;
- To establish an allocation of the Company's related costs among Participants and Industry Members that is consistent with the Exchange Act,

taking into account the timeline for implementation of the CAT and distinctions in the securities trading operations of Participants and Industry Members and their relative impact upon the Company's resources and operations;

- To establish a tiered fee structure in which the fees charged to: (i) CAT Reporters that are Execution Venues, including ATSS, are based upon the level of market share; (ii) Industry Members' non-ATS activities are based upon message traffic; (iii) the CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether Execution Venue and/or Industry Members);

- To provide for ease of billing and other administrative functions;
- To avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality; and
- To build financial stability to support the Company as a going concern.

(B) Industry Member Tiering

Under Section 11.3(b) of the CAT NMS Plan, the Operating Committee is required to establish fixed fees to be payable by Industry Members, based on message traffic generated by such Industry Member, with the Operating Committee establishing at least five and no more than nine tiers.

The CAT NMS Plan clarifies that the fixed fees payable by Industry Members pursuant to Section 11.3(b) shall, in addition to any other applicable message traffic, include message traffic generated by: (i) An ATS that does not execute orders that is sponsored by such Industry Member; and (ii) routing orders to and from any ATS sponsored by such Industry Member. In addition, the Industry Member fees will apply to Industry Members that act as routing broker-dealers for exchanges. The Industry Member fees will not be applicable, however, to an ATS that qualifies as an Execution Venue, as discussed in more detail in the section on Execution Venue tiering.

In accordance with Section 11.3(b), the Operating Committee approved a tiered fee structure for Industry Members (other than Execution Venue ATSS) as described in this section. In determining the tiers, the Operating Committee considered the funding principles set forth in Section 11.2 of the CAT NMS Plan, seeking to create

funding tiers that take into account the relative impact on CAT System resources of different Industry Members, and that establish comparable fees among the CAT Reporters with the most Reportable Events. The Operating Committee has determined that establishing seven tiers results in an allocation of fees that distinguishes between Industry Members with differing levels of message traffic. Thus, each such Industry Member will be placed into one of seven tiers of fixed fees, based on "message traffic" for a defined period (as discussed below).

A seven tier structure was selected to provide a wide range of levels for tiering Industry Members such that Industry Members submitting significantly less message traffic to the CAT would be adequately differentiated from Industry Members submitting substantially more message traffic. The Operating Committee considered historical message traffic from multiple time periods, generated by Industry Members across all exchanges and as submitted to FINRA's Order Audit Trail System ("OATS"), and considered the distribution of firms with similar levels of message traffic, grouping together firms with similar levels of message traffic. Based on this, the Operating Committee determined that seven tiers would group firms with similar levels of message traffic, charging those firms with higher impact on the CAT more, while lowering the burden on Industry Members that have less CAT-related activity. Furthermore, the selection of seven tiers establishes comparable fees among the largest CAT Reporters.

Each Industry Member (other than Execution Venue ATSS) will be ranked by message traffic and tiered by predefined Industry Member percentages (the "Industry Member Percentages"). The Operating Committee determined to use predefined percentages rather than fixed volume thresholds to ensure that the total CAT Fees collected recover the expected CAT costs regardless of changes in the total level of message traffic. To determine the fixed percentage of Industry Members in each tier, the Operating Committee analyzed historical message traffic generated by Industry Members across all exchanges and as submitted to OATS, and considered the distribution of firms with similar levels of message traffic, grouping together firms with similar levels of message traffic. Based on this, the Operating Committee identified seven tiers that would group firms with similar levels of message traffic.

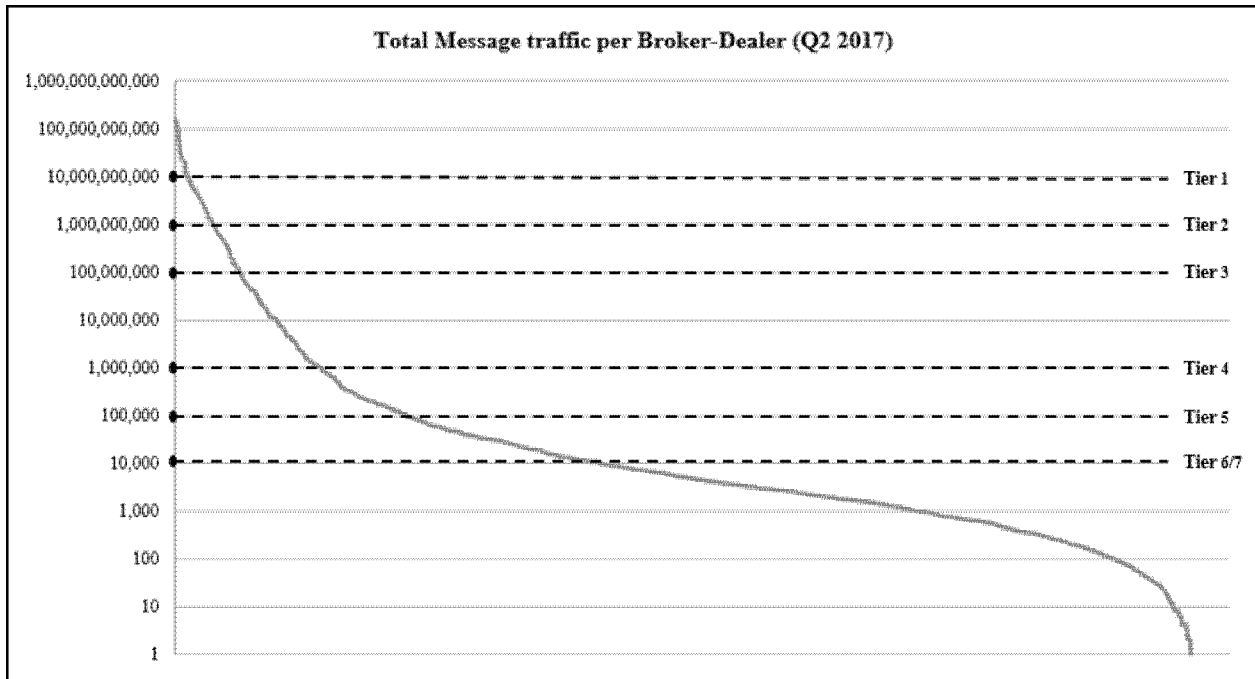
The percentage of costs recovered by each Industry Member tier will be

determined by predefined percentage allocations (the "Industry Member Recovery Allocation"). In determining the fixed percentage allocation of costs recovered for each tier, the Operating Committee considered the impact of CAT Reporter message traffic on the CAT System as well as the distribution of total message volume across Industry Members while seeking to maintain comparable fees among the largest CAT Reporters. Accordingly, following the determination of the percentage of Industry Members in each tier, the Operating Committee identified the percentage of total market volume for each tier based on the historical message traffic upon which Industry Members had been initially ranked. Taking this into account along with the resulting percentage of total recovery, the percentage allocation of costs recovered for each tier were assigned, allocating higher percentages of recovery to tiers with higher levels of message traffic while avoiding any inappropriate

burden on competition. Furthermore, by using percentages of Industry Members and costs recovered per tier, the Operating Committee sought to include elasticity within the funding model, allowing the funding model to respond to changes in either the total number of Industry Members or the total level of message traffic.

The following chart illustrates the breakdown of seven Industry Member tiers across the monthly average of total equity and equity options orders, cancels, quotes and executions in the second quarter of 2017 as well as message traffic thresholds between the largest of Industry Member message traffic gaps. The Operating Committee referenced similar distribution illustrations to determine the appropriate division of Industry Member percentages in each tier by considering the grouping of firms with similar levels of message traffic and seeking to identify relative breakpoints in the message traffic between such

groupings. In reviewing the chart and its corresponding table, note that while these distribution illustrations were referenced to help differentiate between Industry Member tiers, the proposed funding model is driven by fixed percentages of Industry Members across tiers to account for fluctuating levels of message traffic over time. This approach also provides financial stability for the CAT by ensuring that the funding model will recover the required amounts regardless of changes in the number of Industry Members or the amount of message traffic. Actual messages in any tier will vary based on the actual traffic in a given measurement period, as well as the number of firms included in the measurement period. The Industry Member Percentages and Industry Member Recovery Allocation for each tier will remain fixed with each Industry Member's tier to be reassigned periodically, as described below in Section 3(a)(2)(I).



Industry Member tier	Approximate message traffic per Industry Member (Q2 2017) (orders, quotes, cancels and executions)
Tier 1	>10,000,000,000
Tier 2	1,000,000,000–10,000,000,000
Tier 3	100,000,000–1,000,000,000
Tier 4	1,000,000–100,000,000
Tier 5	100,000–1,000,000
Tier 6	10,000–100,000
Tier 7	<10,000

Based on the above analysis, the Operating Committee approved the following Industry Member Percentages

and Industry Member Recovery Allocations:

Industry Member tier	Percentage of Industry Members	Percentage of Industry Member recovery	Percentage of total recovery
Tier 1	0.900	12.00	9.00
Tier 2	2.150	20.50	15.38
Tier 3	2.800	18.50	13.88
Tier 4	7.750	32.00	24.00
Tier 5	8.300	10.00	7.50
Tier 6	18.800	6.00	4.50
Tier 7	59.300	1.00	0.75
Total	100	100	75

For the purposes of creating these tiers based on message traffic, the Operating Committee determined to define the term “message traffic” separately for the period before the commencement of CAT reporting and for the period after the start of CAT reporting. The different definition for message traffic is necessary as there will be no Reportable Events as defined in the Plan, prior to the commencement of CAT reporting. Accordingly, prior to the start of CAT reporting, “message traffic” will be comprised of historical equity and equity options orders, cancels, quotes and executions provided by each exchange and FINRA over the previous three months. Prior to the start of CAT reporting, orders would be comprised of the total number of equity and equity options orders received and originated by a member of an exchange or FINRA over the previous three-month period, including principal orders, cancel/replace orders, market maker orders originated by a member of an exchange, and reserve (iceberg) orders as well as executions originated by a member of FINRA, and excluding order rejects, system-modified orders, order routes and implied orders.⁴⁸ In addition, prior to the start of CAT reporting, cancels would be comprised of the total number of equity and equity option cancels received and originated by a member of an exchange or FINRA over a three-month period, excluding order modifications (e.g., order updates, order splits, partial cancels) and multiple cancels of a complex order. Furthermore, prior to the start of CAT reporting, quotes would be comprised of information readily available to the exchanges and FINRA, such as the total number of historical equity and equity

⁴⁸ Consequently, firms that do not have “message traffic” reported to an exchange or OATS before they are reporting to the CAT would not be subject to a fee until they begin to report information to CAT.

options quotes received and originated by a member of an exchange or FINRA over the prior three-month period. Additionally, prior to the start of CAT reporting, executions would be comprised of the total number of equity and equity option executions received or originated by a member of an exchange or FINRA over a three-month period.

After an Industry Member begins reporting to the CAT, “message traffic” will be calculated based on the Industry Member’s Reportable Events reported to the CAT as will be defined in the Technical Specifications.⁴⁹

Quotes of Options Market Makers and equity market makers will be included in the calculation of total message traffic for those market makers for purposes of tiering under the CAT funding model both prior to CAT reporting and once CAT reporting commences.⁵⁰ To address potential concerns regarding burdens on competition or market quality of including quotes in the calculation of message traffic, however, the Operating Committee determined to discount the Options Market Maker quotes by the trade to quote ratio for options when calculating message traffic

⁴⁹ If an Industry Member (other than an Execution Venue ATS) has no orders, cancels, quotes and executions prior to the commencement of CAT Reporting, or no Reportable Events after CAT reporting commences, then the Industry Member would not have a CAT Fee obligation.

⁵⁰ The SEC approved exemptive relief permitting Options Market Maker quotes to be reported to the Central Repository by the relevant Options Exchange in lieu of requiring that such reporting be done by both the Options Exchange and the Options Market Maker, as required by Rule 613 of Regulation NMS. See Securities Exchange Act Rel. No. 77265 (Mar. 1, 2017, 81 FR 11856 (Mar. 7, 2016)). This exemption applies to Options Market Maker quotes for CAT reporting purposes only. Therefore, notwithstanding the reporting exemption provided for Options Market Maker quotes, Options Market Maker quotes will be included in the calculation of total message traffic for Options Market Makers for purposes of tiering under the CAT funding model both prior to CAT reporting and once CAT reporting commences.

for Options Market Makers. Based on available data for June 2016 through June 2017, the trade to quote ratio for options is 0.01%. Similarly, to avoid disincentives to quoting behavior on the equities side, the Operating Committee determined to discount equity market maker quotes by the trade to quote ratio for equities. Based on available data for June 2016 through June 2017, the trade to quote ratio for equities is 5.43%.⁵¹ The trade to quote ratio for options and the trade to quote ratio for equities will be calculated every three months when tiers are recalculated (as discussed below).

The Operating Committee has determined to calculate fee tiers every three months, on a calendar quarter basis, based on message traffic from the prior three months. Based on its analysis of historical data, the Operating Committee believes that calculating tiers based on three months of data will provide the best balance between reflecting changes in activity by Industry Members while still providing predictability in the tiering for Industry Members. Because fee tiers will be calculated based on message traffic from the prior three months, the Operating Committee will begin calculating message traffic based on an Industry Member’s Reportable Events reported to the CAT once the Industry Member has been reporting to the CAT for three months. Prior to that, fee tiers will be calculated as discussed above with regard to the period prior to CAT reporting.

(C) Execution Venue Tiering

Under Section 11.3(a) of the CAT NMS Plan, the Operating Committee is

⁵¹ The trade to quote ratios were calculated based on the inverse of the average of the monthly equity SIP and OPRA quote to trade ratios from June 2016—June 2017 that were compiled by the Financial Information Forum using data from NASDAQ and SIAC.

required to establish fixed fees payable by Execution Venues. Section 1.1 of the CAT NMS Plan defines an Execution Venue as “a Participant or an alternative trading system (“ATS”) (as defined in Rule 300 of Regulation ATS) that operates pursuant to Rule 301 of Regulation ATS (excluding any such ATS that does not execute orders).”⁵²

The Operating Committee determined that ATSs should be included within the definition of Execution Venue. The Operating Committee believes that it is appropriate to treat ATSs as Execution Venues under the proposed funding model since ATSs have business models that are similar to those of exchanges, and ATSs also compete with exchanges.

Given the differences between Execution Venues that trade NMS Stocks and/or OTC Equity Securities and Execution Venues that trade Listed Options, Section 11.3(a) addresses Execution Venues that trade NMS Stocks and/or OTC Equity Securities separately from Execution Venues that trade Listed Options. Equity and Options Execution Venues are treated separately for two reasons. First, the differing quoting behavior of Equity and Options Execution Venues makes comparison of activity between such Execution Venues difficult. Second, Execution Venue tiers are calculated based on market share of share volume, and it is therefore difficult to compare market share between asset classes (*i.e.*, equity shares versus options contracts). Discussed below is how the funding model treats the two types of Execution Venues.

(I) NMS Stocks and OTC Equity Securities

Section 11.3(a)(i) of the CAT NMS Plan states that each Execution Venue that (i) executes transactions or, (ii) in the case of a national securities association, has trades reported by its members to its trade reporting facility or facilities for reporting transactions effected otherwise than on an exchange, in NMS Stocks or OTC Equity Securities will pay a fixed fee depending on the market share of that Execution Venue in NMS Stocks and OTC Equity Securities, with the Operating Committee establishing at least two and not more than five tiers of fixed fees, based on an Execution Venue’s NMS Stocks and OTC Equity Securities market share. For these purposes, market share for Execution Venues that execute transactions will be calculated by share

volume, and market share for a national securities association that has trades reported by its members to its trade reporting facility or facilities for reporting transactions effected otherwise than on an exchange in NMS Stocks or OTC Equity Securities will be calculated based on share volume of trades reported, provided, however, that the share volume reported to such national securities association by an Execution Venue shall not be included in the calculation of such national security association’s market share.

In accordance with Section 11.3(a)(i) of the CAT NMS Plan, the Operating Committee approved a tiered fee structure for Equity Execution Venues and Option Execution Venues. In determining the Equity Execution Venue Tiers, the Operating Committee considered the funding principles set forth in Section 11.2 of the CAT NMS Plan, seeking to create funding tiers that take into account the relative impact on system resources of different Equity Execution Venues, and that establish comparable fees among the CAT Reporters with the most Reportable Events. Each Equity Execution Venue will be placed into one of four tiers of fixed fees, based on the Execution Venue’s NMS Stocks and OTC Equity Securities market share. In choosing four tiers, the Operating Committee performed an analysis similar to that discussed above with regard to the non-Execution Venue Industry Members to determine the number of tiers for Equity Execution Venues. The Operating Committee determined to establish four tiers for Equity Execution Venues, rather than a larger number of tiers as established for non-Execution Venue Industry Members, because the four tiers were sufficient to distinguish between the smaller number of Equity Execution Venues based on market share. Furthermore, the selection of four tiers serves to help establish comparability among the largest CAT Reporters.

Each Equity Execution Venue will be ranked by market share and tiered by predefined Execution Venue percentages, (the “Equity Execution Venue Percentages”). In determining the fixed percentage of Equity Execution Venues in each tier, the Operating Committee reviewed historical market share of share volume for Execution Venues. Equity Execution Venue market shares of share volume were sourced from market statistics made publicly-available by Bats Global Markets, Inc. (“Bats”). ATS market shares of share volume was sourced from market statistics made publicly-available by FINRA. FINRA trade reporting facility

(“TRF”) and ORF market share of share volume was sourced from market statistics made publicly available by FINRA. Based on data from FINRA and otcmrkt.com, ATSs accounted for 39.12% of the share volume across the TRFs and ORFs during the recent tiering period. A 39.12/60.88 split was applied to the ATS and non-ATS breakdown of FINRA market share, with FINRA tiered based only on the non-ATS portion of its market share of share volume.

The Operating Committee determined to discount the market share of Execution Venue ATSs exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF in recognition of the different trading characteristics of the OTC Equity Securities market as compared to the market in NMS Stocks. Many OTC Equity Securities are priced at less than one dollar—and a significant number at less than one penny—per share and low-priced shares tend to trade in larger quantities. Accordingly, a disproportionately large number of shares are involved in transactions involving OTC Equity Securities versus NMS Stocks. Because the proposed fee tiers are based on market share calculated by share volume, Execution Venue ATSs exclusively trading OTC Equity Securities and FINRA would likely be subject to higher tiers than their operations may warrant. To address this potential concern, the Operating Committee determined to discount the market share of Execution Venue ATSs exclusively trading OTC Equity Securities and the market share of the FINRA ORF by multiplying such market share by the average shares per trade ratio between NMS Stocks and OTC Equity Securities in order to adjust for the greater number of shares being traded in the OTC Equity Securities market. Based on available data for the second quarter of 2017, the average shares per trade ratio between NMS Stocks and OTC Equity Securities is 0.17%.⁵³ The average shares per trade ratio between NMS Stocks and OTC Equity Securities will be recalculated every three months when tiers are recalculated.

Based on this, the Operating Committee considered the distribution of Execution Venues, and grouped together Execution Venues with similar levels of market share. The percentage of costs recovered by each Equity

⁵² Although FINRA does not operate an execution venue, because it is a Participant, it is considered an “Execution Venue” under the Plan for purposes of determining fees.

⁵³ The average shares per trade ratio for both NMS Stocks and OTC Equity Securities from the second quarter of 2017 was calculated using publicly available market volume data from Bats and OTC Markets Group, and the totals were divided to determine the average number of shares per trade between NMS Stocks and OTC Equity Securities.

Execution Venue tier will be determined by predefined percentage allocations (the “Equity Execution Venue Recovery Allocation”). In determining the fixed percentage allocation of costs to be recovered from each tier, the Operating Committee considered the impact of CAT Reporter market share activity on the CAT System as well as the distribution of total market volume across Equity Execution Venues while seeking to maintain comparable fees among the largest CAT Reporters. Accordingly, following the

determination of the percentage of Execution Venues in each tier, the Operating Committee identified the percentage of total market volume for each tier based on the historical market share upon which Execution Venues had been initially ranked. Taking this into account along with the resulting percentage of total recovery, the percentage allocation of cost recovery for each tier were assigned, allocating higher percentages of recovery to the tier with a higher level of market share while avoiding any inappropriate

burden on competition. Furthermore, by using percentages of Equity Execution Venues and cost recovery per tier, the Operating Committee sought to include elasticity within the funding model, allowing the funding model to respond to changes in either the total number of Equity Execution Venues or changes in market share.

Based on this analysis, the Operating Committee approved the following Equity Execution Venue Percentages and Recovery Allocations:

Equity Execution Venue tier	Percentage of Equity Execution Venues	Percentage of Execution Venue recovery	Percentage of total recovery
Tier 1	25.00	33.25	8.31
Tier 2	42.00	25.73	6.43
Tier 3	23.00	8.00	2.00
Tier 4	10.00	0.02	0.01
Total	100	67	16.75

(II) Listed Options

Section 11.3(a)(ii) of the CAT NMS Plan states that each Execution Venue that executes transactions in Listed Options will pay a fixed fee depending on the Listed Options market share of that Execution Venue, with the Operating Committee establishing at least two and no more than five tiers of fixed fees, based on an Execution Venue’s Listed Options market share. For these purposes, market share will be calculated by contract volume.

In accordance with Section 11.3(a)(ii) of the CAT NMS Plan, the Operating Committee approved a tiered fee structure for Options Execution Venues. In determining the tiers, the Operating Committee considered the funding principles set forth in Section 11.2 of the CAT NMS Plan, seeking to create funding tiers that take into account the relative impact on system resources of different Options Execution Venues, and that establish comparable fees among the CAT Reporters with the most Reportable Events. Each Options Execution Venue will be placed into one of two tiers of fixed fees, based on the Execution Venue’s Listed Options market share. In choosing two tiers, the Operating Committee performed an analysis similar to that discussed above with regard to Industry Members (other than Execution Venue ATSS) to

determine the number of tiers for Options Execution Venues. The Operating Committee determined to establish two tiers for Options Execution Venues, rather than a larger number, because the two tiers were sufficient to distinguish between the smaller number of Options Execution Venues based on market share. Furthermore, due to the smaller number of Options Execution Venues, the incorporation of additional Options Execution Venue tiers would result in significantly higher fees for Tier 1 Options Execution Venues and reduce comparability between Execution Venues and Industry Members. Furthermore, the selection of two tiers served to establish comparable fees among the largest CAT Reporters.

Each Options Execution Venue will be ranked by market share and tiered by predefined Execution Venue percentages, (the “Options Execution Venue Percentages”). To determine the fixed percentage of Options Execution Venues in each tier, the Operating Committee analyzed the historical and publicly available market share of Options Execution Venues to group Options Execution Venues with similar market shares across the tiers. Options Execution Venue market share of share volume were sourced from market statistics made publicly-available by

Bats. The process for developing the Options Execution Venue Percentages was the same as discussed above with regard to Equity Execution Venues.

The percentage of costs to be recovered from each Options Execution Venue tier will be determined by predefined percentage allocations (the “Options Execution Venue Recovery Allocation”). In determining the fixed percentage allocation of cost recovery for each tier, the Operating Committee considered the impact of CAT Reporter market share activity on the CAT System as well as the distribution of total market volume across Options Execution Venues while seeking to maintain comparable fees among the largest CAT Reporters. Furthermore, by using percentages of Options Execution Venues and cost recovery per tier, the Operating Committee sought to include elasticity within the funding model, allowing the funding model to respond to changes in either the total number of Options Execution Venues or changes in market share. The process for developing the Options Execution Venue Recovery Allocation was the same as discussed above with regard to Equity Execution Venues.

Based on this analysis, the Operating Committee approved the following Options Execution Venue Percentages and Recovery Allocations:

Options Execution Venue tier	Percentage of Options Execution Venues	Percentage of Execution Venue recovery	Percentage of total recovery
Tier 1	75.00	28.25	7.06

Options Execution Venue tier	Percentage of Options Execution Venues	Percentage of Execution Venue recovery	Percentage of total recovery
Tier 2	25.00	4.75	1.19
Total	100	33	8.25

(III) Market Share/Tier Assignments

The Operating Committee determined that, prior to the start of CAT reporting, market share for Execution Venues would be sourced from publicly-available market data. Options and equity volumes for Participants will be sourced from market data made publicly available by Bats while Execution Venue ATS volumes will be sourced from market data made publicly available by FINRA and OTC Markets. Set forth in the Appendix are two charts, one listing the current Equity Execution Venues, each with its rank and tier, and one listing the current Options Execution Venues, each with its rank and tier.

After the commencement of CAT reporting, market share for Execution Venues will be sourced from data reported to the CAT. Equity Execution Venue market share will be determined by calculating each Equity Execution Venue's proportion of the total volume of NMS Stock and OTC Equity shares reported by all Equity Execution Venues during the relevant time period (with the discounting of market share of Execution Venue ATSs exclusively trading OTC Equity Securities, as described above). Similarly, market share for Options Execution Venues will be determined by calculating each Options Execution Venue's proportion of the total volume of Listed Options contracts reported by all Options Execution Venues during the relevant time period.

The Operating Committee has determined to calculate fee tiers for Execution Venues every three months based on market share from the prior three months. Based on its analysis of historical data, the Operating Committee believes calculating tiers based on three months of data will provide the best balance between reflecting changes in activity by Execution Venues while still providing predictability in the tiering for Execution Venues.

(D) Allocation of Costs

In addition to the funding principles discussed above, including comparability of fees, Section 11.1(c) of the CAT NMS Plan also requires expenses to be fairly and reasonably shared among the Participants and

Industry Members. Accordingly, in developing the proposed fee schedules pursuant to the funding model, the Operating Committee calculated how the CAT costs would be allocated between Industry Members and Execution Venues, and how the portion of CAT costs allocated to Execution Venues would be allocated between Equity Execution Venues and Options Execution Venues. These determinations are described below.

(I) Allocation Between Industry Members and Execution Venues

In determining the cost allocation between Industry Members (other than Execution Venue ATSs) and Execution Venues, the Operating Committee analyzed a range of possible splits for revenue recovery from such Industry Members and Execution Venues, including 80%/20%, 75%/25%, 70%/30% and 65%/35% allocations. Based on this analysis, the Operating Committee determined that 75 percent of total costs recovered would be allocated to Industry Members (other than Execution Venue ATSs) and 25 percent would be allocated to Execution Venues. The Operating Committee determined that this 75%/25% division maintained the greatest level of comparability across the funding model. For example, the cost allocation establishes fees for the largest Industry Members (*i.e.*, those Industry Members in Tiers 1) that are comparable to the largest Equity Execution Venues and Options Execution Venues (*i.e.*, those Execution Venues in Tier 1).

Furthermore, the allocation of total CAT cost recovery recognizes the difference in the number of CAT Reporters that are Industry Members versus CAT Reporters that are Execution Venues. Specifically, the cost allocation takes into consideration that there are approximately 23 times more Industry Members expected to report to the CAT than Execution Venues (*e.g.*, an estimated 1541 Industry Members versus 67 Execution Venues as of June 2017).

(II) Allocation Between Equity Execution Venues and Options Execution Venues

The Operating Committee also analyzed how the portion of CAT costs allocated to Execution Venues would be allocated between Equity Execution Venues and Options Execution Venues. In considering this allocation of costs, the Operating Committee analyzed a range of alternative splits for revenue recovered between Equity and Options Execution Venues, including a 70%/30%, 67%/33%, 65%/35%, 50%/50% and 25%/75% split. Based on this analysis, the Operating Committee determined to allocate 67 percent of Execution Venue costs recovered to Equity Execution Venues and 33 percent to Options Execution Venues. The Operating Committee determined that a 67%/33% allocation between Equity and Options Execution Venues maintained the greatest level of fee equitability and comparability based on the current number of Equity and Options Execution Venues. For example, the allocation establishes fees for the larger Equity Execution Venues that are comparable to the larger Options Execution Venues. Specifically, Tier 1 Equity Execution Venues would pay a quarterly fee of \$81,047 and Tier 1 Options Execution Venues would pay a quarterly fee of \$81,379. In addition to fee comparability between Equity Execution Venues and Options Execution Venues, the allocation also establishes equitability between larger (Tier 1) and smaller (Tier 2) Execution Venues based upon the level of market share. Furthermore, the allocation is intended to reflect the relative levels of current equity and options order events.

(E) Fee Levels

The Operating Committee determined to establish a CAT-specific fee to collectively recover the costs of building and operating the CAT. Accordingly, under the funding model, the sum of the CAT Fees is designed to recover the total cost of the CAT. The Operating Committee has determined overall CAT costs to be comprised of Plan Processor costs and non-Plan Processor costs, which are estimated to be \$50,700,000

in total for the year beginning November 21, 2016.⁵⁴

The Plan Processor costs relate to costs incurred and to be incurred through November 21, 2017 by the Plan Processor and consist of the Plan Processor's current estimates of average yearly ongoing costs, including development costs, which total \$37,500,000. This amount is based upon the fees due to the Plan Processor pursuant to the Company's agreement with the Plan Processor.

The non-Plan Processor estimated costs incurred and to be incurred by the Company through November 21, 2017 consist of three categories of costs. The first category of such costs are third party support costs, which include legal

fees, consulting fees and audit fees from November 21, 2016 until the date of filing as well as estimated third party support costs for the rest of the year. These amount to an estimated \$5,200,000. The second category of non-Plan Processor costs are estimated cyber-insurance costs for the year. Based on discussions with potential cyber-insurance providers, assuming \$2-5 million cyber-insurance premium on \$100 million coverage, the Company has estimated \$3,000,000 for the annual cost. The final cost figures will be determined following receipt of final underwriter quotes. The third category of non-Plan Processor costs is the CAT operational reserve, which is comprised of three months of ongoing Plan

Processor costs (\$9,375,000), third party support costs (\$1,300,000) and cyber-insurance costs (\$750,000). The Operating Committee aims to accumulate the necessary funds to establish the three-month operating reserve for the Company through the CAT Fees charged to CAT Reporters for the year. On an ongoing basis, the Operating Committee will account for any potential need to replenish the operating reserve or other changes to total cost during its annual budgeting process. The following table summarizes the Plan Processor and non-Plan Processor cost components which comprise the total estimated CAT costs of \$50,700,000 for the covered period.

Cost category	Cost component	Amount
Plan Processor	Operational Costs	\$37,500,000
	Third Party Support Costs	5,200,000
Non-Plan Processor	Operational Reserve	⁵⁵ 5,000,000
	Cyber-insurance Costs	3,000,000
	Estimated Total	50,700,000

Based on these estimated costs and the calculations for the funding model described above, the Operating Committee determined to impose the following fees:⁵⁶

For Industry Members (other than Execution Venue ATSS):

Tier	Percentage of Industry Members	Quarterly CAT fee
1	0.900	\$81,483
2	2.150	59,055
3	2.800	40,899
4	7.750	25,566
5	8.300	7,428
6	18.800	1,968
7	59.300	105

For Execution Venues for NMS Stocks and OTC Equity Securities:

Tier	Percentage of Equity Execution Venues	Quarterly CAT fee
1	25.00	\$81,048
2	42.00	37,062
3	23.00	21,126
4	10.00	129

For Execution Venues for Listed Options:

Tier	Percentage of Options Execution Venues	Quarterly CAT fee
1	75.00	\$81,381
2	25.00	37,629

The Operating Committee has calculated the schedule of effective fees for Industry Members (other than Execution Venue ATSS) and Execution Venues in the following manner. Note that the calculation of CAT Fees assumes 52 Equity Execution Venues, 15 Options Execution Venues and 1,541 Industry Members (other than Execution Venue ATSS) as of June 2017.

CALCULATION OF ANNUAL TIER FEES FOR INDUSTRY MEMBERS ["IM"]

Industry Member tier	Percentage of Industry Members	Percentage of Industry Member recovery	Percentage of total recovery
Tier 1	0.900	12.00	9.00
Tier 2	2.150	20.50	15.38
Tier 3	2.800	18.50	13.88
Tier 4	7.750	32.00	24.00
Tier 5	8.300	10.00	7.50
Tier 6	18.800	6.00	4.50
Tier 7	59.300	1.00	0.75
Total	100	100	75

⁵⁴ It is anticipated that CAT-related costs incurred prior to November 21, 2016 will be addressed via a separate filing.

⁵⁵ This \$5,000,000 represents the gradual accumulation of the funds for a target operating reserve of \$11,425,000.

⁵⁶ Note that all monthly, quarterly and annual CAT Fees have been rounded to the nearest dollar.

Industry Member tier	Estimated number of Industry Members
Tier 1	14
Tier 2	33
Tier 3	43
Tier 4	119
Tier 5	128
Tier 6	290
Tier 7	914
Total	1,541

Calculation 1.1 (Calculation of a Tier 1 Industry Member Monthly Fee)

$$1,541 [\text{Estimated Tot. IMs}] \times 0.9\% [\% \text{ of Tier 1 IMs}] = 14 [\text{Estimated Tier 1 IMs}]$$

$$\left(\frac{\$50,700,000 [\text{Tot. Ann. CAT Costs}] \times 75\% [\text{IM \% of Tot. Ann. CAT Costs}] \times 12\% [\% \text{ of Tier 1 IM Recovery}]}{14 [\text{Estimated Tier 1 IMs}]} \right) + 12 [\text{Months per year}] =$$

\$27,161

Calculation 1.2 (Calculation of a Tier 2 Industry Member Monthly Fee)

$$1,541 [\text{Estimated Tot. IMs}] \times 2.15\% [\% \text{ of Tier 2 IMs}] = 33 [\text{Estimated Tier 2 IMs}]$$

$$\left(\frac{\$50,700,000 [\text{Tot. Ann. CAT Costs}] \times 75\% [\text{IM \% of Tot. Ann. CAT Costs}] \times 20.5\% [\% \text{ of Tier 2 IM Recovery}]}{33 [\text{Estimated Tier 2 IMs}]} \right) + 12 [\text{Months per year}] =$$

\$19,685

Calculation 1.3 (Calculation of a Tier 3 Industry Member Monthly Fee)

$$1,541 [\text{Estimated Tot. IMs}] \times 2.125\% [\% \text{ of Tier 3 IMs}] = 43 [\text{Estimated Tier 3 IMs}]$$

$$\left(\frac{\$50,700,000 [\text{Tot. Ann. CAT Costs}] \times 75\% [\text{IM \% of Tot. Ann. CAT Costs}] \times 18.5\% [\% \text{ of Tier 3 IM Recovery}]}{43 [\text{Estimated Tier 3 IMs}]} \right) + 12 [\text{Months per year}] =$$

\$13,633

Calculation 1.4 (Calculation of a Tier 4 Industry Member Monthly Fee)

$$1,541 [\text{Estimated Tot. IMs}] \times 7.75\% [\% \text{ of Tier 4 IMs}] = 119 [\text{Estimated Tier 4 IMs}]$$

$$\left(\frac{\$50,700,000 [\text{Tot. Ann. CAT Costs}] \times 75\% [\text{IM \% of Tot. Ann. CAT Costs}] \times 22\% [\% \text{ of Tier 4 IM Recovery}]}{119 [\text{Estimated Tier 4 IMs}]} \right) + 12 [\text{Months per year}] =$$

\$8522

Calculation 1.5 (Calculation of a Tier 5 Industry Member Annual Fee)

$$1,541 [\text{Estimated Tot. IMs}] \times 8.39\% [\% \text{ of Tier 5 IMs}] = 128 [\text{Estimated Tier 5 IMs}]$$

$$\left(\frac{\$50,700,000 [\text{Tot. Ann. CAT Costs}] \times 75\% [\text{IM \% of Tot. Ann. CAT Costs}] \times 7.75\% [\% \text{ of Tier 5 IM Recovery}]}{128 [\text{Estimated Tier 5 IMs}]} \right) + 12 [\text{Months per year}] =$$

\$2476

Calculation 1.6 (Calculation of a Tier 6 Industry Member Monthly Fee)

$$1,541 [\text{Estimated Tot. IMs}] \times 18.8\% [\% \text{ of Tier 6 IMs}] = 290 [\text{Estimated Tier 6 IMs}]$$

$$\left(\frac{\$50,700,000 [\text{Tot. Ann. CAT Costs}] \times 75\% [\text{IM \% of Tot. Ann. CAT Costs}] \times 6\% [\% \text{ of Tier 6 IM Recovery}]}{290 [\text{Estimated Tier 6 IMs}]} \right) + 12 [\text{Months per year}] =$$

\$656

Calculation 1.7 (Calculation of a Tier 7 Industry Member Monthly Fee)

$$1,541 [\text{Estimated Tot. IMs}] \times 59.3\% [\% \text{ of Tier 7 IMs}] = 914 [\text{Estimated Tier 7 IMs}]$$

$$\left(\frac{\$50,700,000 [\text{Tot. Ann. CAT Costs}] \times 75\% [\text{IM \% of Tot. Ann. CAT Costs}] \times 15\% [\% \text{ of Tier 7 IM Recovery}]}{914 [\text{Estimated Tier 7 IMs}]} \right) + 12 [\text{Months per year}] =$$

\$35

CALCULATION OF ANNUAL TIER FEES FOR EQUITY EXECUTION VENUES (“EV”)

Equity Execution Venue tier	Percentage of Equity Execution Venues	Percentage of Execution Venue recovery	Percentage of total recovery
Tier 1	25.00	33.25	8.31
Tier 2	42.00	25.73	6.43
Tier 3	23.00	8.00	2.00
Tier 4	10.00	49.00	0.01
Total	100	67	16.75

Equity Execution Venue tier	Estimated number of Equity Execution Venues
Tier 1	13
Tier 2	22
Tier 3	12
Tier 4	5
Total	52

Calculation 2.1 (Calculation of a Tier 1 Equity Execution Venue Monthly Fee)

$$\begin{aligned}
 & \$2 \text{ [Estimated Total Equity EVs]} \times 25\% \text{ [5\% of Tier 1 Equity EVs]} = 10 \text{ [Estimated Tier 1 Equity EVs]} \\
 & \left(\frac{\$100,000 \text{ [Total Annual Fee]} \times 10\% \text{ [5\% of Total Annual Fee]} \times 12 \text{ [Months per year]}}{10 \text{ [Estimated Tier 1 Equity EVs]}} \right) = \$27,000
 \end{aligned}$$

Calculation 2.2 (Calculation of a Tier 2 Equity Execution Venue Monthly Fee)

$$\begin{aligned}
 & \$2 \text{ [Estimated Total Equity EVs]} \times 42\% \text{ [5\% of Tier 2 Equity EVs]} = 28 \text{ [Estimated Tier 2 Equity EVs]} \\
 & \left(\frac{\$100,000 \text{ [Total Annual Fee]} \times 10\% \text{ [5\% of Total Annual Fee]} \times 12 \text{ [Months per year]}}{28 \text{ [Estimated Tier 2 Equity EVs]}} \right) = \$12,857
 \end{aligned}$$

Calculation 2.3 (Calculation of a Tier 3 Equity Execution Venue Monthly Fee)

$$\begin{aligned}
 & \$2 \text{ [Estimated Total Equity EVs]} \times 23\% \text{ [5\% of Tier 3 Equity EVs]} = 12 \text{ [Estimated Tier 3 Equity EVs]} \\
 & \left(\frac{\$100,000 \text{ [Total Annual Fee]} \times 10\% \text{ [5\% of Total Annual Fee]} \times 12 \text{ [Months per year]}}{12 \text{ [Estimated Tier 3 Equity EVs]}} \right) = \$7,042
 \end{aligned}$$

Calculation 2.4 (Calculation of a Tier 4 Equity Execution Venue Monthly Fee)

$$\begin{aligned}
 & \$2 \text{ [Estimated Total Equity EVs]} \times 10\% \text{ [5\% of Tier 4 Equity EVs]} = 6 \text{ [Estimated Tier 4 Equity EVs]} \\
 & \left(\frac{\$100,000 \text{ [Total Annual Fee]} \times 10\% \text{ [5\% of Total Annual Fee]} \times 12 \text{ [Months per year]}}{6 \text{ [Estimated Tier 4 Equity EVs]}} \right) = \$400
 \end{aligned}$$

CALCULATION OF ANNUAL TIER FEES FOR OPTIONS EXECUTION VENUES (“EV”)

Options Execution Venue tier	Percentage of Options Execution Venues	Percentage of Execution Venue Recovery	Percentage of total recovery
Tier 1	75.00	28.25	7.06
Tier 2	25.00	4.75	1.19
Total	100	33	8.25

Options Execution Venue tier		Estimated number of Options Execution Venues
Tier 1		11
Tier 2		4
Total		15

Calculation 3.1 (Calculation of a Tier 1 Options Execution Venue Monthly Fee)

$$15 \text{ [Estimated Tot. Options EVs]} \times 75\% \text{ [% of Tier 1 Options EVs]} = 11 \text{ [Estimated Tier 1 Options EVs]}$$

$$\left(\frac{\$10,700,000 \text{ [Tot. Ann. CAT Costs]} \times 25\% \text{ [% of Tot. Ann. CAT Costs]} \times 2.25\% \text{ [% of Tier 1 Options EV Recovery]}}{11 \text{ [Estimated Tier 1 Options EVs]}} \right) \div 12 \text{ [Months per year]} = \$27,127$$

Calculation 3.2 (Calculation of a Tier 2 Options Execution Venue Annual Fee)

$$15 \text{ [Estimated Tot. Options EVs]} \times 25\% \text{ [% of Tier 2 Options EVs]} = 4 \text{ [Estimated Tier 2 Options EVs]}$$

$$\left(\frac{\$10,700,000 \text{ [Tot. Ann. CAT Costs]} \times 25\% \text{ [% of Tot. Ann. CAT Costs]} \times 4.75\% \text{ [% of Tier 2 Options EV Recovery]}}{4 \text{ [Estimated Tier 2 Options EVs]}} \right) \div 12 \text{ [Months per year]} = \$12,543$$

TRACEABILITY OF TOTAL CAT FEES

Type	Industry Member tier	Estimated number of members	CAT fees paid annually	Total recovery
Industry Members	Tier 1	14	\$325,932	\$4,563,048
	Tier 2	33	236,220	7,795,260
	Tier 3	43	163,596	7,034,628
	Tier 4	119	102,264	12,169,416
	Tier 5	128	29,712	3,803,136
	Tier 6	290	7,872	2,282,880
	Tier 7	914	420	383,880
Total		1,541		38,032,248
Equity Execution Venues	Tier 1	13	324,192	4,214,496
	Tier 2	22	148,248	3,261,456
	Tier 3	12	84,504	1,014,048
	Tier 4	5	516	2,580
Total		52		8,492,580
Options Execution Venues	Tier 1	11	325,524	3,580,764
	Tier 2	4	150,516	602,064
Total		15		4,182,828
Total				50,700,000
Excess ⁵⁷				7,656

(F) Comparability of Fees

The funding principles require a funding model in which the fees charged to the CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as

applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether Execution Venue and/or Industry Members). Accordingly, in creating the model, the Operating Committee sought to establish comparable fees for the top tier of Industry Members (other than

Execution Venue ATSS), Equity Execution Venues and Options Execution Venues. Specifically, each Tier 1 CAT Reporter would be required to pay a quarterly fee of approximately \$81,000.

(G) Billing Onset

Under Section 11.1(c) of the CAT NMS Plan, to fund the development and

⁵⁷ The amount in excess of the total CAT costs will contribute to the gradual accumulation of the target operating reserve of \$11.425 million.

implementation of the CAT, the Company shall time the imposition and collection of all fees on Participants and Industry Members in a manner reasonably related to the timing when the Company expects to incur such development and implementation costs. The Company is currently incurring such development and implementation costs and will continue to do so prior to the commencement of CAT reporting and thereafter. In accordance with the CAT NMS Plan, all CAT Reporters, including both Industry Members and Execution Venues (including Participants), will be invoiced as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Participants and the operative date of the Plan amendment adopting CAT Fees for Participants.

(H) Changes to Fee Levels and Tiers

Section 11.3(d) of the CAT NMS Plan states that “[t]he Operating Committee shall review such fee schedule on at least an annual basis and shall make any changes to such fee schedule that it deems appropriate. The Operating Committee is authorized to review such fee schedule on a more regular basis, but shall not make any changes on more than a semi-annual basis unless, pursuant to a Supermajority Vote, the Operating Committee concludes that such change is necessary for the adequate funding of the Company.” With such reviews, the Operating Committee will review the distribution of Industry Members and Execution Venues across tiers, and make any updates to the percentage of CAT Reporters allocated to each tier as may be necessary. In addition, the reviews will evaluate the estimated ongoing

CAT costs and the level of the operating reserve. To the extent that the total CAT costs decrease, the fees would be adjusted downward, and to the extent that the total CAT costs increase, the fees would be adjusted upward.⁵⁸ Furthermore, any surplus of the Company’s revenues over its expenses is to be included within the operational reserve to offset future fees. The limitations on more frequent changes to the fee, however, are intended to provide budgeting certainty for the CAT Reporters and the Company.⁵⁹ To the extent that the Operating Committee approves changes to the number of tiers in the funding model or the fees assigned to each tier, then the Operating Committee will file such changes with the SEC pursuant to Rule 608 of the Exchange Act, and the Participants will file such changes with the SEC pursuant to Section 19(b) of the Exchange Act and Rule 19b-4 thereunder, and any such changes will become effective in accordance with the requirements of those provisions.

(I) Initial and Periodic Tier Reassignments

The Operating Committee has determined to calculate fee tiers every three months based on market share or message traffic, as applicable, from the prior three months. For the initial tier assignments, the Company will calculate the relevant tier for each CAT Reporter using the three months of data prior to the commencement date. As with the initial tier assignment, for the tri-monthly reassignments, the Company will calculate the relevant tier using the three months of data prior to the relevant tri-monthly date. Any movement of CAT Reporters between tiers will not change the criteria for each

tier or the fee amount corresponding to each tier.

In performing the tri-monthly reassignments, the assignment of CAT Reporters in each assigned tier is relative. Therefore, a CAT Reporter’s assigned tier will depend, not only on its own message traffic or market share, but also on the message traffic/market share across all CAT Reporters. For example, the percentage of Industry Members (other than Execution Venue ATs) in each tier is relative such that such Industry Member’s assigned tier will depend on message traffic generated across all CAT Reporters as well as the total number of CAT Reporters. The Operating Committee will inform CAT Reporters of their assigned tier every three months following the periodic tiering process, as the funding model will compare an individual CAT Reporter’s activity to that of other CAT Reporters in the marketplace.

The following demonstrates a tier reassignment. In accordance with the funding model, the top 75% of Options Execution Venues in market share are categorized as Tier 1 while the bottom 25% of Options Execution Venues in market share are categorized as Tier 2. In the sample scenario below, Options Execution Venue L is initially categorized as a Tier 2 Options Execution Venue in Period A due to its market share. When market share is recalculated for Period B, the market share of Execution Venue L increases, and it is therefore subsequently reranked and reassigned to Tier 1 in Period B. Correspondingly, Options Execution Venue K, initially a Tier 1 Options Execution Venue in Period A, is reassigned to Tier 2 in Period B due to decreases in its market share.

Period A			Period B		
Options Execution Venue	Market share rank	Tier	Options Execution Venue	Market share rank	Tier
Options Execution Venue A	1	1	Options Execution Venue A	1	1
Options Execution Venue B	2	1	Options Execution Venue B	2	1
Options Execution Venue C	3	1	Options Execution Venue C	3	1
Options Execution Venue D	4	1	Options Execution Venue D	4	1
Options Execution Venue E	5	1	Options Execution Venue E	5	1
Options Execution Venue F	6	1	Options Execution Venue F	6	1
Options Execution Venue G	7	1	Options Execution Venue I	7	1
Options Execution Venue H	8	1	Options Execution Venue H	8	1
Options Execution Venue I	9	1	Options Execution Venue G	9	1
Options Execution Venue J	10	1	Options Execution Venue J	10	1
Options Execution Venue K	11	1	Options Execution Venue L	11	1
Options Execution Venue L	12	2	Options Execution Venue K	12	2
Options Execution Venue M	13	2	Options Execution Venue N	13	2
Options Execution Venue N	14	2	Options Execution Venue M	14	2

⁵⁸ The CAT Fees are designed to recover the costs associated with the CAT. Accordingly, CAT Fees would not be affected by increases or decreases in other non-CAT expenses incurred by the

Participants, such as any changes in costs related to the retirement of existing regulatory systems, such as OATS.

⁵⁹ Section B.7, Appendix C of the CAT NMS Plan, Approval Order at 85006.

Period A			Period B		
Options Execution Venue	Market share rank	Tier	Options Execution Venue	Market share rank	Tier
Options Execution Venue O	15	2	Options Execution Venue O	15	2

For each periodic tier reassignment, the Operating Committee will review the new tier assignments, particularly those assignments for CAT Reporters that shift from the lowest tier to a higher tier. This review is intended to evaluate whether potential changes to the market or CAT Reporters (e.g., dissolution of a large CAT Reporter) adversely affect the tier reassignments.

(J) Sunset Provision

The Operating Committee developed the proposed funding model by analyzing currently available historical data. Such historical data, however, is not as comprehensive as data that will be submitted to the CAT. Accordingly, the Operating Committee believes that it will be appropriate to revisit the funding model once CAT Reporters have actual experience with the funding model. Accordingly, the Operating Committee determined to include an automatic sunset provision for the proposed fees. Specifically, the Operating Committee determined that the CAT Fees should automatically expire two years after the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. The Operating Committee intends to monitor the operation of the funding model during this two year period and to evaluate its effectiveness during that period. Such a process will inform the Operating Committee’s approach to funding the CAT after the two year period.

(3) Proposed CAT Fee Schedule

SRO proposes the Consolidated Audit Trail Funding Fees to impose the CAT Fees determined by the Operating Committee on SRO’s members. The proposed fee schedule has four sections, covering definitions, the fee schedule for CAT Fees, the timing and manner of payments, and the automatic sunset of the CAT Fees. Each of these sections is discussed in detail below.

(A) Definitions

Paragraph (a) of the proposed fee schedule sets forth the definitions for the proposed fee schedule. Paragraph (a)(1) states that, for purposes of the Consolidated Audit Trail Funding Fees, the terms “CAT”, “CAT NMS Plan,” “Industry Member,” “NMS Stock,” “OTC Equity Security”, “Options

Market Maker”, and “Participant” are defined as set forth in Rule 4.5 (Consolidated Audit Trail—Definitions).

The proposed fee schedule imposes different fees on Equity ATSs and Industry Members that are not Equity ATSs. Accordingly, the proposed fee schedule defines the term “Equity ATS.” First, paragraph (a)(2) defines an “ATS” to mean an alternative trading system as defined in Rule 300(a) of Regulation ATS under the Securities Exchange Act of 1934, as amended, that operates pursuant to Rule 301 of Regulation ATS. This is the same definition of an ATS as set forth in Section 1.1 of the CAT NMS Plan in the definition of an “Execution Venue.” Then, paragraph (a)(4) defines an “Equity ATS” as an ATS that executes transactions in NMS Stocks and/or OTC Equity Securities.

Paragraph (a)(3) of the proposed fee schedule defines the term “CAT Fee” to mean the Consolidated Audit Trail Funding Fee(s) to be paid by Industry Members as set forth in paragraph (b) in the proposed fee schedule.

Finally, Paragraph (a)(6) defines an “Execution Venue” as a Participant or an ATS (excluding any such ATS that does not execute orders). This definition is the same substantive definition as set forth in Section 1.1 of the CAT NMS Plan. Paragraph (a)(5) defines an “Equity Execution Venue” as an Execution Venue that trades NMS Stocks and/or OTC Equity Securities.

(B) Fee Schedule

SRO proposes to impose the CAT Fees applicable to its Industry Members through paragraph (b) of the proposed fee schedule. Paragraph (b)(1) of the proposed fee schedule sets forth the CAT Fees applicable to Industry Members other than Equity ATSs. Specifically, paragraph (b)(1) states that the Company will assign each Industry Member (other than an Equity ATS) to a fee tier once every quarter, where such tier assignment is calculated by ranking each Industry Member based on its total message traffic (with discounts for equity market maker quotes and Options Market Maker quotes based on the trade to quote ratio for equities and options, respectively) for the three months prior to the quarterly tier calculation day and assigning each Industry Member to a tier based on that ranking and predefined

Industry Member percentages. The Industry Members with the highest total quarterly message traffic will be ranked in Tier 1, and the Industry Members with lowest quarterly message traffic will be ranked in Tier 7. Each quarter, each Industry Member (other than an Equity ATS) shall pay the following CAT Fee corresponding to the tier assigned by the Company for such Industry Member for that quarter:

Tier	Percentage of Industry Members	Quarterly CAT fee
1	0.900	\$81,483
2	2.150	59,055
3	2.800	40,899
4	7.750	25,566
5	8.300	7,428
6	18.800	1,968
7	59.300	105

Paragraph (b)(2) of the proposed fee schedule sets forth the CAT Fees applicable to Equity ATSs.⁶⁰ These are the same fees that Participants that trade NMS Stocks and/or OTC Equity Securities will pay. Specifically, paragraph (b)(2) states that the Company will assign each Equity ATS to a fee tier once every quarter, where such tier assignment is calculated by ranking each Equity Execution Venue based on its total market share of NMS Stocks and OTC Equity Securities (with a discount for Equity ATSs exclusively trading OTC Equity Securities based on the average shares per trade ratio between NMS Stocks and OTC Equity Securities) for the three months prior to the quarterly tier calculation day and assigning each Equity ATS to a tier based on that ranking and predefined Equity Execution Venue percentages. The Equity ATSs with the higher total quarterly market share will be ranked in Tier 1, and the Equity ATSs with the lowest quarterly market share will be ranked in Tier 4. Specifically, paragraph (b)(2) states that, each quarter, each Equity ATS shall pay the following CAT Fee corresponding to the tier assigned by the Company for such Equity ATS for that quarter:

⁶⁰ Note that no fee schedule is provided for Execution Venue ATSs that execute transactions in Listed Options, as no such Execution Venue ATSs currently exist due to trading restrictions related to Listed Options.

Tier	Percentage of Equity Execution Venues	Quarterly CAT fee
1	25.00	\$81,048
2	42.00	37,062
3	23.00	21,126
4	10.00	129

(C) Timing and Manner of Payment

Section 11.4 of the CAT NMS Plan states that the Operating Committee shall establish a system for the collection of fees authorized under the CAT NMS Plan. The Operating Committee may include such collection responsibility as a function of the Plan Processor or another administrator. To implement the payment process to be adopted by the Operating Committee, paragraph (c)(1) of the proposed fee schedule states that the Company will provide each Industry Member with one invoice each quarter for its CAT Fees as determined pursuant to paragraph (b) of the proposed fee schedule, regardless of whether the Industry Member is a member of multiple self-regulatory organizations. Paragraph (c)(1) further states that each Industry Member will pay its CAT Fees to the Company via the centralized system for the collection of CAT Fees established by the Company in the manner prescribed by the Company. SRO will provide Industry Members with details regarding the manner of payment of CAT Fees by Regulatory Circular.

All CAT fees will be billed and collected centrally through the Company via the Plan Processor. Although each Participant will adopt its own fee schedule regarding CAT Fees, no CAT Fees or portion thereof will be collected by the individual Participants. Each Industry Member will receive from the Company one invoice for its applicable CAT fees, not separate invoices from each Participant of which it is a member. The Industry Members will pay the CAT Fees to the Company via the centralized system for the collection of CAT fees established by the Company.⁶¹

Section 11.4 of the CAT NMS Plan also states that Participants shall require each Industry Member to pay all applicable authorized CAT Fees within thirty days after receipt of an invoice or other notice indicating payment is due (unless a longer payment period is otherwise indicated). Section 11.4 further states that, if an Industry Member fails to pay any such fee when due, such Industry Member shall pay interest on the outstanding balance from

such due date until such fee is paid at a per annum rate equal to the lesser of: (i) The Prime Rate plus 300 basis points; or (ii) the maximum rate permitted by applicable law. Therefore, in accordance with Section 11.4 of the CAT NMS Plan, SRO proposed to adopt paragraph (c)(2) of the proposed fee schedule. Paragraph (c)(2) of the proposed fee schedule states that each Industry Member shall pay CAT Fees within thirty days after receipt of an invoice or other notice indicating payment is due (unless a longer payment period is otherwise indicated). If an Industry Member fails to pay any such fee when due, such Industry Member shall pay interest on the outstanding balance from such due date until such fee is paid at a per annum rate equal to the lesser of: (i) The Prime Rate plus 300 basis points; or (ii) the maximum rate permitted by applicable law.

(D) Sunset Provision

The Operating Committee has determined to require that the CAT Fees automatically sunset two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. Accordingly, SRO proposes paragraph (d) of the fee schedule, which states that “[t]hese Consolidated Audit Trailing Funding Fees will automatically expire two years after the operative date of the amendment of the CAT NMS Plan that adopts CAT fees for the Participants.”

(4) Changes to Prior CAT Fee Plan Amendment

The proposed funding model set forth in this Amendment is a revised version of the Original Proposal. The Commission received a number of comment letters in response to the Original Proposal.⁶² The SEC suspended the Original Proposal and instituted proceedings to determine whether to approve or disapprove it.⁶³ Pursuant to those proceedings, additional comment letters were submitted regarding the proposed funding model.⁶⁴ In developing this Amendment, the Operating Committee carefully considered these comments and made a number of changes to the Original Proposal to address these comments where appropriate.

This Amendment makes the following changes to the Original Proposal: (1) Adds two additional CAT Fee tiers for

⁶² For a description of the comments submitted in response to the Original Proposal, see Suspension Order.

⁶³ Suspension Order.

⁶⁴ See MFA Letter; SIFMA Letter; FIA Principal Traders Group Letter; Belvedere Letter; Sidley Letter; Group One Letter; and Virtu Financial Letter.

Equity Execution Venues; (2) discounts the market share of Execution Venue ATSS exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF by the average shares per trade ratio between NMS Stocks and OTC Equity Securities (calculated as 0.17% based on available data from the second quarter of 2017) when calculating the market share of Execution Venue ATSS exclusively trading OTC Equity Securities and FINRA; (3) discounts the Options Market Maker quotes by the trade to quote ratio for options (calculated as 0.01% based on available data for June 2016 through June 2017) when calculating message traffic for Options Market Makers; (4) discounts equity market maker quotes by the trade to quote ratio for equities (calculated as 5.43% based on available data for June 2016 through June 2017) when calculating message traffic for equity market makers; (5) decreases the number of tiers for Industry Members (other than the Execution Venue ATSS) from nine to seven; (6) changes the allocation of CAT costs between Equity Execution Venues and Options Execution Venues from 75%/25% to 67%/33%; (7) adjusts tier percentages and recovery allocations for Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSS); (8) focuses the comparability of CAT Fees on the individual entity level, rather than primarily on the comparability of affiliated entities; (9) commences invoicing of CAT Reporters as promptly as possible following the latest of the operative date of the Consolidated Audit Trail Funding Fees for each of the Participants and the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants; and (10) requires the proposed fees to automatically expire two years from the operative date of the CAT NMS Plan amendment adopting CAT Fees for the Participants.

(A) Equity Execution Venues

(i) Small Equity Execution Venues

In the Original Proposal, the Operating Committee proposed to establish two fee tiers for Equity Execution Venues. The Commission and commenters raised the concern that, by establishing only two tiers, smaller Equity Execution Venues (e.g., those Equity ATSS representing less than 1% of NMS market share) would be placed in the same fee tier as larger Equity Execution Venues, thereby imposing an undue or inappropriate burden on

⁶¹ Section 11.4 of the CAT NMS Plan.

competition.⁶⁵ To address this concern, the Operating Committee proposes to add two additional tiers for Equity Execution Venues, a third tier for smaller Equity Execution Venues and a fourth tier for the smallest Equity Execution Venues.

Specifically, the Original Proposal had two tiers of Equity Execution Venues. Tier 1 required the largest Equity Execution Venues to pay a quarterly fee of \$63,375. Based on available data, these largest Equity Execution Venues were those that had equity market share of share volume greater than or equal to 1%.⁶⁶ Tier 2 required the remaining smaller Equity Execution Venues to pay a quarterly fee of \$38,820.

To address concerns about the potential for the \$38,820 quarterly fee to impose an undue burden on smaller Equity Execution Venues, the Operating Committee determined to move to a four tier structure for Equity Execution Venues. Tier 1 would continue to include the largest Equity Execution Venues by share volume (that is, based on currently available data, those with market share of equity share volume greater than or equal to one percent), and these Equity Execution Venues would be required to pay a quarterly fee of \$81,048. The Operating Committee determined to divide the original Tier 2 into three tiers. The new Tier 2 Equity Execution Venues, which would include the next largest Equity Execution Venues by equity share volume, would be required to pay a quarterly fee of \$37,062. The new Tier 3 Equity Execution Venues would be required to pay a quarterly fee of \$21,126. The new Tier 4 Equity Execution Venues, which would include the smallest Equity Execution Venues by share volume, would be required to pay a quarterly fee of \$129.

In developing the proposed four tier structure, the Operating Committee considered keeping the existing two tiers, as well as shifting to three, four or five Equity Execution Venue tiers (the maximum number of tiers permitted under the Plan), to address the concerns regarding small Equity Execution

Venues. For each of the two, three, four and five tier alternatives, the Operating Committee considered the assignment of various percentages of Equity Execution Venues to each tier as well as various percentage of Equity Execution Venue recovery allocations for each alternative. As discussed below in more detail, each of these options was considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined that the four tier alternative addressed the spectrum of different Equity Execution Venues. The Operating Committee determined that neither a two tier structure nor a three tier structure sufficiently accounted for the range of market shares of smaller Equity Execution Venues. The Operating Committee also determined that, given the limited number of Equity Execution Venues, that a fifth tier was unnecessary to address the range of market shares of the Equity Execution Venues.

By increasing the number of tiers for Equity Execution Venues and reducing the proposed CAT Fees for the smaller Equity Execution Venues, the Operating Committee believes that the proposed fees for Equity Execution Venues would not impose an undue or inappropriate burden on competition under Section 6 or Section 15A of the Exchange Act. Moreover, the Operating Committee believes that the proposed fees appropriately take into account the distinctions in the securities trading operations of different Equity Execution Venues, as required under the funding principles of the CAT NMS Plan.⁶⁷ The larger number of tiers more closely tracks the variety of sizes of equity share volume of Equity Execution Venues. In addition, the reduction in the fees for the smaller Equity Execution Venues recognizes the potential burden of larger fees on smaller entities. In particular, the very small quarterly fee of \$129 for Tier 4 Equity Execution Venues reflects the fact that certain Equity Execution Venues have a very small share volume due to their typically more focused business models.

Accordingly, with this Amendment, SRO proposes to amend paragraph (b)(2) of the proposed fee schedule to add the two additional tiers for Equity Execution Venues, to establish the percentages and fees for Tiers 3 and 4 as described, and to revise the percentages and fees for Tiers 1 and 2 as described.

(ii) Execution Venues for OTC Equity Securities

In the Original Proposal, the Operating Committee proposed to group Execution Venues for OTC Equity Securities and Execution Venues for NMS Stocks in the same tier structure. The Commission and commenters raised concerns as to whether this determination to place Execution Venues for OTC Equity Securities in the same tier structure as Execution Venues for NMS Stocks would result in an undue or inappropriate burden on competition, recognizing that the application of share volume may lead to different outcomes as applied to OTC Equity Securities and NMS Stocks.⁶⁸ To address this concern, the Operating Committee proposes to discount the market share of Execution Venue ATSS exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF by the average shares per trade ratio between NMS Stocks and OTC Equity Securities (0.17% for the second quarter of 2017) in order to adjust for the greater number of shares being traded in the OTC Equity Securities market, which is generally a function of a lower per share price for OTC Equity Securities when compared to NMS Stocks.

As commenters noted, many OTC Equity Securities are priced at less than one dollar—and a significant number at less than one penny—and low-priced shares tend to trade in larger quantities. Accordingly, a disproportionately large number of shares are involved in transactions involving OTC Equity Securities versus NMS Stocks, which has the effect of overstating an Execution Venue's true market share when the Execution Venue is involved in the trading of OTC Equity Securities. Because the proposed fee tiers are based on market share calculated by share volume, Execution Venue ATSS trading OTC Equity Securities and FINRA may be subject to higher tiers than their operations may warrant.⁶⁹ The Operating Committee proposes to address this concern in two ways. First, the Operating Committee proposes to increase the number of Equity Execution Venue tiers, as discussed above. Second, the Operating Committee determined to discount the market share of Execution Venue ATSS exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF when calculating their tier placement. Because the disparity in share volume between Execution Venues trading in OTC

⁶⁵ See Suspension Order at 31664; SIFMA Letter at 3.

⁶⁶ Note that while these equity market share thresholds were referenced as data points to help differentiate between Equity Execution Venue tiers, the proposed funding model is directly driven not by market share thresholds, but rather by fixed percentages of Equity Execution Venues across tiers to account for fluctuating levels of market share across time. Actual market share in any tier will vary based on the actual market activity in a given measurement period, as well as the number of Equity Execution Venues included in the measurement period.

⁶⁷ Section 11.2(b) of the CAT NMS Plan.

⁶⁸ See Suspension Order at 31664–5.

⁶⁹ Suspension Order at 31664–5.

Equity Securities and NMS Stocks is based on the different number of shares per trade for OTC Equity Securities and NMS Stocks, the Operating Committee believes that discounting the share volume of such Execution Venue ATSS as well as the market share of the FINRA ORF would address the difference in shares per trade for OTC Equity Securities and NMS Stocks. Specifically, the Operating Committee proposes to impose a discount based on the objective measure of the average shares per trade ratio between NMS Stocks and OTC Equity Securities. Based on available data from the second quarter of 2017, the average shares per trade ratio between NMS Stocks and OTC Equity Securities is 0.17%.

The practical effect of applying such a discount for trading in OTC Equity Securities is to shift Execution Venue ATSS exclusively trading OTC Equity Securities to tiers for smaller Execution Venues and with lower fees. For example, under the Original Proposal, one Execution Venue ATSS exclusively trading OTC Equity Securities was placed in the first CAT Fee tier, which had a quarterly fee of \$63,375. With the imposition of the proposed tier changes and the discount, this ATSS would be ranked in Tier 3 and would owe a quarterly fee of \$21,126.

In developing the proposed discount for Equity Execution Venue ATSS exclusively trading OTC Equity Securities and FINRA, the Operating Committee evaluated different alternatives to address the concerns related to OTC Equity Securities, including creating a separate tier structure for Execution Venues trading OTC Equity Securities (like the separate tier for Options Execution Venues) as well as the proposed discounting method for Execution Venue ATSS exclusively trading OTC Equity Securities and FINRA. For these alternatives, the Operating Committee considered how each alternative would affect the recovery allocations. In addition, each of these options was considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee did not adopt a separate tier structure for Equity Execution Venues trading OTC Equity Securities as they determined that the proposed discount approach appropriately addresses the concern. The Operating Committee determined to adopt the proposed discount because it directly relates to the concern regarding the trading patterns and operations in

the OTC Equity Securities markets, and is an objective discounting method.

By increasing the number of tiers for Equity Execution Venues and imposing a discount on the market share of share volume calculation for trading in OTC Equity Securities, the Operating Committee believes that the proposed fees for Equity Execution Venues would not impose an undue or inappropriate burden on competition under Section 6 or Section 15A of the Exchange Act. Moreover, the Operating Committee believes that the proposed fees appropriately take into account the distinctions in the securities trading operations of different Equity Execution Venues, as required under the funding principles of the CAT NMS Plan.⁷⁰ As discussed above, the larger number of tiers more closely tracks the variety of sizes of equity share volume of Equity Execution Venues. In addition, the proposed discount recognizes the different types of trading operations at Equity Execution Venues trading OTC Equity Securities versus those trading NMS Stocks, thereby more closely matching the relative revenue generation by Equity Execution Venues trading OTC Equity Securities to their CAT Fees.

Accordingly, with this Amendment, SRO proposes to amend paragraph (b)(2) of the proposed fee schedule to indicate that the market share for Equity ATSS exclusively trading OTC Equity Securities as well as the market share of the FINRA ORF would be discounted. In addition, as discussed above, to address concerns related to smaller ATSS, including those that exclusively trade OTC Equity Securities, SRO proposes to amend paragraph (b)(2) of the proposed fee schedule to add two additional tiers for Equity Execution Venues, to establish the percentages and fees for Tiers 3 and 4 as described, and to revise the percentages and fees for Tiers 1 and 2 as described.

(B) Market Makers

In the Original Proposal, the Operating Committee proposed to include both Options Market Maker quotes and equities market maker quotes in the calculation of total message traffic for such market makers for purposes of tiering for Industry Members (other than Execution Venue ATSS). The Commission and commenters raised questions as to whether the proposed treatment of Options Market Maker quotes may result in an undue or inappropriate burden on competition or may lead to

a reduction in market quality.⁷¹ To address this concern, the Operating Committee determined to discount the Options Market Maker quotes by the trade to quote ratio for options when calculating message traffic for Options Market Makers. Similarly, to avoid disincentives to quoting behavior on the equities side as well, the Operating Committee determined to discount equity market maker quotes by the trade to quote ratio for equities when calculating message traffic for equities market makers.

In the Original Proposal, market maker quotes were treated the same as other message traffic for purposes of tiering for Industry Members (other than Execution Venue ATSS). Commenters noted, however, that charging Industry Members on the basis of message traffic will impact market makers disproportionately because of their continuous quoting obligations. Moreover, in the context of options market makers, message traffic would include bids and offers for every listed options strikes and series, which are not an issue for equities.⁷² The Operating Committee proposes to address this concern in two ways. First, the Operating Committee proposes to discount Options Market Maker quotes when calculating the Options Market Makers' tier placement. Specifically, the Operating Committee proposes to impose a discount based on the objective measure of the trade to quote ratio for options. Based on available data from June 2016 through June 2017, the trade to quote ratio for options is 0.01%. Second, the Operating Committee proposes to discount equities market maker quotes when calculating the equities market makers' tier placement. Specifically, the Operating Committee proposes to impose a discount based on the objective measure of the trade to quote ratio for equities. Based on available data for June 2016 through June 2017, this trade to quote ratio for equities is 5.43%.

The practical effect of applying such discounts for quoting activity is to shift market makers' calculated message traffic lower, leading to the potential shift to tiers for lower message traffic and reduced fees. Such an approach would move sixteen Industry Member CAT Reporters that are market makers to a lower tier than in the Original Proposal. For example, under the

⁷¹ See Suspension Order at 31663–4; SIFMA Letter at 4–6; FIA Principal Traders Group Letter at 3; Sidley Letter at 2–6; Group One Letter at 2–6; and Belvedere Letter at 2.

⁷² Suspension Order at 31664.

⁷⁰ Section 11.2(b) of the CAT NMS Plan.

Original Proposal, Broker-Dealer Firm ABC was placed in the first CAT Fee tier, which had a quarterly fee of \$101,004. With the imposition of the proposed tier changes and the discount, Broker-Dealer Firm ABC, an options market maker, would be ranked in Tier 3 and would owe a quarterly fee of \$40,899.

In developing the proposed market maker discounts, the Operating Committee considered various discounts for Options Market Makers and equity market makers, including discounts of 50%, 25%, 0.00002%, as well as the 5.43% for option market makers and 0.01% for equity market makers. Each of these options were considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined to adopt the proposed discount because it directly relates to the concern regarding the quoting requirement, is an objective discounting method, and has the desired potential to shift market makers to lower fee tiers.

By imposing a discount on Options Market Makers and equities market makers' quoting traffic for the calculation of message traffic, the Operating Committee believes that the proposed fees for market makers would not impose an undue or inappropriate burden on competition under Section 6 or Section 15A of the Exchange Act. Moreover, the Operating Committee believes that the proposed fees appropriately take into account the distinctions in the securities trading operations of different Industry Members, and avoid disincentives, such as a reduction in market quality, as required under the funding principles of the CAT NMS Plan.⁷³ The proposed discounts recognize the different types of trading operations presented by Options Market Makers and equities market makers, as well as the value of the market makers' quoting activity to the market as a whole. Accordingly, the Operating Committee believes that the proposed discounts will not impact the ability of small Options Market Makers or equities market makers to provide liquidity.

Accordingly, with this Amendment, SRO proposes to amend paragraph (b)(1) of the proposed fee schedule to indicate that the message traffic related to equity market maker quotes and Options Market Maker quotes would be discounted. In addition, SRO proposes to define the term "Options Market

Maker" in paragraph (a)(1) of the proposed fee schedule.

(C) Comparability/Allocation of Costs

Under the Original Proposal, 75% of CAT costs were allocated to Industry Members (other than Execution Venue ATSSs) and 25% of CAT costs were allocated to Execution Venues. This cost allocation sought to maintain the greatest level of comparability across the funding model, where comparability considered affiliations among or between CAT Reporters. The Commission and commenters expressed concerns regarding whether the proposed 75%/25% allocation of CAT costs is consistent with the Plan's funding principles and the Exchange Act, including whether the allocation places a burden on competition or reduces market quality. The Commission and commenters also questioned whether the approach of accounting for affiliations among CAT Reporters in setting CAT Fees disadvantages non-affiliated CAT Reporters or otherwise burdens competition in the market for trading services.⁷⁴

In response to these concerns, the Operating Committee determined to revise the proposed funding model to focus the comparability of CAT Fees on the individual entity level, rather than primarily on the comparability of affiliated entities. In light of the interconnected nature of the various aspects of the funding model, the Operating Committee determined to revise various aspects of the model to enhance comparability at the individual entity level. Specifically, to achieve such comparability, the Operating Committee determined to (1) decrease the number of tiers for Industry Members (other than Execution Venue ATSSs) from nine to seven; (2) change the allocation of CAT costs between Equity Execution Venues and Options Execution Venues from 75%/25% to 67%/33%; and (3) adjust tier percentages and recovery allocations for Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSSs). With these changes, the proposed funding model provides fee comparability for the largest individual entities, with the largest Industry Members (other than Execution Venue ATSSs), Equity Execution Venues and Options Execution Venues each paying a CAT Fee of approximately \$81,000 each quarter.

(i) Number of Industry Member Tiers

In the Original Proposal, the proposed funding model had nine tiers for Industry Members (other than Execution Venue ATSSs). The Operating Committee determined that reducing the number of tiers from nine tiers to seven tiers (and adjusting the predefined Industry Member Percentages as well) continues to provide a fair allocation of fees among Industry Members and appropriately distinguishes between Industry Members with differing levels of message traffic. In reaching this conclusion, the Operating Committee considered historical message traffic generated by Industry Members across all exchanges and as submitted to FINRA's OATS, and considered the distribution of firms with similar levels of message traffic, grouping together firms with similar levels of message traffic. Based on this, the Operating Committee determined that seven tiers would group firms with similar levels of message traffic, while also achieving greater comparability in the model for the individual CAT Reporters with the greatest market share or message traffic.

In developing the proposed seven tier structure, the Operating Committee considered remaining at nine tiers, as well as reducing the number of tiers down to seven when considering how to address the concerns raised regarding comparability. For each of the alternatives, the Operating Committee considered the assignment of various percentages of Industry Members to each tier as well as various percentages of Industry Member recovery allocations for each alternative. Each of these options was considered in the context of its effects on the full funding model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined that the seven tier alternative provided the most fee comparability at the individual entity level for the largest CAT Reporters, while both providing logical breaks in tiering for Industry Members with different levels of message traffic and a sufficient number of tiers to provide for the full spectrum of different levels of message traffic for all Industry Members.

(ii) Allocation of CAT Costs Between Equity and Options Execution Venues

The Operating Committee also determined to adjust the allocation of CAT costs between Equity Execution Venues and Options Execution Venues to enhance comparability at the individual entity level. In the Original

⁷⁴ See Suspension Order at 31662-3; SIFMA Letter at 3; Sidley Letter at 6-7; Group One Letter at 2; and Belvedere Letter at 2.

⁷³ Section 11.2(b) of the CAT NMS Plan.

Proposal, 75% of Execution Venue CAT costs were allocated to Equity Execution Venues, and 25% of Execution Venue CAT costs were allocated to Options Execution Venues. To achieve the goal of increased comparability at the individual entity level, the Operating Committee analyzed a range of alternative splits for revenue recovery between Equity and Options Execution Venues, along with other changes in the proposed funding model. Based on this analysis, the Operating Committee determined to allocate 67 percent of Execution Venue costs recovered to Equity Execution Venues and 33 percent to Options Execution Venues. The Operating Committee determined that a 67/33 allocation between Equity and Options Execution Venues enhances the level of fee comparability for the largest CAT Reporters. Specifically, the largest Equity and Options Execution Venues would pay a quarterly CAT Fee of approximately \$81,000.

In developing the proposed allocation of CAT costs between Equity and Options Execution Venues, the Operating Committee considered various different options for such allocation, including keeping the original 75%/25% allocation, as well as shifting to a 70%/30%, 67%/33%, or 57.75%/42.25% allocation. For each of the alternatives, the Operating Committee considered the effect each allocation would have on the assignment of various percentages of Equity Execution Venues to each tier as well as various percentages of Equity Execution Venue recovery allocations for each alternative. Moreover, each of these options was considered in the context of the full model, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. The Operating Committee determined that the 67%/33% allocation between Equity and Options Execution Venues provided the greatest level of fee comparability at the individual entity level for the largest CAT Reporters, while still providing for appropriate fee levels across all tiers for all CAT Reporters.

(iii) Allocation of Costs Between Execution Venues and Industry Members

The Operating Committee determined to allocate 25% of CAT costs to Execution Venues and 75% to Industry Members (other than Execution Venue ATSSs), as it had in the Original Proposal. The Operating Committee determined that this 75%/25% allocation, along with the other changes proposed above, led to the most

comparable fees for the largest Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSSs). The largest Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSSs) would each pay a quarterly CAT Fee of approximately \$81,000.

As a preliminary matter, the Operating Committee determined that it is appropriate to allocate most of the costs to create, implement and maintain the CAT to Industry Members for several reasons. First, there are many more broker-dealers expected to report to the CAT than Participants (*i.e.*, 1,541 broker-dealer CAT Reporters versus 22 Participants). Second, since most of the costs to process CAT reportable data is generated by Industry Members, Industry Members could be expected to contribute toward such costs. Finally, as noted by the SEC, the CAT “substantially enhance[s] the ability of the SROs and the Commission to oversee today’s securities markets,”⁷⁵ thereby benefitting all market participants. After making this determination, the Operating Committee analyzed several different cost allocations, as discussed further below, and determined that an allocation where 75% of the CAT costs should be borne by the Industry Members (other than Execution Venue ATSSs) and 25% should be paid by Execution Venues was most appropriate and led to the greatest comparability of CAT Fees for the largest CAT Reporters.

In developing the proposed allocation of CAT costs between Execution Venues and Industry Members (other than Execution Venue ATSSs), the Operating Committee considered various different options for such allocation, including keeping the original 75%/25% allocation, as well as shifting to an 80%/20%, 70%/30%, or 65%/35% allocation. Each of these options was considered in the context of the full model, including the effect on each of the changes discussed above, as changes in each variable in the model affect other variables in the model when allocating the total CAT costs among CAT Reporters. In particular, for each of the alternatives, the Operating Committee considered the effect each allocation had on the assignment of various percentages of Equity Execution Venues, Options Execution Venues and Industry Members (other than Execution Venue ATSSs) to each relevant tier as well as various percentages of recovery

allocations for each tier. The Operating Committee determined that the 75%/25% allocation between Execution Venues and Industry Members (other than Execution Venue ATSSs) provided the greatest level of fee comparability at the individual entity level for the largest CAT Reporters, while still providing for appropriate fee levels across all tiers for all CAT Reporters.

(iv) Affiliations

The funding principles set forth in Section 11.2 of the Plan require that the fees charged to CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether Execution Venue and/or Industry Members). The proposed funding model satisfies this requirement. As discussed above, under the proposed funding model, the largest Equity Execution Venues, Options Execution Venues, and Industry Members (other than Execution Venue ATSSs) pay approximately the same fee. Moreover, the Operating Committee believes that the proposed funding model takes into consideration affiliations between or among CAT Reporters as complexes with multiple CAT Reporters will pay the appropriate fee based on the proposed fee schedule for each of the CAT Reporters in the complex. For example, a complex with a Tier 1 Equity Execution Venue and Tier 2 Industry Member will pay the same as another complex with a Tier 1 Equity Execution Venue and Tier 2 Industry Member.

(v) Fee Schedule Changes

Accordingly, with this Amendment, SRO proposes to amend paragraphs (b)(1) and (2) of the proposed fee schedule to reflect the changes discussed in this section. Specifically, SRO proposes to amend paragraph (b)(1) and (2) of the proposed fee schedule to update the number of tiers, and the fees and percentages assigned to each tier to reflect the described changes.

(D) Market Share/Message Traffic

In the Original Proposal, the Operating Committee proposed to charge Execution Venues based on market share and Industry Members (other than Execution Venue ATSSs) based on message traffic. Commenters questioned the use of the two different

⁷⁵ Securities Exchange Act Rel. No. 67457 (Jul 18, 2012), 77 FR 45722, 45726 (Aug. 1, 2012) (“Rule 613 Adopting Release”).

metrics for calculating CAT Fees.⁷⁶ The Operating Committee continues to believe that the proposed use of market share and message traffic satisfies the requirements of the Exchange Act and the funding principles set forth in the CAT NMS Plan. Accordingly, the proposed funding model continues to charge Execution Venues based on market share and Industry Members (other than Execution Venue ATs) based on message traffic.

In drafting the Plan and the Original Proposal, the Operating Committee expressed the view that the correlation between message traffic and size does not apply to Execution Venues, which they described as producing similar amounts of message traffic regardless of size. The Operating Committee believed that charging Execution Venues based on message traffic would result in both large and small Execution Venues paying comparable fees, which would be inequitable, so the Operating Committee determined that it would be more appropriate to treat Execution Venues differently from Industry Members in the funding model. Upon a more detailed analysis of available data, however, the Operating Committee noted that Execution Venues have varying levels of message traffic. Nevertheless, the Operating Committee continues to believe that a bifurcated funding model—where Industry Members (other than Execution Venue ATs) are charged fees based on message traffic and Execution Venues are charged based on market share—complies with the Plan and meets the standards of the Exchange Act for the reasons set forth below.

Charging Industry Members based on message traffic is the most equitable means for establishing fees for Industry Members (other than Execution Venue ATs). This approach will assess fees to Industry Members that create larger volumes of message traffic that are relatively higher than those fees charged to Industry Members that create smaller volumes of message traffic. Since message traffic, along with fixed costs of the Plan Processor, is a key component of the costs of operating the CAT, message traffic is an appropriate criterion for placing Industry Members in a particular fee tier.

The Operating Committee also believes that it is appropriate to charge Execution Venues CAT Fees based on their market share. In contrast to Industry Members (other than Execution Venue ATs), which determine the degree to which they produce the

message traffic that constitutes CAT Reportable Events, the CAT Reportable Events of Execution Venues are largely derivative of quotations and orders received from Industry Members that the Execution Venues are required to display. The business model for Execution Venues, however, is focused on executions in their markets. As a result, the Operating Committee believes that it is more equitable to charge Execution Venues based on their market share rather than their message traffic.

Similarly, focusing on message traffic would make it more difficult to draw distinctions between large and small exchanges, including options exchanges in particular. For instance, the Operating Committee analyzed the message traffic of Execution Venues and Industry Members for the period of April 2017 to June 2017 and placed all CAT Reporters into a nine-tier framework (*i.e.*, a single tier may include both Execution Venues and Industry Members). The Operating Committee's analysis found that the majority of exchanges (15 total) were grouped in Tiers 1 and 2. Moreover, virtually all of the options exchanges were in Tiers 1 and 2.⁷⁷ Given the concentration of options exchanges in Tiers 1 and 2, the Operating Committee believes that using a funding model based purely on message traffic would make it more difficult to distinguish between large and small options exchanges, as compared to the proposed bifurcated fee approach.

In addition, the Operating Committee also believes that it is appropriate to treat ATs as Execution Venues under the proposed funding model since ATs have business models that are similar to those of exchanges, and ATs also compete with exchanges. For these reasons, the Operating Committee believes that charging Execution Venues based on market share is more appropriate and equitable than charging Execution Venues based on message traffic.

(E) Time Limit

In the Original Proposal, the Operating Committee did not impose any time limit on the application of the proposed CAT Fees. As discussed above, the Operating Committee developed the proposed funding model by analyzing currently available historical data. Such historical data, however, is not as comprehensive as data that will be submitted to the CAT.

Accordingly, the Operating Committee believes that it will be appropriate to revisit the funding model once CAT Reporters have actual experience with the funding model. Accordingly, the Operating Committee proposes to include a sunset provision in the proposed fee model. The proposed CAT Fees will sunset two years after the operative date of the CAT NMS Plan amendment adopting CAT Fees for Participants. Specifically, SRO proposes to add paragraph (d) of the proposed fee schedule to include this sunset provision. Such a provision will provide the Operating Committee and other market participants with the opportunity to reevaluate the performance of the proposed funding model.

(F) Tier Structure/Decreasing Cost per Unit

In the Original Proposal, the Operating Committee determined to use a tiered fee structure. The Commission and commenters questioned whether the decreasing cost per additional unit (of message traffic in the case of Industry Members, or of share volume in the case of Execution Venues) in the proposed fee schedules burdens competition by disadvantaging small Industry Members and Execution Venues and/or by creating barriers to entry in the market for trading services and/or the market for broker-dealer services.⁷⁸

The Operating Committee does not believe that decreasing cost per additional unit in the proposed fee schedules places an unfair competitive burden on Small Industry Members and Execution Venues. While the cost per unit of message traffic or share volume necessarily will decrease as volume increases in any tiered fee model using fixed fee percentages and, as a result, Small Industry Members and small Execution Venues may pay a larger fee per message or share, this comment fails to take account of the substantial differences in the absolute fees paid by Small Industry Members and small Execution Venues as opposed to large Industry Members and large Execution Venues. For example, under the fee proposals, Tier 7 Industry Members would pay a quarterly fee of \$105, while Tier 1 Industry Members would pay a quarterly fee of \$81,483. Similarly, a Tier 4 Equity Execution Venue would pay a quarterly fee of \$129, while a Tier 1 Equity Execution Venue would pay a quarterly fee of \$81,048. Thus, Small Industry Members and small Execution Venues are not disadvantaged in terms

⁷⁶ Suspension Order at 31663; FIA Principal Traders Group Letter at 2.

⁷⁷ The Participants note that this analysis did not place MIAx PEARL in Tier 1 or Tier 2 since the exchange commenced trading on February 6, 2017.

⁷⁸ Suspension Order at 31667.

of the total fees that they actually pay. In contrast to a tiered model using fixed fee percentages, the Operating Committee believes that strictly variable or metered funding models based on message traffic or share volume would be more likely to affect market behavior and may present administrative challenges (e.g., the costs to calculate and monitor fees may exceed the fees charged to the smallest CAT Reporters).

(G) Other Alternatives Considered

In addition to the various funding model alternatives discussed above regarding discounts, number of tiers and allocation percentages, the Operating Committee also discussed other possible funding models. For example, the Operating Committee considered allocating the total CAT costs equally among each of the Participants, and then permitting each Participant to charge its own members as it deems appropriate.⁷⁹ The Operating Committee determined that such an approach raised a variety of issues, including the likely inconsistency of the ensuing charges, potential for lack of transparency, and the impracticality of multiple SROs submitting invoices for CAT charges. The Operating Committee therefore determined that the proposed funding model was preferable to this alternative.

(H) Industry Member Input

Commenters expressed concern regarding the level of Industry Member input into the development of the proposed funding model, and certain commenters have recommended a greater role in the governance of the CAT.⁸⁰ The Participants previously addressed this concern in its letters responding to comments on the Plan and the CAT Fees.⁸¹ As discussed in those letters, the Participants discussed the funding model with the Development Advisory Group (“DAG”), the advisory group formed to assist in the development of the Plan, during its original development.⁸² Moreover, Industry Members currently have a voice in the affairs of the Operating Committee and operation of the CAT generally through the Advisory Committee established pursuant to Rule 613(b)(7) and Section 4.13 of the Plan.

⁷⁹ See FIA Principal Traders Group Letter at 2; Belvedere Letter at 4.

⁸⁰ See Suspension Order at 31662; MFA Letter at 1–2.

⁸¹ Letter from Participants to Brent J. Fields, Secretary, SEC (Sept. 23, 2016) (“Plan Response Letter”); Letter from CAT NMS Plan Participants to Brent J. Fields, Secretary, SEC (June 29, 2017) (“Fee Rule Response Letter”).

⁸² Fee Rule Response Letter at 2; Plan Response Letter at 18.

The Advisory Committee attends all meetings of the Operating Committee, as well as meetings of various subcommittees and working groups, and provides valuable and critical input for the Participants’ and Operating Committee’s consideration. The Operating Committee continues to believe that that Industry Members have an appropriate voice regarding the funding of the Company.

(I) Conflicts of Interest

Commenters also raised concerns regarding Participant conflicts of interest in setting the CAT Fees.⁸³ The Participants previously responded to this concern in both the Plan Response Letter and the Fee Rule Response Letter.⁸⁴ As discussed in those letters, the Plan, as approved by the SEC, adopts various measures to protect against the potential conflicts issues raised by the Participants’ fee-setting authority. Such measures include the operation of the Company as a not for profit business league and on a break-even basis, and the requirement that the Participants file all CAT Fees under Section 19(b) of the Exchange Act. The Operating Committee continues to believe that these measures adequately protect against concerns regarding conflicts of interest in setting fees, and that additional measures, such as an independent third party to evaluate an appropriate CAT Fee, are unnecessary.

(J) Fee Transparency

Commenters also argued that they could not adequately assess whether the CAT Fees were fair and equitable because the Operating Committee has not provided details as to what the Participants are receiving in return for the CAT Fees.⁸⁵ The Operating Committee provided a detailed discussion of the proposed funding model in the Plan, including the expenses to be covered by the CAT Fees. In addition, the agreement between the Company and the Plan Processor sets forth a comprehensive set of services to be provided to the Company with regard to the CAT. Such services include, without limitation: User support services (e.g., a help desk); tools to allow each CAT Reporter to monitor and correct their submissions; a comprehensive compliance program to monitor CAT Reporters’ adherence to Rule 613; publication of detailed Technical Specifications for Industry

⁸³ See Suspension Order at 31662; FIA Principal Traders Group at 3.

⁸⁴ See Plan Response Letter at 16, 17; Fee Rule Response Letter at 10–12.

⁸⁵ See FIA Principal Traders Group at 3; SIFMA Letter at 3.

Members and Participants; performing data linkage functions; creating comprehensive data security and confidentiality safeguards; creating query functionality for regulatory users (i.e., the Participants, and the SEC and SEC staff); and performing billing and collection functions. The Operating Committee further notes that the services provided by the Plan Processor and the costs related thereto were subject to a bidding process.

(K) Funding Authority

Commenters also questioned the authority of the Operating Committee to impose CAT Fees on Industry Members.⁸⁶ The Participants previously responded to this same comment in the Plan Response Letter and the Fee Rule Response Letter.⁸⁷ As the Participants previously noted, SEC Rule 613 specifically contemplates broker-dealers contributing to the funding of the CAT. In addition, as noted by the SEC, the CAT “substantially enhance[s] the ability of the SROs and the Commission to oversee today’s securities markets,”⁸⁸ thereby benefitting all market participants. Therefore, the Operating Committee continues to believe that it is equitable for both Participants and Industry Members to contribute to funding the cost of the CAT.

2. Statutory Basis

SRO believes that the proposed rule change is consistent with the provisions of Section 6(b)(5) of the Act,⁸⁹ which require, among other things, that the SRO rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest, and not designed to permit unfair discrimination between customers, issuers, brokers and dealer, and Section 6(b)(4) of the Act,⁹⁰ which requires that SRO rules provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using its facilities. As discussed above, the SEC approved the bifurcated, tiered, fixed fee funding model in the CAT NMS Plan, finding it was reasonable and that it equitably allocated fees among Participants and Industry Members. SRO believes that the proposed tiered fees adopted pursuant to the funding model approved by the SEC in the CAT

⁸⁶ See Suspension Order at 31661–2; SIFMA Letter at 2.

⁸⁷ See Plan Response Letter at 9–10; Fee Rule Response Letter at 3–4.

⁸⁸ Rule 613 Adopting Release at 45726.

⁸⁹ 15 U.S.C. 78f(b)(5).

⁹⁰ 15 U.S.C. 78f(b)(4).

NMS Plan are reasonable, equitably allocated and not unfairly discriminatory.

SRO believes that this proposal is consistent with the Act because it implements, interprets or clarifies the provisions of the Plan, and is designed to assist SRO and its Industry Members in meeting regulatory obligations pursuant to the Plan. In approving the Plan, the SEC noted that the Plan “is necessary and appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanism of a national market system, or is otherwise in furtherance of the purposes of the Act.”⁹¹ To the extent that this proposal implements, interprets or clarifies the Plan and applies specific requirements to Industry Members, SRO believes that this proposal furthers the objectives of the Plan, as identified by the SEC, and is therefore consistent with the Act.

SRO believes that the proposed tiered fees are reasonable. First, the total CAT Fees to be collected would be directly associated with the costs of establishing and maintaining the CAT, where such costs include Plan Processor costs and costs related to insurance, third party services and the operational reserve. The CAT Fees would not cover Participant services unrelated to the CAT. In addition, any surplus CAT Fees cannot be distributed to the individual Participants; such surpluses must be used as a reserve to offset future fees. Given the direct relationship between the fees and the CAT costs, SRO believes that the total level of the CAT Fees is reasonable.

In addition, SRO believes that the proposed CAT Fees are reasonably designed to allocate the total costs of the CAT equitably between and among the Participants and Industry Members, and are therefore not unfairly discriminatory. As discussed in detail above, the proposed tiered fees impose comparable fees on similarly situated CAT Reporters. For example, those with a larger impact on the CAT (measured via message traffic or market share) pay higher fees, whereas CAT Reporters with a smaller impact pay lower fees. Correspondingly, the tiered structure lessens the impact on smaller CAT Reporters by imposing smaller fees on those CAT Reporters with less market share or message traffic. In addition, the fee structure takes into consideration distinctions in securities trading operations of CAT Reporters, including ATSS trading OTC Equity Securities, and equity and options market makers.

Moreover, SRO believes that the division of the total CAT costs between Industry Members and Execution Venues, and the division of the Execution Venue portion of total costs between Equity and Options Execution Venues, is reasonably designed to allocate CAT costs among CAT Reporters. The 75%/25% division between Industry Members (other than Execution Venue ATSSs) and Execution Venues maintains the greatest level of comparability across the funding model. For example, the cost allocation establishes fees for the largest Industry Members (*i.e.*, those Industry Members in Tiers 1) that are comparable to the largest Equity Execution Venues and Options Execution Venues (*i.e.*, those Execution Venues in Tier 1). Furthermore, the allocation of total CAT cost recovery recognizes the difference in the number of CAT Reporters that are Industry Members (other than Execution Venue ATSSs) versus CAT Reporters that are Execution Venues. Similarly, the 67%/33% allocation between Equity and Options Execution Venues also helps to provide fee comparability for the largest CAT Reporters.

Finally, SRO believes that the proposed fees are reasonable because they would provide ease of calculation, ease of billing and other administrative functions, and predictability of a fixed fee. Such factors are crucial to estimating a reliable revenue stream for the Company and for permitting CAT Reporters to reasonably predict their payment obligations for budgeting purposes.

(B) Self-Regulatory Organization’s Statement on Burden on Competition

Section 6(b)(8) of the Act⁹² require that SRO rules not impose any burden on competition that is not necessary or appropriate. SRO does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. SRO notes that the proposed rule change implements provisions of the CAT NMS Plan approved by the Commission, and is designed to assist SRO in meeting its regulatory obligations pursuant to the Plan. Similarly, all national securities exchanges and FINRA are proposing this proposed fee schedule to implement the requirements of the CAT NMS Plan. Therefore, this is not a competitive fee filing and, therefore, it does not raise competition issues between and among the exchanges and FINRA.

Moreover, as previously described, SRO believes that the proposed rule change fairly and equitably allocates costs among CAT Reporters. In particular, the proposed fee schedule is structured to impose comparable fees on similarly situated CAT Reporters, and lessen the impact on smaller CAT Reporters. CAT Reporters with similar levels of CAT activity will pay similar fees. For example, Industry Members (other than Execution Venue ATSSs) with higher levels of message traffic will pay higher fees, and those with lower levels of message traffic will pay lower fees. Similarly, Execution Venue ATSSs and other Execution Venues with larger market share will pay higher fees, and those with lower levels of market share will pay lower fees. Therefore, given that there is generally a relationship between message traffic and/or market share to the CAT Reporter’s size, smaller CAT Reporters generally pay less than larger CAT Reporters. Accordingly, SRO does not believe that the CAT Fees would have a disproportionate effect on smaller or larger CAT Reporters. In addition, ATSSs and exchanges will pay the same fees based on market share. Therefore, SRO does not believe that the fees will impose any burden on the competition between ATSSs and exchanges. Accordingly, SRO believes that the proposed fees will minimize the potential for adverse effects on competition between CAT Reporters in the market.

Furthermore, the tiered, fixed fee funding model limits the disincentives to providing liquidity to the market. Therefore, the proposed fees are structured to limit burdens on competitive quoting and other liquidity provision in the market.

In addition, the Operating Committee believes that the proposed changes to the Original Proposal, as discussed above in detail, address certain competitive concerns raised by commenters, including concerns related to, among other things, smaller ATSSs, ATSSs trading OTC Equity Securities, market making quoting and fee comparability. As discussed above, the Operating Committee believes that the proposals address the competitive concerns raised by commenters.

(C) Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

SRO has set forth responses to comments received regarding the Original Proposal in Section 3(a)(4) above.

⁹¹ Approval Order at 84697.

⁹² 15 U.S.C. 78f(b)(8)

III. Solicitation of Comments on Amendment No. 1

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment No. 1 is consistent with the Act. In particular, the Commission seeks comment on the following:

Allocation of Costs

(1) Commenters' views as to whether the allocation of CAT costs is consistent with the funding principle expressed in the CAT NMS Plan that requires the Operating Committee to "avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality."⁹³

(2) Commenters' views as to whether the allocation of 25% of CAT costs to the Execution Venues (including all the Participants) and 75% to Industry Members, will incentivize or disincentivize the Participants to effectively and efficiently manage the CAT costs incurred by the Participants since they will only bear 25% of such costs.

(3) Commenters' views on the determination to allocate 75% of all costs incurred by the Participants from November 21, 2016 to November 21, 2017 to Industry Members (other than Execution Venue ATSSs), when such costs are development and build costs and when Industry Member reporting is scheduled to commence a year later, including views on whether such "fees, costs and expenses . . . [are] fairly and reasonably shared among the Participants and Industry Members" in accordance with the CAT NMS Plan.⁹⁴

(4) Commenters' views on whether an analysis of the ratio of the expected Industry Member-reported CAT messages to the expected SRO-reported CAT messages should be the basis for determining the allocation of costs between Industry Members and Execution Venues.⁹⁵

(5) Any additional data analysis on the allocation of CAT costs, including any existing supporting evidence.

Comparability

(6) Commenters' views on the shift in the standard used to assess the comparability of CAT Fees, with the

emphasis now on comparability of individual entities instead of affiliated entities, including views as to whether this shift is consistent with the funding principle expressed in the CAT NMS Plan that requires the Operating Committee to establish a fee structure in which the fees charged to "CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether Execution Venues and/or Industry Members)."⁹⁶

(7) Commenters' views as to whether the reduction in the number of tiers for Industry Members (other than Execution Venue ATSSs) from nine to seven, the revised allocation of CAT costs between Equity Execution Venues and Options Execution Venues from a 75%/25% split to a 67%/33% split, and the adjustment of all tier percentages and recovery allocations achieves comparability across individual entities, and whether these changes should have resulted in a change to the allocation of 75% of total CAT costs to Industry Members (other than Execution Venue ATSSs) and 25% of such costs to Execution Venues.

Discounts

(8) Commenters' views as to whether the discounts for options market-makers, equities market-makers, and Equity ATSSs trading OTC Equity Securities are clear, reasonable, and consistent with the funding principle expressed in the CAT NMS Plan that requires the Operating Committee to "avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality,"⁹⁷ including views as to whether the discounts for market-makers limit any potential disincentives to act as a market-maker and/or to provide liquidity due to CAT fees.

Calculation of Costs and Imposition of CAT Fees

(9) Commenters' views as to whether the amendment provides sufficient information regarding the amount of costs incurred from November 21, 2016 to November 21, 2017, particularly, how those costs were calculated, how those costs relate to the proposed CAT Fees, and how costs incurred after November 21, 2017 will be assessed upon Industry Members and Execution Venues;

(10) Commenters' views as to whether the timing of the imposition and collection of CAT Fees on Execution Venues and Industry Members is reasonably related to the timing of when the Company expects to incur such development and implementation costs.⁹⁸

(11) Commenters' views on dividing CAT costs equally among each of the Participants, and then each Participant charging its own members as it deems appropriate, taking into consideration the possibility of inconsistency in charges, the potential for lack of transparency, and the impracticality of multiple SROs submitting invoices for CAT charges.

Burden on Competition and Barriers to Entry

(12) Commenters' views as to whether the allocation of 75% of CAT costs to Industry Members (other than Execution Venue ATSSs) imposes any burdens on competition to Industry Members, including views on what baseline competitive landscape the Commission should consider when analyzing the proposed allocation of CAT costs.

(13) Commenters' views on the burdens on competition, including the relevant markets and services and the impact of such burdens on the baseline competitive landscape in those relevant markets and services.

(14) Commenters' views on any potential burdens imposed by the fees on competition between and among CAT Reporters, including views on which baseline markets and services the fees could have competitive effects on and whether the fees are designed to minimize such effects.

(15) Commenters' general views on the impact of the proposed fees on economies of scale and barriers to entry.

(16) Commenters' views on the baseline economies of scale and barriers to entry for Industry Members and Execution Venues and the relevant markets and services over which these economies of scale and barriers to entry exist.

(17) Commenters' views as to whether a tiered fee structure necessarily results in less active tiers paying more per unit than those in more active tiers, thus creating economies of scale, with supporting information if possible.

(18) Commenters' views as to how the level of the fees for the least active tiers would or would not affect barriers to entry.

(19) Commenters' views on whether the difference between the cost per unit (messages or market share) in less active

⁹³ Section 11.2(e) of the CAT NMS Plan.

⁹⁴ Section 11.1(c) of the CAT NMS Plan.

⁹⁵ The Notice for the CAT NMS Plan did not provide a comprehensive count of audit trail message traffic from different regulatory data sources, but the Commission did estimate the ratio of all SRO audit trail messages to OATS audit trail messages to be 1.9431. See Securities Exchange Act Release No. 77724 (April 27, 2016), 81 FR 30613, 30721 n.919 and accompanying text (May 17, 2016).

⁹⁶ Section 11.2(c) of the CAT NMS Plan.

⁹⁷ Section 11.2(e) of the CAT NMS Plan.

⁹⁸ Section 11.1(c) of the CAT NMS Plan.

tiers compared to the cost per unit in more active tiers creates regulatory economies of scale that favor larger competitors and, if so:

(a) How those economies of scale compare to operational economies of scale; and

(b) Whether those economies of scale reduce or increase the current advantages enjoyed by larger competitors or otherwise alter the competitive landscape.

(20) Commenters' views on whether the fees could affect competition between and among national securities exchanges and FINRA, in light of the fact that implementation of the fees does not require the unanimous consent of all such entities, and, specifically:

(a) Whether any of the national securities exchanges or FINRA are disadvantaged by the fees; and

(b) If so, whether any such disadvantages would be of a magnitude that would alter the competitive landscape.

(21) Commenters' views on any potential burden imposed by the fees on competitive quoting and other liquidity provision in the market, including, specifically:

(a) Commenters' views on the kinds of disincentives that discourage liquidity provision and/or disincentives that the Commission should consider in its analysis;

(b) Commenters' views as to whether the fees could disincentivize the provision of liquidity; and

(c) Commenters' views as to whether the fees limit any disincentives to provide liquidity.

(22) Commenters' views as to whether the amendment adequately responds to and/or addresses comments received on related filings.

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-BatsBYX-2017-11 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-BatsBYX-2017-11. 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 website (<http://www.sec.gov/>

[rules/sro.shtml](http://www.sec.gov/rules/sro.shtml)). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-BatsBYX-2017-11, and should be submitted on or before January 4, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁹⁹

Robert W. Errett,
Deputy Secretary.

[FR Doc. 2017-26996 Filed 12-13-17; 8:45 am]

BILLING CODE 8011-01-P

SMALL BUSINESS ADMINISTRATION

Agency Information Collection Activities: Proposed Collection; Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery

AGENCY: Small Business Administration.
ACTION: 30-day notice and request for comments.

SUMMARY: The U.S. Small Business Administration (SBA) is submitting a Generic Information Collection Request (Generic ICR): "Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery" to the Office of Management and Budget (OMB) for approval under the Paperwork Reduction Act (PRA). This information collection is part of a Federal Government-wide effort to streamline the process to seek feedback from the public on the agency's service delivery. SBA previously published a

60-day notice soliciting public comment on the proposed information collection. This 30-day notice, as required by the PRA, provides an additional opportunity for public comment on the Generic ICR.

DATES: Comments must be submitted January 16, 2018.

ADDRESSES: Send all comments to Curtis B. Rich, Agency Clearance Officer, Small Business Administration, 409 3rd Street, 5th Floor, Washington, DC 20416. (202) 205-7030 curtis.rich@sba.gov; and SBA Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Amber Chaudhry, Presidential Management Fellow, Office of Communications and Public Liaison, amber.chaudhry@sba.gov, 202-205-0085.

SUPPLEMENTARY INFORMATION:

Title: Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery.

Abstract: The information collection activity will garner qualitative customer and stakeholder feedback in an efficient, timely manner, in accordance with the Administration's commitment to improving service delivery. By qualitative feedback we mean information that provides useful insights on perceptions and opinions, but are not statistical surveys that yield quantitative results that can be generalized to the population of study. This feedback will provide insights into customer or stakeholder perceptions, experiences and expectations, provide an early warning of issues with service, or focus attention on areas where communication, training or changes in operations might improve delivery of products or services. These collections will allow for ongoing, collaborative and actionable communications between the Agency and its customers and stakeholders. It will also allow feedback to contribute directly to the improvement of program management.

Feedback collected under this generic clearance will provide useful information, but it will not yield data that can be generalized to the overall population. This type of generic clearance for qualitative information will not be used for quantitative information collections that are designed to yield reliably actionable results, such as monitoring trends over time or documenting program performance. Such data uses require more rigorous designs that address: The target population to which

⁹⁹ 17 CFR 200.30-3(a)(12).

generalizations will be made, the sampling frame, the sample design (including stratification and clustering), the precision requirements or power calculations that justify the proposed sample size, the expected response rate, methods for assessing potential non-response bias, the protocols for data collection, and any testing procedures that were or will be undertaken prior fielding the study. Depending on the degree of influence the results are likely to have, such collections may still be eligible for submission for other generic mechanisms that are designed to yield quantitative results.

The Agency did not receive any comments in response to the 60-day public comment notice published in the **Federal Register** on September 26, 2017, at 82 FR 44865.

Below we provide the SBA's projected average annual estimates for the next three years:

Current Actions: New collection of information.

Type of Review: New Collection.

Affected Public: Individuals and Households, Businesses and Organizations, State, Local or Tribal Government.

Average Expected Annual Number of Activities: 20 *Estimated Annual Respondents:* 7,500.

Estimated Annual responses: 7,500.

Frequency of Response: Once per request; on occasion.

Average Minutes per Response: 38 minutes.

Burden Hours: 2690.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB Control Number.

Curtis B. Rich,
Management Analyst.

[FR Doc. 2017-26981 Filed 12-13-17; 8:45 am]

BILLING CODE 8025-01-P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36157]

City and County of Denver— Acquisition Exemption—Western Stock Show Association in the City and County of Denver, CO

The City and County of Denver, Colo. (the City), a political subdivision of the State of Colorado and a noncarrier, has filed a verified notice of exemption under 49 CFR 1150.31 to acquire from the Western Stock Show Association (WSSA) the real property underlying two lines of railroad for a total distance of approximately 1.2 miles in the

Denver Stockyards in the City (the Lines). The Lines consist of two corridors of rail line: (1) The National Western Drive Corridor (NWD Corridor), which is adjacent to National Western Drive, from the south right-of-way line of East 47th Avenue, extending northeast and then north to the northeastern right-of-way line of Race Court; and (2) the River Corridor, which is adjacent to the east bank of the South Platte River, from the intersection with the NWD Corridor at a point just north of that corridor's southern endpoint, extending north and then northeast to an intersection with the NWD Corridor just south of Race Court.

The City states that it will acquire no right or obligation to provide freight rail service over the Lines.¹ According to the City, although WSSA owns the real property, the Lines are operated by the Denver Rock Island Railroad (DRIR), a Class III rail carrier, which owns the rail, ties, and ballast over which it conducts its service. The City states that DRIR will retain its common carrier rights to provide rail service over the Lines and ownership of the rails, ties, and track bed, and it will continue its operations on the Lines following the City's acquisition of the real property from WSSA.² According to the City, DRIR's nonexclusive freight operating easement over the Lines will remain in effect, subject to any amendments necessary to address the City's acquisition of the underlying real property and future improvements to and relocation of the Lines, on which the City states it will coordinate with DRIR.³ The City states that it will at no

¹ A motion to dismiss the notice of exemption on grounds that the transaction does not require authorization from the Board was concurrently filed with this notice of exemption. The motion to dismiss will be addressed in a subsequent Board decision.

² The City states that over time a number of railroads have operated on the Denver Stockyards. Due to acquisitions and consolidations, the City has not been able to confirm that all prior operators have either merged into DRIR or the two carriers for which the agency has authorized discontinuance of service. However, according to the City, for the past two decades DRIR has been the only freight rail operator on the Lines. The City states that it will pursue further proceedings as appropriate to resolve the status of any lingering previously granted common carrier interests.

³ The notice states that following the acquisition, the status quo would continue "with respect to freight rail operations . . . and any future alterations to the site [would] be designed to allow current operations to continue. Further Board approval would be required for DRIR to discontinue or abandon any freight service that DRIR currently offers on the line." (Notice 6-7.) The concurrently filed motion to dismiss states that the "redevelopment includes the proposed consolidation of rail operations on a single corridor." (Mot. 5.) This notice should not be construed as approving, or indicating whether Board approval would be required for, any

time have the right to interfere with DRIR's ability to fulfill its common carrier freight obligation.

The City explains that it is acquiring the property to implement a comprehensive redevelopment plan of the Denver Stockyards to: (a) Provide improved facilities for Denver's annual National Western Stock Show and Rodeo; (b) develop, in conjunction with Colorado State University (CSU), an equine sport medicine facility and stock animal research complex; (c) create additional mixed-use facilities, and (d) establish a public park. In connection with the real property acquisition and development project, the City states that the City, WSSA, and CSU entered into a Framework Agreement. As part of the agreement, the parties entered into a Real Property Conveyance Agreement that will govern the transfers of real property including the real property associated with the Lines.

The City certifies that, because it will not conduct any rail carrier operations on the Line, its projected revenues from freight operations will not result in the creation of a Class I or Class II carrier.

The City states that it expects to consummate the proposed transaction in approximately the second quarter of 2018. The earliest this transaction may be consummated is December 28, 2017, the effective date of the exemption (30 days after the verified notice of exemption was filed).

If the notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than December 21, 2017 (at least seven days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 36157, must be filed with the Surface Transportation Board, 395 E Street SW, Washington, DC 20423-0001. In addition, a copy of each pleading must be served on Charles A. Spitulnik, Kaplan Kirsch & Rockwell LLP, 1001 Connecticut Ave. NW, Suite 800, Washington, DC 20036.

Board decisions and notices are available on our website at WWW.STB.GOV.

Decided: December 11, 2017.

consolidation of track associated with the redevelopment.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.

Jeffrey Herzig,
Clearance Clerk.

[FR Doc. 2017-26969 Filed 12-13-17; 8:45 am]

BILLING CODE 4915-01-P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[FHWA Docket No. FHWA-2017-0038]

Surface Transportation Project Delivery Program; TxDOT Audit #4 Report

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice, request for comment.

SUMMARY: The Surface Transportation Project Delivery Program allows a State to assume FHWA's environmental responsibilities for review, consultation, and compliance for Federal highway projects. When a State assumes these Federal responsibilities, the State becomes solely responsible and liable for carrying out the responsibilities it has assumed, in lieu of FHWA. Prior to the Fixing America's Surface Transportation (FAST) Act of 2015, the Program required semiannual audits during each of the first 2 years of State participation to ensure compliance by each State participating in the Program. This notice announces and solicits comments on the fourth audit report for the Texas Department of Transportation's (TxDOT) participation in accordance with these pre-FAST Act requirements.

DATES: Comments must be received on or before January 16, 2018.

ADDRESSES: Mail or hand deliver comments to Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue SE, Room W12-140, Washington, DC 20590. You may also submit comments electronically at www.regulations.gov. All comments should include the docket number that appears in the heading of this document. All comments received will be available for examination and copying at the above address from 9 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard or you may print the acknowledgment page that appears after submitting comments electronically. Anyone is able to search the electronic form of all comments in any one of our dockets by the name of

the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, or labor union). The DOT posts these comments, without edits, 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: Dr. Owen Lindauer, Office of Project Development and Environmental Review, (202) 366-2655, owen.lindauer@dot.gov, or Mr. Jomar Maldonado, Office of the Chief Counsel, (202) 366-1373, jomar.maldonado@dot.gov, Federal Highway Administration, Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590. Office hours are from 8:00 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this notice may be downloaded from the specific docket page at www.regulations.gov.

Background

The Surface Transportation Project Delivery Program allows a State to assume FHWA's environmental responsibilities for review, consultation, and compliance for Federal highway projects. This provision has been codified at 23 U.S.C. 327. Since December 16, 2014, TxDOT has assumed FHWA's responsibilities under National Environmental Policy Act and the responsibilities for reviews under other Federal environmental requirements under this authority.

Prior to December 4, 2015, 23 U.S.C. 327(g) required the Secretary to conduct semiannual audits during each of the first 2 years of State participation, annual audits during years 3 and 4, and monitoring each subsequent year of State participation to ensure compliance by each State participating in the program. The results of each audit were required to be presented in the form of an audit report and be made available for public comment. On December 4, 2015, the President signed into law the FAST Act, Pub. L. 114-94, 129 Stat. 1312 (2015). Section 1308 of the FAST Act amended the audit provisions by limiting the number of audits to one audit each year during the first 4 years of a State's participation. This notice announces the availability of the report for the fourth audit for TxDOT conducted prior to the FAST Act and solicits public comment on it.

Authority: Section 1313 of Public Law 112-141; Section 6005 of Public Law 109-59; Public Law 114-94; 23 U.S.C. 327; 49 CFR 1.85.

Issued on: December 8, 2017.

Brandye L. Hendrickson,
Acting Administrator, Federal Highway Administration.

DRAFT

Surface Transportation Project Delivery Program

FHWA Audit #4 of the Texas Department of Transportation

June 16, 2016 to August 1, 2017

Executive Summary

This report summarizes the results of FHWA's fourth audit review (Audit #4) to assess the performance by the Texas Department of Transportation (TxDOT) regarding its assumption of responsibilities assigned by Federal Highway Administration (FHWA), under a memorandum of understanding (MOU) that took effect on December 16, 2014. TxDOT assumed FHWA's National Environmental Policy Act (NEPA) responsibilities and other environmental review responsibilities related to Federal-aid highway projects in Texas. The status of FHWA's observations from the third audit review (Audit #3), including any TxDOT self-imposed corrective actions, is detailed at the end of this report. The FHWA Audit #4 team (team) appreciates the cooperation and professionalism of TxDOT staff in conducting this review.

The team was formed in October 2016 and met regularly to prepare for the audit. Prior to the on-site visit, the team: (1) performed reviews of project files in TxDOT's Environmental Compliance Oversight System (ECOS), (2) examined TxDOT's responses to FHWA's information requests, and (3) developed interview questions. Interviews of TxDOT and resource agency staff occurred during the on-site portion of this audit, conducted on May 22-26, 2017.

The TxDOT continues to develop, revise, and implement procedures and processes required to carry out the NEPA Assignment Program. Based on information provided by TxDOT and from interviews, TxDOT is committed to maintaining a successful program. This report describes two (2) categories of non-compliance observations and eight (8) observations that represent opportunities for TxDOT to improve its program. It also includes brief status updates of the Audit #3 conclusions.

The TxDOT has continued to make progress toward meeting the responsibilities it has assumed in

accordance with the MOU. The non-compliance observations identified in this review will require TxDOT to take corrective action. By taking corrective action and considering changes based on the observations in this report, TxDOT should continue to move the NEPA Assignment Program forward successfully.

Background

The Surface Transportation Project Delivery Program (NEPA Assignment Program) allows a State to assume FHWA's environmental responsibilities for review, consultation, and compliance for highway projects. This program is codified at 23 U.S.C. 327. When a State assumes these Federal responsibilities for NEPA project decision-making, the State becomes solely responsible and liable for carrying out these obligations in lieu of, and without further NEPA related approval by, FHWA.

The State of Texas was assigned the responsibility for making project NEPA approvals and the responsibility for making other related environmental decisions for highway projects on December 16, 2014. In enacting Texas Transportation Code, § 201.6035, the State has waived its sovereign immunity under the 11th Amendment of the U.S. Constitution and consents to defend against any actions brought by its citizens for NEPA decisions it has made in Federal court.

The FHWA project-specific environmental review responsibilities assigned to TxDOT are specified in the MOU. These responsibilities include: compliance with the Endangered Species Act (ESA), Section 7 consultations with the U.S. Fish and Wildlife Service (USFWS) and the National Oceanic and Atmospheric Administration's National Marine Fisheries Service, and Section 106 consultations with the Texas Historical Commission (THC) regarding impacts to historic properties. Other responsibilities may not be assigned and remain with FHWA. They include: (1) responsibility for project-level conformity determinations under the Clean Air Act, and (2) the responsibility for government-to-government consultation with federally-recognized Indian tribes. Based on 23 U.S.C. 327(a)(2)(D), any responsibility not explicitly assigned in the MOU is retained by FHWA.

The MOU specifies that FHWA is required to conduct six audit reviews. These audits are part of FHWA's oversight responsibility for the NEPA Assignment Program. The reviews are to assess a State's compliance with the

provisions of the MOU. They also are used to evaluate a State's progress toward achieving its performance measures as specified in the MOU; to evaluate the success of the NEPA Assignment Program; and to inform the administration of the findings regarding the NEPA Assignment Program. In December 2015, statutory changes in Section 1308 of the Fixing America's Surface Transportation Act (FAST Act) reduced the frequency of these audit reviews to one audit per year during the first four years of state participation in the program. This audit is the fourth completed in Texas. The 5th and final audit is planned for 2018.

Scope and Methodology

The overall scope of this audit review is defined both in statute (23 U.S.C. 327) and the MOU (Part 11). An audit generally is defined as an official and careful examination and verification of accounts and records, especially of financial accounts, by an independent, unbiased body. Regarding accounts or financial records, audits may follow a prescribed process or methodology, and be conducted by "auditors" who have special training in those processes or methods. The FHWA considers this review to meet the definition of an audit because it is an unbiased, independent, official, and careful examination and verification of records and information about TxDOT's assumption of environmental responsibilities. Principal members of the team that conducted this audit have completed special training in audit processes and methods.

The diverse composition of the team and the process of developing the review report and publishing it in the **Federal Register** help to maintain an unbiased review and establish the audit as an official action taken by FHWA. The team for Audit #4 included NEPA subject-matter experts from the FHWA Texas Division Office, as well as FHWA offices in Washington, DC, Atlanta, GA, Charleston, SC, and Salt Lake City, UT. In addition to the NEPA experts, the team included FHWA planners, engineers, and air quality specialists from the Texas Division office.

Audits, as stated in the MOU (Parts 11.1.1 and 11.1.5), are the primary mechanism used by FHWA to oversee TxDOT's compliance with the MOU, evaluate TxDOT's progress toward achieving the performance measures identified in the MOU (Part 10.2), and collect information needed for the Secretary's annual report to Congress. These audits also consider TxDOT's technical competency and organizational capacity, adequacy of the

financial resources committed by TxDOT to administer the responsibilities assumed, quality assurance/quality control process, attainment of performance measures, compliance with the MOU requirements, and compliance with applicable laws and policies in administering the responsibilities assumed.

This audit reviewed processes and procedures (i.e., toolkits and handbooks) TxDOT staff use to process and make NEPA approvals. The information the team gathered that served as the basis for this audit came from three primary sources: (1) TxDOT's response to a pre-audit #4 information request (PAIR #4), (2) a review of both a judgmental and random sample of project files in ECOS with approval dates after February 1, 2016, and (3) interviews with TxDOT and the USFWS staff. The TxDOT provided information in response to FHWA pre-audit questions and requests for documents and provided a written clarification to FHWA thereafter. That material covered the following six topics: program management, documentation and records management, quality assurance/quality control, legal sufficiency review, performance measurement, and training. In addition to considering these six topics, the team also considered the following topics: Endangered Species Act (ESA) compliance, consideration of noise impacts and noise mitigation (Noise), and adherence to the TxDOT Public Involvement plan.

The intent of the review was to check that TxDOT has the proper procedures in place to implement the responsibilities assumed through the MOU, ensure that the staff is aware of those procedures, and make certain the staff implements the procedures appropriately to achieve compliance with NEPA and other assigned responsibilities. The review did not second guess project-specific decisions, as such decisions are the sole responsibility of TxDOT. The team focused on whether the procedures TxDOT followed complied with all Federal statutes, regulation, policy, procedure, process, guidance, and guidelines.

The team defined the timeframe for highway project environmental approvals subject to this fourth audit to be between February 1, 2016, and January 31, 2017. The project file review effort occurred in two phases: approvals made during Round 1 (Feb 1, 2016–July 31, 2016) and Round 2 (Aug 1, 2016–Jan 31, 2017). One important note is that this audit project file review time frame spans a full 12 months, where previous

audits reviewed project approvals that spanned 6 months. The population of environmental approvals included 224 projects based on 12 certified lists of NEPA approvals reported monthly by TxDOT. The NEPA project file approvals reviewed included: (1) categorical exclusion determinations (CEs), (2) approvals to circulate draft Environmental Assessments (EAs), (3) findings of no significant impacts (FONSI), (4) re-evaluations of EAs, Section 4(f) decisions, (5) approvals of a draft environmental impact statement (DEIS), and (6) re-evaluations of EISs and records of decision (RODs). Project files reviewed constitute a sample of randomly selected c-listed CE, and 100 percent of the following file approvals: 4(f) approvals; CE determinations for actions not listed in the “c” or “d” lists; the FONSI and its EA; the ROD and its EIS; and re-evaluations of these documents and approvals.

The interviews conducted by the team focused on TxDOT’s leadership and staff at the Environmental Affairs Division (ENV) Headquarters in Austin and staff in four of TxDOT’s Districts. The team interviewed the Austin District and then divided into two groups (the next day) to complete the face-to-face interviews of District staff in Waco and San Antonio. Members of the team interviewed staff from the Ft. Worth District via teleconference. The team used the same ECOS project document review form but updated interview questions for Districts and ENV staff with new focus areas to gather data.

Overall Audit Opinion

The TxDOT continues to make progress in the implementation of its program that assumes FHWA’s NEPA project-level decision responsibility and other environmental responsibilities. The team acknowledges TxDOT’s effort to refine and, when necessary, establish additional written internal policies and procedures. The team found evidence of TxDOT’s continuing efforts to train staff in clarifying the roles and responsibilities of TxDOT staff, and in educating staff in an effort to assure compliance with all of the assigned responsibilities.

The team identified two non-compliant observations in this audit that TxDOT will need to address through corrective actions. These non-compliance observations come from a review of TxDOT procedures, project file documentation, and interview information. This report also identifies several notable observations and successful practices that we recommend be expanded.

Non-Compliance Observations

Non-compliance observations are instances where the team found the TxDOT was out of compliance or deficient in proper implementation of a Federal regulation, statute, guidance, policy, the terms of the MOU, or TxDOT’s own procedures for compliance with the NEPA process. Such observations may also include instances where TxDOT has failed to maintain technical competency, adequate personnel, and/or financial resources to carry out the assumed responsibilities. Other non-compliance observations could suggest a persistent failure to adequately consult, coordinate, or consider the concerns of other Federal, State, tribal, or local agencies with oversight, consultation, or coordination responsibilities. The FHWA expects TxDOT to develop and implement corrective actions to address all non-compliance observations. As part of information gathered for this audit, TxDOT informed the team they are still implementing some recommendations made by FHWA on Audit #3 to address non-compliance. The FHWA will conduct followup reviews of non-compliance observations in Audit #5 from this review.

The MOU (Part 3.1.1) states that “[p]ursuant to 23 U.S.C. 327(a)(2)(A), on the Effective Date, FHWA assigns, and TxDOT assumes, subject to the terms and conditions set forth in 23 U.S.C. 327 and this MOU, all of the USDOT Secretary’s responsibilities for compliance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 et seq. with respect to the highway projects specified under subpart 3.3. This includes statutory provisions, regulations, policies, and guidance related to the implementation of NEPA for Federal highway projects such as 23 U.S.C. 139, 40 CFR 1500–1508, DOT Order 5610.1C, and 23 CFR 771 as applicable.” Also, the performance measure in MOU Part 10.2.1(A) for compliance with NEPA and other Federal environmental statutes and regulations commits TxDOT to maintaining documented compliance with requirements of all applicable statutes and regulations, as well as provisions in the MOU. The following non-compliance observations are presented as two categories of non-compliance observations: (1) with procedures specified in Federal laws, regulations, policy, or guidance, or (2) with the State’s environmental review procedures.

Audit #4 Non-Compliance Observation #1: Section 5.1.1 of the MOU requires

the State to follow Federal laws, regulations, policy, and procedures to implement the responsibilities assumed. This review identified several examples of deficient adherence to these Federal procedures.

(a) *Project scope analyzed for impacts differed from the scope approved*

Making an approval that includes actions not considered as part of environmental review is deficient according to the FHWA Technical Advisory 6640.8A. The scope of the FONSI cannot include actions not considered in the EA. This recurring deficiency was also identified for a project file in Audit #3.

(b) *Plan consistency prior to NEPA approval*

Section 3.3.1 of the MOU requires that prior to approving any CE determination, FONSI, Final EIS, or final EIS/ROD, TxDOT will ensure and document that the project is consistent with the current Transportation Improvement Plan (TIP), Regional Transportation Plan (RTP), or Metropolitan Transportation Plan (MTP). The team identified two projects where TxDOT made NEPA approval without meeting the MOU consistency requirement.

(c) *Public Involvement*

The FHWA’s regulation at 23 CFR 771.119(h) requires a second public notification to occur 30 days prior to issuing a FONSI. The team reviewed a project file where TxDOT approved a FONSI for an action described in 23 CFR 771.115(a) without evidence of a required additional public notification. TxDOT acknowledges this requirement in their updated public involvement handbook.

(d) *Timing of NEPA approval*

One project file lacked documentation for Section 106 compliance prior to TxDOT making a NEPA approval. The FHWA regulation at 23 CFR 771.133 expects compliance with all applicable laws or reasonable assurance all requirements will be met at the time of an approval.

Audit #4 Non-Compliance Observation #2: Section 7.2.1 of the MOU requires the State to develop State procedures to implement the responsibilities assumed. This review identified several examples of deficient adherence to these state procedures.

(a) *Reporting of approvals made by TxDOT*

MOU section 8.7.1 requires the State to certify on a list the approvals it makes pursuant to the terms of the MOU and Federal review requirements so FHWA

knows which projects completed NEPA and are eligible for Federal-aid funding. The FHWA identified a project whose approval was made pursuant to State law and therefore should not have been on the certified list of projects eligible for Federal-aid funding. This is a recurrence from Audit #3.

(b) *Noise workshop timing*

One project did not follow the TxDOT Noise guidelines for the timing of a required noise workshop. TxDOT improperly held a noise workshop months before the public hearing opportunity. The TxDOT noise guidelines (Guidelines for Analysis and Abatement of Roadway Traffic Noise, 2011) identifies procedures for compliance with 23 CFR 772. This is a recurrence of the same non-compliance observation in Audit #3.

(c) *Endangered Species Act Section 7*

The TxDOT provided training to staff and updated its Section 7 compliance procedures, as part of a partnering effort after Audit #3 between FHWA, TxDOT, and USFWS. However, one project was still not in compliance with the updated procedures.

(d) *Indirect & Cumulative Impacts*

One project file reviewed by the team lacked the indirect and cumulative impact analysis that is expected according to TxDOT's indirect and cumulative impact evaluation procedures.

(e) *Federal approval request for a State-funded project*

The review team reviewed a project file where TxDOT followed State environmental laws and then requested Federal-aid to purchase right-of-way. TxDOT informed the team that they are removing Federal funds from the ROW portion of this project as corrective action. This is a recurrence from Audit #3.

Successful Practices and Other Observations

This section summarizes the team's observations about issues or practices that TxDOT may consider as areas to improve. It also summarizes practices that the team believes are successful, so that TxDOT can consider continuing or expanding those programs in the future. Further information on these successful practices and observations is contained in the following subsections that address these six topic areas: program management; documentation and records management; quality assurance/quality control; legal sufficiency; performance management; and training.

Throughout the following subsections, the team lists 8

observations for TxDOT to consider in order to make improvements. The FHWA's suggested implementation methods of action include: corrective action, targeted training, revising procedures, continued self-assessment, improved QA/QC, or some other means. The team acknowledges that, by sharing the preliminary draft audit report with TxDOT, TxDOT has begun the process of implementing actions to address these observations and improve its program prior to the publication of this report.

1. Program Management

Successful Practices and Observations

The team appreciates TxDOT ENV willingness to partner with FHWA before, during, and after audit reviews. This has resulted in improved communication and assisted the team in verifying many of the conclusions in this report. The quarterly partnering sessions, started in 2016, will be an ongoing effort. These exchanges of information between FHWA and TxDOT have clarified and refined FHWA's reviews and assisted TxDOT's efforts to make improvements to their environmental review processes and procedures.

The team noted in District and ENV staff interviews that they welcomed the opportunity to be responsible and accountable for NEPA decisions. Additionally, TxDOT District staff members and management have said in interviews that they are more diligent with their documentation because they know that these approvals will be internally assessed and the District held accountable by the TxDOT ENV Program Review Team (formerly TxDOT's Self-Assessment Branch, [SAB]). District staff indicated in interviews that the former SAB detailed reviews were highly valued because they learned from their mistakes and make improvements. Accountability, in part, is driving an enhanced desire for TxDOT staff to consistently and carefully complete environmental reviews.

The team recognizes enhanced communication among individuals in the project development process through the Core Team (a partnership of District and ENV environmental staff assigned to an individual EIS project) as a valuable concept. Information gained from interviews and materials provided by TxDOT in most cases demonstrate improved communication amongst Districts and between Districts and ENV. The team noted that "NEPA Chats" (regular conference calls led by ENV, providing a platform for Districts

to discuss complex NEPA implementation issues) are still, for the most part, well received. Districts also provide internal self-initiated training across disciplines so everyone in the District Office is aware of TxDOT procedures to try to ensure that staff follows NEPA-related, discipline specific processes. This keeps projects on-schedule or ensures that there are no surprises if projected schedules slip.

Audit #4 Observation #1: Noise procedure clarification.

TxDOT ENV is currently in the process of proposing an update to their Noise Guidelines. The team reviewed a project file where the decisions based on an original noise study were re-examined to reach a different conclusion. The current TxDOT Noise Guidelines do not address how, or under what conditions a re-examination of an original Noise Study report that reaches different conclusions could occur. The team urges TxDOT to clarify their noise guidelines to ensure consistent and fair and equitable treatment of stakeholders affected by highway noise impacts.

Audit #4 Observation #2: Section 7 of the Endangered Species Act

During the interviews, the review team learned that there is a disincentive for "may affect" determinations because TxDOT cannot predict the amount of time required to complete informal consultation. If a particular project's schedule could accommodate the time required for informal consultation, a "may affect" determination might be made to minimize a risk of a legal challenge.

The review team would like to draw TxDOT's attention to the possibility that risk management decisionmaking can introduce a bias or "disincentive" to coordinate with USFWS when it is expected according to Federal policy and guidance. In fulfilling ESA Section 7(a)(2) responsibilities, Congress intended the "benefit of the doubt" to be given to the species (H.R. Conf. Rep. 96-697, 96 Cong., 1st sess. 1979).

The team acknowledges that TxDOT plans to train staff on its revised ESA handbook and standard operating procedures, and this may inform staff of this bias. Through interviews, the team learned that in certain Districts with sensitive habitats (i.e., karst) or the possibility of a species present (i.e., a salamander), ENV managers would review a project's information in addition to the District's and/or ENV biologists. This enhanced review process is currently limited only to two Districts and could be expanded to

include instances where such bias may occur.

Audit #4 Observation #3: Project description and logical termini

The team reviewed one project where the scope described in the NEPA document differed from what was proposed to be implemented. A proposed added capacity project's description indicated a longer terminus compared to a schematic. The team could not determine whether the description or the schematic accurately reflected the project proposal.

A second reviewed project contained a description of the proposed project as the project's purpose instead of identifying a purpose that would accommodate more than one reasonable alternative. The team urges TxDOT to make reviewers aware of these challenges.

2. Documentation and Records Management

The team relied on information in ECOS, TxDOT's official file of record, to evaluate project documentation and records management practices. Many TxDOT toolkit and handbook procedures mention the requirement to store official documentation in ECOS. The ECOS is also a tool for storage and management of information records, as well as for disclosure within TxDOT District Offices. ECOS is how TxDOT identifies and procures information required to be disclosed to, and requested by, the public. ECOS is being upgraded, and there are four more phased upgrades planned over time. The most recent work includes incorporation of a revised scope development tool, Biological Evaluation (BE) form, and new way to electronically approve a CE determination form in lieu of paper. The TxDOT staff noted that ECOS is both adaptable and flexible.

Successful Practices and Observations

A number of successful practices demonstrated by TxDOT were evident as a result of the documentation and records management review. The team learned that ECOS continues to improve in download speed and compatibility. The team learned through interviews with TxDOT staff members that ENV is changing the scope development tool within ECOS and that functionality will improve. Some staff indicated that they also utilized the scope development tool to develop their own checklists to ensure that all environmental requirements have been met prior to making a NEPA approval.

Audit #4 Observation #4: Record keeping integrity

The team's review included project files that were incomplete because of missing or incorrect CSJ references that would link the files to environmental review documentation. TxDOT has indicated that they are working to address this problem. In addition to the issue of database links, the team identified a project file that lacked a record of required public involvement required per TxDOT procedures. The team learned from interviews that ENV and District staff do not consistently include such documentation in ECOS. Also, one reviewed project file had outdated data for threatened and endangered species. The team urges TxDOT staff to rely upon up to date and complete data in making project decisions.

The team identified one project file where total project costs were not presented in the project documentation and EA documents were added after the FONSI was signed. The added EA documentation was editorial in nature. The team urges TxDOT to ensure the project file contains supportive documentation. Material that was not considered as part of the NEPA decision, and that was dated after the NEPA approval should not be included in a project's file.

The team found a project file that had conflicting information about a detour. The review form indicated that no detour was proposed, but letters to a county agency said that a road would be closed, which would require addressing the need for a detour. Our review was unable to confirm the detour or whether the impact road closure was considered.

3. Quality Assurance/Quality Control (QA/QC)

Successful Practices and Observations

The team observed some continued successful practices from previous audits in (QA/QC). These successful practices include the use of established checklists, certifications, NEPA Chats, and the CORE Team concept (items described in previous audit reports). The TxDOT District Office environmental staff continue to do peer reviews of environmental decisions to double check the quality and accuracy of documentation. The Environmental Affairs Division has established a post-NEPA review team (performance review team) that was briefly mentioned in the Self-Assessment report to FHWA. Through our interviews, we learned that the team reaches out to ENVs own Section Directors and subject matter experts, in addition to District

environmental staff, regarding their observations to improve the quality of documentation in future NEPA decisions. The FHWA team observed increased evidence in ECOS of documentation of collaboration illustrating the efforts to improve document quality and accuracy.

Audit #4 Observation #5: Effectiveness and change in QA/QC

Based on project file reviews, the team found errors and omissions that should have been identified and addressed through TxDOT quality control. Also, TxDOT's certified monthly list of project decisions contained errors, some of which were recurring.

During this review period, the team was informed that TxDOT's approach to QA/QC had changed since the previous audit review. In audit #3, the team identified the Self-Assessment Branch (SAB) as a successful practice. TxDOT's response in the PAIR #4 indicated SAB was disbanded and ENV did not explain how its function would be replaced. Through interviews, the team learned that TxDOT had reorganized its SAB staff and modified its approach to QA/QC. This report identifies a higher number of observations that were either non-compliant or the result of missing or erroneous information compared to previous audits. The team could not assess the validity and relevance of TxDOT's self-assessment of QA/QC because TxDOT's methodology (sampling and timeframe) was not explained. Lastly, through interviews with District environmental staff, the team learned that they are unclear on how errors and omissions now identified by the new "performance review team" and ENV SMEs are to be resolved. The team urges TxDOT to evaluate its new approach to QA/QC with relevant and valid performance measures and to explain its approach to QA/QC to its staff.

4. Legal Sufficiency Review

Based on the interviews with two of the General Counsel Division (GCD) staff and documentation review, the requirements for legal sufficiency under the MOU continue to be adequately fulfilled.

There are five attorneys in TxDOT's GCD, with one serving as lead attorney. Additional assistance is provided by a consultant attorney who has delivered environmental legal assistance to ENV for several years and by an outside law firm. The contract for the outside law firm is currently going through a scheduled re-procurement. The GCD assistance continues to be guided by

ENVs Project Delivery Manual Sections 303.080 through 303.086. These sections provide guidance on conducting legal sufficiency review of FHWA-funded projects and those documents that are to be published in the **Federal Register**, such as the Notice of Intent (NOI) to prepare an EIS, Statute of Limitation (139(l)), and Notice of Availability of EIS.

GCD continues to serve as a resource to ENV and the Districts and is involved early in the development of large and complex projects. One example is the very large Houston District IH 45 project around downtown Houston with an estimated cost of \$4.5 billion. The GCD lead attorney has been involved in the project and participated in the project's public hearing. GCD participates in the monthly NEPA chats and recently provided informal training during the chat on project scoping, logical termini, and independent utility.

According to TxDOT's response to FHWA's PAIR #4, GCD staff has reviewed or been involved in legal review for eight projects. The ENV project delivery managers make requests for review of a document or assistance to the lead attorney, who then assigns that project to an attorney for legal review. Attorney comments are provided in the standard comment response matrix back to ENV and are reviewed by the lead attorney. All comments must be satisfactorily addressed for GCD to complete its legal sufficiency determination. The GCD does not issue conditional legal sufficiency determinations. Legal sufficiency is documented by email to ENV.

A notable effort by GCD, in the last year, were the two lawsuits on TxDOT issued Federal environmental FONSI decision on the MOPAC intersections, the ongoing environmental process on the widening of south MOPAC, and State environmental decision on SH 45 SW. The lawsuit advanced only the Federal environmental decision on the MOPAC intersections. GCD worked first to develop the administrative record, having the numerous consultant and TxDOT staff provide documentation of their involvement on the MOPAC intersections project. Staff from GCD, Attorney General, and outside counsel then developed the voluminous record, which is their first since assuming NEPA responsibilities. The initial request by the plaintiffs for a preliminary injunction on the project was denied in Federal court, and, since a hearing on the merits was held later, they are awaiting the judge's decision. The FHWA and DOJ were notified, as

appropriate, of the notices of pleadings through the court's PACE database.

Successful Practice

ENV involves GCD early on projects and issues in need of their attention and expertise. Based on our discussions, GCD continues to be involved with the Districts and ENV throughout the NEPA project development process, when needed, and addresses legal issues, as appropriate. Based on interview responses, observation, and the comments above, TxDOT's approach to legal sufficiency is adequate.

5. Performance Measurement

TxDOT states in their self-assessment summary report that they achieved acceptable performance goals for all five performance-based performance metrics with the remaining seven performance goals remaining, consistent with the March 2016 self-assessment. The TxDOT continues to devote a high level of effort to develop the metrics to measure performance. During this audit, the team learned through interviews that the methodology employed to assess QA/QC performance had been revamped to the point that the results do not appear to be comparable with measures from previous years.

Successful Practices and Observations

As part of TxDOT's response to the PAIR #4, TxDOT provided an alternate performance metric for EA timeframes that analyzed the distribution of EA durations for projects initiated and completed prior to assignment, initiated prior to assignment but completed after assignment, and ones initiated and completed after assignment. This creative approach identified both improved and diminished performance in EA timeframes for projects initiated before assignment but completed after assignment. TxDOT reports in their response to the PAIR #4 that, at a 95 percent confidence interval, comparing completion times for EA projects before and after assignment, the post-assignment median timeframe for completion is faster after assignment.

Audit #4 Observation #6: Performance measure awareness and effectiveness

The team noted through interviews of TxDOT District Office staff that many were unaware of TxDOT performance measures and their results. We encourage TxDOT environmental leadership to make these results available to their staff, if only as a means of feedback on performance. Overall, these measures are a positive reflection of actions taken by TxDOT staff, and sharing changes in

performance measures may lead to improved performance.

As mentioned above, the team learned that TxDOT's QA/QC methodology changed from that utilized since the previous audit. Previously, the measure reported the percent of project files determined to be complete and accurate, but included information on substantive errors made across different documents. Now the measure is limited only to the percent of project files determined to be complete that relies upon new yes/no/NA response questions whose result lacks an evaluation of the substantialness of errors of accuracy or completion. The team urges TxDOT to continue to analyze the information they are already collecting on the completeness and accuracy of project files as means of implementing information that usually leads to continuous improvement.

6. Training Program

Since the period of the previous audit, TxDOT has revamped its on-line training program, as training courses content were out of date. Training continues to be offered to TxDOT staff informally through NEPA chats as well as through in-person instructor training. All of the training information for any individual TxDOT District staff environmental professional can be found on a TxDOT sharepoint site and is monitored by the training coordinator (especially the qualifications in the Texas Administrative Code). This makes it much more straightforward for third parties (including FHWA) to assess the District staff competency and exposure to training. Since Audit #3 TxDOT has increased the number of hours of training that staff are required to have to maintain environmental certification from 16 to 32 hours. Based on interviews, we learned that some individuals had far exceeded the minimal number of training hours required. We learned that training hours could be earned by participating in the environmental conference, but with a stipulation that other sources of training would be required.

Successful Practices and Observations

The team recognizes the following successful training practices. We learned from interviews that two TxDOT District Offices conduct annual training events for staff of local governments as a means to help them develop their own projects. This training identifies the TxDOT expectations for successful project development, including environmental review.

Another successful practice we learned from interviews, and reported

by TxDOT in the list of training scheduled, is that public involvement training has been revised to emphasize additional outreach that goes beyond the minimum requirements. The emphasis appears to be on achieving meaningful public engagement rather than simple public disclosure.

Finally, the team would like to acknowledge that TxDOT has recognized and taken advantage of cross training that is a successful practice. The TxDOT ENV strategic planning coordinator informed us in an interview that he co-taught a class on planning consistency by adding an environmental component. The team taught how the planning issues relate to environmental review and compliance 5 or 6 times throughout the State. The ENV strategic planning coordinator is now working with the local government division to add an environment module to the Local Project Assistance (LPA) class with specific discussion of environmental reviews (adding information on how to work with ENV at TxDOT, or how to find consultants who are approved to do work for TxDOT).

Audit #4 Observation #7: Additional outreach on improvements.

The team learned through interviews the value and importance of NEPA chats for informing ENV staff when there are changes in procedures, guidance, or policy. For example, when the handbook for compliance with ESA was first completed, it was the subject of a NEPA chat. The team is aware of recent changes TxDOT made to the handbook related to a non-compliance related to ESA compliance. Based on information gained from interviews, the team learned that the changes to the ESA SOP/handbook were not followed by a NEPA chat. As a result, we confirmed that most of the TxDOT Biology SMEs were unaware of the handbook changes. The team appreciates that TxDOT has revised its ESA handbook and urges staff to implement training or other outreach to inform TxDOT staff of these revisions.

Audit #4 Observation #8: FAST Act training.

The Fixing America's Transportation (FAST) Act included several new statutory requirements for the environmental review process, as well as other changes that change NEPA procedures and requirements. The FHWA's Office of Project Development and Environmental Review has released some guidance on how to implement these requirements and anticipates releasing additional information. Even though additional information on these

changes is forthcoming, States under NEPA assignment are required to implement these changes. The team learned through TxDOT's PAIR #4, and through interviews, that TxDOT has neither developed nor delivered training to its staff concerning new requirements for the FAST Act for environmental review. In response to this observation, TxDOT is currently collaborating with FHWA to develop a presentation on this topic for its annual environmental conference.

Status of Non-Compliance Observations and Other Observations From Audit #3 (April 2017)

Audit #3 Non-Compliance Observations

1. *Section 7 Consultation*— TxDOT ENV made revisions to their ESA procedures that they have shared with FHWA and USFWS via partnering sessions. TxDOT implementation and training efforts are still pending by ENV management on the revised procedures to ENV and District staff.
2. *Noise Policy*— TxDOT has informed the team that they are in the process of updating the 2011 Noise Guidelines. TxDOT will submit those guidelines to FHWA for review and approval once they are updated. TxDOT has not indicated whether they intend to provide training on these guidelines for TxDOT District Office and consultant staff.
3. *Public Involvement*— TxDOT updated their FHWA approved Handbook in November of 2016. There was one recurrence of a non-compliant action that was reported in Audit #3 during Audit #4. TxDOT informed FHWA that ENV will request that FHWA review their Texas Administrative Code in lieu of their previous request that FHWA review only their Public Involvement Handbook.
4. *Section 4(f)*— FHWA did not have any non-compliance observations in regards to TxDOT carrying out their assigned Section 4(f) responsibilities during Audit #4.

Audit #3 Observations

1. *A certified project had an incomplete review*— TxDOT continues to certify NEPA approvals for projects on a list provided to FHWA. This audit review identified an error of the inclusion of a project on a certified list.
2. *Inconsistent and contradictory information in some project files*— TxDOT has made ECOS software upgrades recently that address this problem. This audit review continued to identify project file errors in the consistency of information.

3. *TxDOT's QA/QC performance measure could demonstrate continuous improvement*— Since Audit #3, TxDOT has developed a new approach to the QA/QC performance measure. For CE reviews, the methodology is based on "yes/no/NA" answers to 50 questions (for EA projects there are 100 questions) based on requirements in the TxDOT handbooks. The measures are an average of the individual projects reviewed. TxDOT has not addressed how this new measure may demonstrate continuous improvement.

4. *Consider implementing more meaningful timeliness measures*— TxDOT's response to the pre-audit information request as well as in their self-assessment summary included detailed discussions of the timeliness measures for CEs as well as for EA projects that are meaningful.
5. *TxDOT's ability to monitor the certification and competency status of their qualified staff*— TxDOT has included on its training sharepoint site a database that identifies each environmental staff member, a complete list of training they have completed, and when that training occurred. TxDOT's training coordinator is responsible for monitoring this database to ensure all staff maintain their competency and qualification status per State law as well as the ongoing training requirement specified by the ENV director.

Next Steps

The FHWA provided a preliminary draft audit report to TxDOT for a 14-day review and comment period. The team has considered TxDOT comments in developing this draft Audit #4 report. As the next step, FHWA will publish a notice in the **Federal Register** to make it available to the public for a 30-day review comment period [23 U.S.C. 327(g)]. No later than 60 days after the close of the comment period, FHWA will respond to all comments submitted in finalizing this draft audit report [pursuant to 23 U.S.C. 327(g)(2)(B)]. Once finalized, the audit report will be published in the **Federal Register**.

[FR Doc. 2017-26947 Filed 12-13-17; 8:45 am]

BILLING CODE 4910-22-P

DEPARTMENT OF VETERANS AFFAIRS**Reasonable Charges for Medical Care or Services; v3.23, 2018 Calendar Year Update and National Average Administrative Prescription Drug Charge Update****AGENCY:** Department of Veterans Affairs.**ACTION:** Notice.

SUMMARY: This Department of Veterans Affairs (VA) notice updates the data for calculating the “Reasonable Charges” collected or recovered by VA for medical care or services. This notice also updates the “National Average Administrative Prescription Costs” for purposes of calculating VA’s charges for prescription drugs that were not administered during treatment, but provided or furnished by VA to a veteran.

FOR FURTHER INFORMATION CONTACT:

Romona Greene, Office of Community Care, Revenue Operations, Payer Relations and Services, Rates and Charges (10D1C1), Veterans Health Administration (VHA), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (202) 382-2521. (This is not a toll free number).

SUPPLEMENTARY INFORMATION: Section 17.101 of Title 38 of the Code of Federal Regulations sets forth the “Reasonable Charges” for medical care or services provided or furnished by VA to a veteran: “For a nonservice-connected disability for which the veteran is entitled to care (or the payment of expenses for care) under a health plan contract; For a nonservice-connected disability incurred incident to the veteran’s employment and covered under a worker’s compensation law or plan that provides reimbursement or indemnification for such care and services; or For a nonservice-connected disability incurred as a result of a motor vehicle accident in a State that requires automobile accident reparations insurance.” Section 17.101 provides the methodologies for establishing billed amounts for several types of charges; however, this notice will only address partial hospitalization facility charges; outpatient facility charges; physician and other professional charges, including professional charges for anesthesia services and dental services; pathology and laboratory charges; observation care facility charges; ambulance and other emergency transportation charges; and charges for durable medical equipment, drugs, injectables, and other medical services, items, and supplies identified by

Healthcare Common Procedure Coding System (HCPCS) Level II codes.

Section 17.101 provides that the actual charge amounts at individual VA medical facilities based on these methodologies and the data sources used for calculating those actual charge amounts will either be published as a notice in the **Federal Register** or will be posted on the internet site of the Veterans Health Administration Office of Community Care’s website at https://www.va.gov/communitycare/revenue_ops/payer_rates.asp.

Certain charges are hereby updated as stated in this notice and will be effective on January 1, 2018.

In cases where VA has not established charges for medical care or services provided or furnished at VA expense (by either VA or non-VA providers) under other provisions or regulations, the method for determining VA’s charges is set forth at 38 CFR 17.101(a)(8).

Based on the methodologies set forth in § 17.101, this notice provides an update to charges for 2018 HCPCS Level II and Current Procedural Terminology (CPT) codes. Charges are also being updated based on more recent versions of data sources for the following charge types: partial hospitalization facility charges; outpatient facility charges; physician and other professional charges, including professional charges for anesthesia services and dental services; pathology and laboratory charges; observation care facility charges; ambulance and other emergency transportation charges; and charges for durable medical equipment, drugs, injectables, and other medical services, items, and supplies identified by HCPCS Level II codes. As of the date of this notice, the actual charge amounts at individual VA medical facilities based on the methodologies in § 17.101 will be posted on the VHA Office of Community Care’s website at https://www.va.gov/communitycare/revenue_ops/payer_rates.asp under the heading “Reasonable Charges Data Tables” and identified as “v3.23 Data Tables (Outpatient and Professional).”

The list of data sources used for calculating the actual charge amounts listed above also will be posted on the VHA Office of Community Care’s website under the heading “Reasonable Charges Data Sources” and identified as “Reasonable Charges v3.23 Data Sources (Outpatient and Professional) (PDF).”

Acute inpatient facility charges and skilled nursing facility/sub-acute inpatient facility charges remain the same as set forth in the notice published in the **Federal Register** on September 25, 2017 (82 FR 44701).

We are also updating the list of VA medical facility locations. The list of VA medical facility locations, including the first three digits of their zip codes as well as provider-based/non-provider-based designations, will be posted on the VHA Office of Community Care’s website under the heading “VA Medical Facility Locations” and identified as “v3.23 (Jan18).”

As indicated in 38 CFR 17.101(m), when VA provides or furnishes prescription drugs not administered during treatment, “charges billed separately for such prescription drugs will consist of the amount that equals the total of the actual cost to VA for the drugs and the national average of VA administrative costs associated with dispensing the drugs for each prescription.” Section 17.101(m) includes the methodology for calculating the national average administrative cost for prescription drug charges not administered during treatment.

VA determines the amount of the national average administrative cost annually for the prior fiscal year (October through September) and then applies the charge at the start of the next calendar year. The national average administrative drug cost for calendar year 2018 is \$16.64. This change will be posted on the VHA Office of Community Care’s website at https://www.va.gov/COMMUNITYCARE/revenue_ops/admin_costs.asp under the heading “CY 2018 Average Administrative Cost for Prescriptions.”

Consistent with § 17.101, the national average administrative cost, the updated data, and supplementary tables containing the changes described in this notice will be posted online, as indicated in this notice. This notice will be posted on the VHA Office of Community Care’s website under the heading “**Federal Registers**, Rules, and Notices” and identified as “v3.23 **Federal Register** Notice 01/01/18 (Outpatient and Professional), and National Administrative Cost (PDF).” The national average administrative cost, updated data, and supplementary tables containing the changes described will be effective until changed by a subsequent **Federal Register** notice.

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. Gina S. Farrisee, Deputy Chief of Staff, Department of Veterans Affairs,

approved this document on November 24, 2017, for publication.

Dated: November 24, 2017.

Jeffrey Martin,

*Office Program Manager, Office of Regulation
Policy & Management, Office of the Secretary,
Department of Veterans Affairs.*

[FR Doc. 2017-26950 Filed 12-13-17; 8:45 am]

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Part II

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Parts 414, 416, and 419

Medicare Program: Hospital Outpatient Prospective Payment and
Ambulatory Surgical Center Payment Systems and Quality Reporting
Programs; Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES**Centers for Medicare & Medicaid Services****42 CFR Parts 414, 416, and 419**

[CMS-1678-FC]

RIN 0938-AT03

Medicare Program: Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems and Quality Reporting Programs*Republication*

Editorial Note: Rule document 2017-23932 was originally published on pages 52356 through 52637 in the issue of Monday, November 13, 2017. In that publication, a section of the document was omitted due to a printing error. The corrected document is published here in its entirety.

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Final rule with comment period.

SUMMARY: This final rule with comment period revises the Medicare hospital outpatient prospective payment system (OPPS) and the Medicare ambulatory surgical center (ASC) payment system for CY 2018 to implement changes arising from our continuing experience with these systems. In this final rule with comment period, we describe the changes to the amounts and factors used to determine the payment rates for Medicare services paid under the OPPS and those paid under the ASC payment system. In addition, this final rule with comment period updates and refines the requirements for the Hospital Outpatient Quality Reporting (OQR) Program and the ASC Quality Reporting (ASCQR) Program.

DATES:

Effective date: This final rule with comment period is effective on January 1, 2018, unless otherwise noted.

Comment period: To be assured consideration, comments on the payment classifications assigned to HCPCS codes identified in Addenda B, AA, and BB with the comment indicator "NI" and on other areas specified throughout this final rule with comment period must be received at one of the addresses provided in the **ADDRESSES** section no later than 5 p.m. EST on December 31, 2017.

ADDRESSES: In commenting, please refer to file code CMS-1678-FC when commenting on the issues in this proposed rule. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (no duplicates, please):

1. *Electronically.* You may (and we encourage you to) submit electronic comments on this regulation to <http://www.regulations.gov>. Follow the instructions under the "submit a comment" tab.

2. *By regular mail.* You may mail written comments to the following address ONLY:

Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS-1678-FC, P.O. Box 8013, Baltimore, MD 21244-1850.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments via express or overnight mail to the following address ONLY:

Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS-1678-FC, Mail Stop C4-26-05, 7500 Security Boulevard, Baltimore, MD 21244-1850.

4. *By hand or courier.* If you prefer, you may deliver (by hand or courier) your written comments before the close of the comment period to either of the following addresses:

a. For delivery in Washington, DC—Centers for Medicare & Medicaid Services, Department of Health and Human Services, Room 445-G, Hubert H. Humphrey Building, 200 Independence Avenue SW., Washington, DC 20201.

(Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without Federal Government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

b. For delivery in Baltimore, MD—Centers for Medicare & Medicaid Services, Department of Health and Human Services, 7500 Security Boulevard, Baltimore, MD 21244-1850.

If you intend to deliver your comments to the Baltimore address, please call the telephone number (410) 786-7195 in advance to schedule your arrival with one of our staff members.

Comments mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

For information on viewing public comments, we refer readers to the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: (We note that public comments must be submitted through one of the four channels outlined in the **ADDRESSES** section above. Comments may not be submitted via email.)

Advisory Panel on Hospital Outpatient Payment (HOP Panel), contact the HOP Panel mailbox at APCPanel@cms.hhs.gov.

Ambulatory Surgical Center (ASC) Payment System, contact Elisabeth Daniel via email Elisabeth.Daniel1@cms.hhs.gov or at 410-786-0237.

Ambulatory Surgical Center Quality Reporting (ASCQR) Program Administration, Validation, and Reconsideration Issues, contact Anita Bhatia via email Anita.Bhatia@cms.hhs.gov or at 410-786-7236.

Ambulatory Surgical Center Quality Reporting (ASCQR) Program Measures, contact Vinitha Meyyur via email Vinitha.Meyyur@cms.hhs.gov or at 410-786-8819.

Blood and Blood Products, contact Josh McFeeters via email Joshua.McFeeters@cms.hhs.gov or at 410-786-9732.

Cancer Hospital Payments, contact Scott Talaga via email Scott.Talaga@cms.hhs.gov or at 410-786-4142.

Care Management Services, contact Scott Talaga via email Scott.Talaga@cms.hhs.gov or at 410-786-4142.

CPT Codes, contact Marjorie Baldo via email Marjorie.Baldo@cms.hhs.gov or at 410-786-4617.

CMS Web Posting of the OPPS and ASC Payment Files, contact Chuck Braver via email Chuck.Braver@cms.hhs.gov or at 410-786-6719.

Composite APCs (Low Dose Brachytherapy and Multiple Imaging), contact Twi Jackson via email Twi.Jackson@cms.hhs.gov or at 410-786-1159.

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All Other Issues Related to Hospital Outpatient and Ambulatory Surgical Center Payments Not Previously Identified, contact Lela Strong via email Lela.Strong@cms.hhs.gov or at 410-786-3213.

SUPPLEMENTARY INFORMATION:

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following Web site as soon as possible after they have been received: <http://www.regulations.gov/>. Follow the search instructions on that Web site to view public comments.

Comments received timely will also be available for public inspection, generally beginning approximately 3 weeks after publication of the rule, at

the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, MD 21244, on Monday through Friday of each week from 8:30 a.m. to 4 p.m. EST. To schedule an appointment to view public comments, phone 1-800-743-3951.

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In the past, a majority of the Addenda referred to in our OPPS/ASC proposed and final rules were published in the **Federal Register** as part of the annual rulemakings. However, beginning with the CY 2012 OPPS/ASC proposed rule, all of the Addenda no longer appear in the **Federal Register** as part of the annual OPPS/ASC proposed and final rules to decrease administrative burden and reduce costs associated with publishing lengthy tables. Instead, these Addenda are published and available only on the CMS Web site. The Addenda relating to the OPPS are available at: <https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/HospitalOutpatientPPS/index.html>. The Addenda relating to the ASC payment system are available at: <https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/HospitalOutpatientPPS/index.html>.

Alphabetical List of Acronyms Appearing in This Federal Register Document

AHA American Hospital Association
 AMA American Medical Association
 AMI Acute myocardial infarction
 APC Ambulatory Payment Classification
 API Application programming interface
 APU Annual payment update
 ASC Ambulatory surgical center
 ASCQR Ambulatory Surgical Center Quality Reporting
 ASP Average sales price
 AUC Appropriate use criteria
 AWP Average wholesale price
 BBA Balanced Budget Act of 1997, Public Law 105-33
 BBRA Medicare, Medicaid, and SCHIP [State Children's Health Insurance Program] Balanced Budget Refinement Act of 1999, Public Law 106-113
 BIPA Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000, Public Law 106-554
 BLS Bureau of Labor Statistics
 CAH Critical access hospital
 CAHPS Consumer Assessment of Healthcare Providers and Systems

CAP Competitive Acquisition Program
 C-APC Comprehensive Ambulatory Payment Classification
 CASPER Certification and Survey Provider Enhanced Reporting
 CAUTI Catheter-associated urinary tract infection
 CBSA Core-Based Statistical Area
 CCM Chronic care management
 CCN CMS Certification Number
 CCR Cost-to-charge ratio
 CDC Centers for Disease Control and Prevention
 CED Coverage with Evidence Development
 CERT Comprehensive Error Rate Testing
 CFR Code of Federal Regulations
 CI Comment indicator
 CLABSI Central Line [Catheter] Associated Blood Stream Infection
 CLFS Clinical Laboratory Fee Schedule
 CMHC Community mental health center
 CMS Centers for Medicare & Medicaid Services
 CoP Condition of participation
 CPI-U Consumer Price Index for All Urban Consumers
 CPT Current Procedural Terminology (copyrighted by the American Medical Association)
 CR Change request
 CRC Colorectal cancer
 CSAC Consensus Standards Approval Committee
 CT Computed tomography
 CV Coefficient of variation
 CY Calendar year
 DFO Designated Federal Official
 DME Durable medical equipment
 DMEPOS Durable Medical Equipment, Prosthetic, Orthotics, and Supplies
 DOS Date of service
 DRA Deficit Reduction Act of 2005, Public Law 109-171
 DSH Disproportionate share hospital
 EACH Essential access community hospital
 EAM Extended assessment and management
 ECD Expanded criteria donor
 EBRT External beam radiotherapy
 ECG Electrocardiogram
 ED Emergency department
 EDTC Emergency department transfer communication
 EHR Electronic health record
 E/M Evaluation and management
 ESRD End-stage renal disease
 ESRD QIP End-Stage Renal Disease Quality Improvement Program
 FACA Federal Advisory Committee Act, Public Law 92-463
 FDA Food and Drug Administration
 FFS [Medicare] Fee-for-service
 FY Fiscal year
 GAO Government Accountability Office
 GI Gastrointestinal
 GME Graduate medical education
 HAI Healthcare-associated infection
 HCAHPS Hospital Consumer Assessment of Healthcare Providers and Systems
 HCERA Health Care and Education Reconciliation Act of 2010, Public Law 111-152
 HCP Health care personnel
 HCPCS Healthcare Common Procedure Coding System
 HCRIS Healthcare Cost Report Information System

HCUP Healthcare Cost and Utilization Project	MRA Magnetic resonance angiography	SSI Surgical site infection
HEU Highly enriched uranium	MRgFUS Magnetic Resonance Image Guided Focused Ultrasound	TEP Technical Expert Panel
HH QRP Home Health Quality Reporting Program	MRI Magnetic resonance imaging	TOPs Transitional Outpatient Payments
HHS Department of Health and Human Services	MRSA Methicillin-Resistant Staphylococcus Aureus	VBP Value-based purchasing
HIE Health information exchange	MS-DRG Medicare severity diagnosis-related group	WAC Wholesale acquisition cost
HIPAA Health Insurance Portability and Accountability Act of 1996, Public Law 104-191	MSIS Medicaid Statistical Information System	
HOP Hospital Outpatient Payment [Panel]	MUC Measure under consideration	
HOPD Hospital outpatient department	NCCI National Correct Coding Initiative	
HOP QDRP Hospital Outpatient Quality Data Reporting Program	NEMA National Electrical Manufacturers Association	
HPMS Health Plan Management System	NHSN National Healthcare Safety Network	
IBD Inflammatory bowel disease	NOTA National Organ and Transplantation Act	
ICC Interclass correlation coefficient	NOS Not otherwise specified	
ICD Implantable cardioverter defibrillator	NPI National Provider Identifier	
ICD-9-CM International Classification of Diseases, Ninth Revision, Clinical Modification	NQF National Quality Forum	
ICD-10 International Classification of Diseases, Tenth Revision	NQS National Quality Strategy	
ICH In-center hemodialysis	NTIOL New technology intraocular lens	
ICR Information collection requirement	NUBC National Uniform Billing Committee	
IDTF Independent diagnostic testing facility	OACT [CMS] Office of the Actuary	
IGI IHS Global, Inc.	OBRA Omnibus Budget Reconciliation Act of 1996, Public Law 99-509	
IHS Indian Health Service	O/E Observed to expected event	
I/OCE Integrated Outpatient Code Editor	OIG [HHS] Office of the Inspector General	
IOL Intraocular lens	OMB Office of Management and Budget	
IORT Intraoperative radiation treatment	ONC Office of the National Coordinator for Health Information Technology	
IPFQR Inpatient Psychiatric Facility Quality Reporting	OPD [Hospital] Outpatient Department	
IPPS [Hospital] Inpatient Prospective Payment System	OPPS [Hospital] Outpatient Prospective Payment System	
IQR [Hospital] Inpatient Quality Reporting	OPSF Outpatient Provider-Specific File	
IRF Inpatient rehabilitation facility	OQR [Hospital] Outpatient Quality Reporting	
IRF QRP Inpatient Rehabilitation Facility Quality Reporting Program	OT Occupational therapy	
IT Information technology	PAMA Protecting Access to Medicare Act of 2014, Public Law 113-93	
LCD Local coverage determination	PCHQR PPS-Exempt Cancer Hospital Quality Reporting	
LDR Low dose rate	PCR Payment-to-cost ratio	
LTCH Long-term care hospital	PDC Per day cost	
LTCHQR Long-Term Care Hospital Quality Reporting	PDE Prescription Drug Event	
MAC Medicare Administrative Contractor	PE Practice expense	
MACRA Medicare Access and CHIP Reauthorization Act of 2015, Public Law 114-10	PHP Partial hospitalization program	
MAP Measure Application Partnership	PHSA Public Health Service Act, Public Law 96-88	
MDH Medicare-dependent, small rural hospital	PN Pneumonia	
MedPAC Medicare Payment Advisory Commission	POS Place of service	
MEG Magnetoencephalography	PPI Producer Price Index	
MFP Multifactor productivity	PPS Prospective payment system	
MGCRB Medicare Geographic Classification Review Board	PQRI Physician Quality Reporting Initiative	
MIEA-TRHCA Medicare Improvements and Extension Act under Division B, Title I of the Tax Relief Health Care Act of 2006, Public Law 109-432	PQRS Physician Quality Reporting System	
MIPPA Medicare Improvements for Patients and Providers Act of 2008, Public Law 110-275	QDC Quality data code	
MLR Medical loss ratio	QIO Quality Improvement Organization	
MMA Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Public Law 108-173	RFA Regulatory Flexibility Act	
MMEA Medicare and Medicaid Extenders Act of 2010, Public Law 111-309	RHQDAPU Reporting Hospital Quality Data for Annual Payment Update	
MMSEA Medicare, Medicaid, and SCHIP Extension Act of 2007, Public Law 110-173	RTI Research Triangle Institute, International	
MPFS Medicare Physician Fee Schedule	RVU Relative value unit	
MR Medical review	SAD Self-administered drug	
	SAMS Secure Access Management Services	
	SCH Sole community hospital	
	SCOD Specified covered outpatient drugs	
	SES Socioeconomic status	
	SI Status indicator	
	SIA Systems Improvement Agreement	
	SIR Standardized infection ratio	
	SNF Skilled nursing facility	
	SRS Stereotactic radiosurgery	
	SRTR Scientific Registry of Transplant Recipients	
	SSA Social Security Administration	

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I. Summary and Background

A. Executive Summary of This Document

1. Purpose

In this final rule with comment period, we are updating the payment

policies and payment rates for services furnished to Medicare beneficiaries in hospital outpatient departments (HOPDs) and ambulatory surgical centers (ASCs) beginning January 1, 2018. Section 1833(t) of the Social Security Act (the Act) requires us to annually review and update the payment rates for services payable under the Hospital Outpatient Prospective Payment System (OPPS). Specifically, section 1833(t)(9)(A) of the Act requires the Secretary to review certain components of the OPPS not less often than annually, and to revise the groups, relative payment weights, and other adjustments that take into account changes in medical practices, changes in technologies, and the addition of new services, new cost data, and other relevant information and factors. In addition, under section 1833(i) of the Act, we annually review and update the ASC payment rates. We describe these and various other statutory authorities in the relevant sections of this final rule with comment period. In addition, this final rule with comment period updates and refines the requirements for the Hospital Outpatient Quality Reporting (OQR) Program and the ASC Quality Reporting (ASCQR) Program.

2. Summary of the Major Provisions

- *OPPS Update:* For CY 2018, we are increasing the payment rates under the OPPS by an Outpatient Department (OPD) fee schedule increase factor of 1.35 percent. This increase factor is based on the hospital inpatient market basket percentage increase of 2.7 percent for inpatient services paid under the hospital inpatient prospective payment system (IPPS), minus the multifactor productivity (MFP) adjustment of 0.6 percentage point, and minus a 0.75 percentage point adjustment required by the Affordable Care Act. Based on this update, we estimate that total payments to OPPS providers (including beneficiary cost-sharing and estimated changes in enrollment, utilization, and case-mix) for CY 2018 is approximately \$70 billion, an increase of approximately \$5.8 billion compared to estimated CY 2017 OPPS payments.

We are continuing to implement the statutory 2.0 percentage point reduction in payments for hospitals failing to meet the hospital outpatient quality reporting requirements, by applying a reporting factor of 0.980 to the OPPS payments and copayments for all applicable services.

- *High Cost/Low Cost Threshold for Packaged Skin Substitutes:* As we did for CY 2017, we are assigning skin substitutes with a geometric mean unit

cost (MUC) or a per day cost (PDC) that exceeds either the MUC threshold or the PDC threshold to the high cost group. In addition, for CY 2018, we are establishing that a skin substitute product that does not exceed either the CY 2018 MUC or PDC threshold for CY 2018, but was assigned to the high cost group for CY 2017, is assigned to the high cost group for CY 2018. The goal of our policy is to maintain similar levels of payment for skin substitute products for CY 2018 while we study our current skin substitute payment methodology to determine whether refinements to our existing methodologies may be warranted.

- *Supervision of Hospital Outpatient Therapeutic Services:* In the CY 2009 and CY 2010 OPPS/ASC proposed rules and final rules with comment period, we clarified that direct supervision is required for hospital outpatient therapeutic services covered and paid by Medicare that are furnished in hospitals, CAHs, and in provider-based departments (PBDs) of hospitals, as set forth in the CY 2000 OPPS final rule with comment period. For several years, there has been a moratorium on the enforcement of the direct supervision requirement for CAHs and small rural hospitals, with the latest moratorium on enforcement expiring on December 31, 2016. In this final rule with comment period, as we proposed, we are reinstating the nonenforcement policy for direct supervision of outpatient therapeutic services furnished in CAHs and small rural hospitals having 100 or fewer beds and reinstating our enforcement instruction for CY 2018 and CY 2019.

- *340B Drug Pricing:* We are changing our current Medicare Part B drug payment methodology for 340B hospitals that we believe will better, and more appropriately, reflect the resources and acquisition costs that these hospitals incur. These changes will lower drug costs for Medicare beneficiaries for drugs acquired by hospitals under the 340B Program. For CY 2018, we are exercising the Secretary's authority to adjust the applicable payment rate as necessary for separately payable drugs and biologicals (other than drugs on pass-through payment status and vaccines) acquired under the 340B Program from average sales price (ASP) plus 6 percent to ASP minus 22.5 percent. Rural sole community hospitals (SCHs), children's hospitals, and PPS-exempt cancer hospitals are excluded from this payment adjustment in CY 2018. In addition, in this final rule with comment period, we are establishing two modifiers to identify whether a drug

billed under the OPPS was purchased under the 340B Program—one for hospitals that are subject to the payment reduction and another for hospitals not subject to the payment reduction but that acquire drugs under the 340B Program.

- *Device Pass-Through Payment Applications:* For CY 2018, we evaluated five devices for eligibility to receive pass through payments and sought public comments in the CY 2018 proposed rule on whether each of these items meet the criteria for device pass-through payment status. None of the applications were approved for device pass-through payments for CY 2018.

- *Rural Adjustment:* We are continuing the adjustment of 7.1 percent to the OPPS payments to certain rural SCHs, including essential access community hospitals (EACHs). This adjustment will apply to all services paid under the OPPS, excluding separately payable drugs and biologicals, devices paid under the pass-through payment policy, and items paid at charges reduced to cost.

- *Cancer Hospital Payment Adjustment:* For CY 2018, we are continuing to provide additional payments to cancer hospitals so that the cancer hospital's payment-to-cost ratio (PCR) after the additional payments is equal to the weighted average PCR for the other OPPS hospitals using the most recently submitted or settled cost report data. However, beginning CY 2018, section 16002(b) of the 21st Century Cures Act requires that this weighted average PCR be reduced by 1.0 percentage point. Based on the data and the required 1.0 percentage point reduction, a target PCR of 0.88 will be used to determine the CY 2018 cancer hospital payment adjustment to be paid at cost report settlement. That is, the payment adjustments will be the additional payments needed to result in a PCR equal to 0.88 for each cancer hospital.

- *Changes to the Inpatient Only List:* For CY 2018, we are finalizing our proposal to remove total knee arthroplasty (TKA) from the inpatient only list. In addition, we are precluding the Recovery Audit Contractors from reviewing TKA procedures for "patient status" (that is, site of service) for a period of 2 years. We note that we will monitor changes in site of service to determine whether changes may be necessary to certain CMS Innovation Center models. In addition, we are removing five other procedures from the inpatient only list and adding one procedure to the list.

- *Comprehensive APCs:* For CY 2018, we did not propose to create any new

C-APCs or make any extensive changes to the already established methodology used for C-APCs. There will be a total number of 62 C-APCs as of January 1, 2018. For CY 2018, for the C-APC for stereotactic radio surgery (SRS), specifically, C-APC 5627 (Level 7 Radiation Therapy), we are continuing to make separate payments for the 10 planning and preparation services adjunctive to the delivery of the SRS treatment using either the Cobalt-60-based or LINAC-based technology when furnished to a beneficiary within 30 days of the SRS treatment. In addition, the data collection period for SRS claims with modifier "CP" is set to conclude on December 31, 2017. Accordingly, for CY 2018, we are deleting this modifier and discontinuing its required use.

- *Packaging Policies:* In CY 2015, we implemented a policy to conditionally package ancillary services assigned to APCs with a geometric mean cost of \$100 or less prior to packaging, with some exceptions, including drug administration services. For CY 2018, we are removing the exception for certain drug administration services and conditionally packaging payment for low-cost drug administration services. We did not propose to package drug administration add-on codes for CY 2018, but solicited comments on this policy. The public comments that we received are discussed in this final rule with comment period. In addition, we solicited comments on existing packaging policies that exist under the OPPS, including those related to drugs that function as a supply in a diagnostic test or procedure or in a surgical procedure. The public comments that we received are also discussed in this final rule with comment period.

- *Payment Changes for X-rays Taken Using Computed Radiography Technology:* Section 502(b) of Division O, Title V of the Consolidated Appropriations Act, 2016 (Pub. L. 114-113) amended section 1833(t)(16) of the Act by adding new subparagraph (F). New section 1833(t)(16)(F)(ii) of the Act provides for a phased-in reduction of payments for imaging services that are taken using computed radiography technology. That section provides that payments for such services furnished during CYs 2018 through 2022 shall be reduced by 7 percent, and if such services are furnished during CY 2023 or a subsequent year, payments for such services shall be reduced by 10 percent. We are establishing a new modifier that will be reported on claims to identify those HCPCS codes that describe X-rays taken using computed radiography technology. Specifically, this modifier,

as allowed under the provisions of new section 1833(t)(16)(F)(ii) of the Act, will be reported with the applicable HCPCS code to describe imaging services that are taken using computed radiography technology beginning January 1, 2018.

- *ASC Payment Update:* For CY 2018, we are increasing payment rates under the ASC payment system by 1.2 percent for ASCs that meet the quality reporting requirements under the ASCQR Program. This increase is based on a projected CPI-U update of 1.7 percent minus a multifactor productivity adjustment required by the Affordable Care Act of 0.5 percentage point. Based on this update, we estimate that total payments to ASCs (including beneficiary cost-sharing and estimated changes in enrollment, utilization, and case-mix) for CY 2018 is approximately \$4.62 billion, an increase of approximately \$130 million compared to estimated CY 2017 Medicare payments. In addition, in the CY 2018 proposed rule, we solicited comment on payment reform for ASCs, including the collection of cost data which may support a rate update other than CPI-U. We discuss the public comments that we received in response to this solicitation in this final rule with comment period.

- *Comment Solicitation on ASC Payment Reform:* In the CY 2018 proposed rule, we indicated that we were broadly interested in feedback from stakeholders and other interested parties on potential reforms to the current payment system, including, but not limited to (1) the rate update factor applied to ASC payments, (2) whether and how ASCs should submit data relating to costs, (3) whether ASCs should bill on the institutional claim form rather than the professional claim form, and (4) other ideas to improve payment accuracy for ASCs. We discuss the feedback we received in this final rule with comment period.

- *Changes to the List of ASC Covered Surgical Procedures:* For CY 2018, we are adding three procedures to the ASC covered procedures list. In addition, in the CY 2018 proposed rule, we solicited comment on whether total knee arthroplasty, partial hip arthroplasty and total hip arthroplasty meet the criteria to be added to the ASC covered procedures list. We also solicited comments from stakeholders on whether there are codes that are outside the AMA-CPT surgical code range that nonetheless, should be considered to be a covered surgical procedure. We discuss the public comments we received on this solicitation in this final rule with comment period.

- *Revisions to the Laboratory Date of Service Policy:* To better understand the potential impact of the current date of service (DOS) policy on billing for molecular pathology tests and advanced diagnostic laboratory tests (ADLTs) under the new private payor rate-based Clinical Laboratory Fee Schedule (CLFS), in the CY 2018 proposed rule, we solicited public comments on billing for molecular pathology tests and certain ADLTs ordered less than 14 days of a hospital outpatient discharge and discussed potential modifications to our DOS policy to address those tests. After considering the public comments received, we are adding an additional exception to our current laboratory DOS regulations at 42 CFR 414.510. This new exception to the laboratory DOS policy generally permits laboratories to bill Medicare directly for ADLTs and molecular pathology tests excluded from OPPS packaging policy if the specimen was collected from a hospital outpatient during a hospital outpatient encounter and the test was performed following the patient's discharge from the hospital outpatient department. We discuss the public comments we received on this solicitation in this final rule with comment period.

- *Hospital Outpatient Quality Reporting (OQR) Program:* For the Hospital OQR Program, we are finalizing our proposals to remove and delay certain measures for the CY 2020 payment determination and subsequent years. Specifically, beginning with the CY 2020 payment determination, we are finalizing our proposals to remove: (1) OP-21: Median Time to Pain Management for Long Bone Fracture; and (2) OP-26: Hospital Outpatient Volume Data on Selected Outpatient Surgical Procedures. While we proposed to remove: OP-1: Median Time to Fibrinolysis, OP-4: Aspirin at Arrival, OP-20: Door to Diagnostic Evaluation by a Qualified Medical Professional, and OP-25: Safe Surgery Checklist for the CY 2021 payment determination and subsequent years, we are finalizing these proposals with modification, such that we are removing them for the CY 2020 payment determination and subsequent years, one year earlier than proposed. We are also finalizing our proposal to delay the OAS CAHPS Survey-based measures (OP-37 a-e) beginning with the CY 2020 payment determination (CY 2018 reporting). In addition, for the CY 2020 payment determination and subsequent years we are: (1) Providing clarification on our procedures for validation of chart-abstracted measures for targeting the poorest performing outlier hospitals; (2)

formalizing the validation educational review process and updating it to allow corrections of incorrect validation results for chart-abstracted measures, and modifying the CFR accordingly; (3) aligning the first quarter for which to submit data for hospitals that did not participate in the previous year's Hospital OQR Program and make corresponding changes to the CFR; and (4) aligning the naming of the Extraordinary Circumstances Exceptions (ECE) policy with that used in our other quality reporting and value-based payment programs and making corresponding changes to the CFR. We are not finalizing our proposal to extend the Notice of Participation (NOP) deadline and make corresponding changes to the CFR. Lastly, we are finalizing with modifications our proposal to publicly report OP-18c: Median Time from Emergency Department Arrival to Emergency Department Departure for Discharged Emergency Department Patients—Psychiatric/Mental Health Patients.

• *Ambulatory Surgical Center Quality Reporting (ASCQR) Program:* For the ASCQR Program, we are finalizing measures and policies for the CY 2019 payment determination, 2021 payment determination, and CY 2022 payment determination and subsequent years. Specifically, we are finalizing our proposals to, beginning with the CY 2019 payment determination, remove three measures from the ASCQR Program measure set: (1) ASC-5: Prophylactic Intravenous (IV) Antibiotic Timing; (2) ASC-6: Safe Surgery Checklist Use; and, (3) ASC-7: Ambulatory Surgical Center Facility Volume Data on Selected Ambulatory Surgical Center Surgical Procedures. In addition, we are also finalizing our proposal to delay the OAS CAHPS Survey measures (ASC-15a-e) beginning with the CY 2020 payment determination (CY 2018 data collection). Furthermore, starting with CY 2018, we are finalizing our proposals to: (1) Expand the CMS online tool to also allow for batch submission of measure data and make corresponding changes to the CFR; and (2) align the naming of the Extraordinary Circumstances Exceptions (ECE) policy with that used in our other quality reporting and value-based payment programs and make corresponding changes to the CFR. We are not finalizing our proposal to adopt one new measure, ASC-16: Toxic Anterior Segment Syndrome, beginning with the CY 2021 payment determination. However, we are finalizing proposals to adopt two new measures collected via claims,

beginning with the CY 2022 payment determination, ASC-17: Hospital Visits after Orthopedic Ambulatory Surgical Center Procedures and ASC-18: Hospital Visits after Urology Ambulatory Surgical Center Procedures.

3. Summary of Costs and Benefits

In sections XVIII. and XIX. of this final rule with comment period, we set forth a detailed analysis of the regulatory and Federalism impacts that the changes will have on affected entities and beneficiaries. Key estimated impacts are described below.

a. Impacts of the OPSS Update

(1) Impacts of All OPSS Changes

Table 88 in section XVIII. of this final rule with comment period displays the distributional impact of all the OPSS changes on various groups of hospitals and CMHCs for CY 2018 compared to all estimated OPSS payments in CY 2017. We estimate that policies in this final rule with comment period will result in a 1.4 percent overall increase in OPSS payments to providers. We estimate that total OPSS payments for CY 2018, including beneficiary cost-sharing, to the approximate 3,900 facilities paid under the OPSS (including general acute care hospitals, children's hospitals, cancer hospitals, and CMHCs) will increase by approximately \$690 million compared to CY 2017 payments, excluding our estimated changes in enrollment, utilization, and case-mix.

We estimated the isolated impact of our OPSS policies on CMHCs because CMHCs are only paid for partial hospitalization services under the OPSS. Continuing the provider-specific structure that we adopted beginning in CY 2011 and basing payment fully on the type of provider furnishing the service, we estimate a 17.2 percent increase in CY 2018 payments to CMHCs relative to their CY 2017 payments.

(2) Impacts of the Updated Wage Indexes

We estimate that our update of the wage indexes based on the FY 2018 IPPS final rule wage indexes results in no change for urban and rural hospitals under the OPSS. These wage indexes include the continued implementation of the OMB labor market area delineations based on 2010 Decennial Census data.

(3) Impacts of the Rural Adjustment and the Cancer Hospital Payment Adjustment

There are no significant impacts of our CY 2018 payment policies for hospitals that are eligible for the rural

adjustment or for the cancer hospital payment adjustment. We are not making any change in policies for determining the rural hospital payment adjustments. While we are implementing the required reduction to the cancer hospital payment adjustment in Section 16002 of the 21st Century Cures Act for CY 2018, the adjustment amounts do not significantly impact the budget neutrality adjustments for these policies.

(4) Impacts of the OPD Fee Schedule Increase Factor

We estimate that, for most hospitals, the application of the OPD fee schedule increase factor of 1.35 percent to the conversion factor for CY 2018 will mitigate the impacts of the budget neutrality adjustments. As a result of the OPD fee schedule increase factor and other budget neutrality adjustments, we estimate that rural and urban hospitals will experience increases of approximately 1.3 percent for urban hospitals and 2.7 percent for rural hospitals. Classifying hospitals by teaching status, we estimate non-teaching hospitals will experience increases of 2.9 percent, minor teaching hospitals will experience increases of 1.7 percent, and major teaching hospitals will experience decreases of -0.9 percent. We also classified hospitals by type of ownership. We estimate that hospitals with voluntary ownership will experience increases of 1.3 percent, hospitals with proprietary ownership will experience increases of 4.5 percent and hospitals with government ownership will experience no change in payments.

b. Impacts of the ASC Payment Update

For impact purposes, the surgical procedures on the ASC list of covered procedures are aggregated into surgical specialty groups using CPT and HCPCS code range definitions. The percentage change in estimated total payments by specialty groups under the CY 2018 payment rates, compared to estimated CY 2017 payment rates, generally ranges between an increase of 1 to 5 percent, depending on the service, with some exceptions.

B. Legislative and Regulatory Authority for the Hospital OPSS

When Title XVIII of the Social Security Act was enacted, Medicare payment for hospital outpatient services was based on hospital-specific costs. In an effort to ensure that Medicare and its beneficiaries pay appropriately for services and to encourage more efficient delivery of care, the Congress mandated replacement of the reasonable cost-

based payment methodology with a prospective payment system (PPS). The Balanced Budget Act of 1997 (BBA) (Pub. L. 105–33) added section 1833(t) to the Act, authorizing implementation of a PPS for hospital outpatient services. The OPSS was first implemented for services furnished on or after August 1, 2000. Implementing regulations for the OPSS are located at 42 CFR parts 410 and 419.

The Medicare, Medicaid, and SCHIP Balanced Budget Refinement Act of 1999 (BBRA) (Pub. L. 106–113) made major changes in the hospital OPSS. The following Acts made additional changes to the OPSS: The Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 (BIPA) (Pub. L. 106–554); the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) (Pub. L. 108–173); the Deficit Reduction Act of 2005 (DRA) (Pub. L. 109–171), enacted on February 8, 2006; the Medicare Improvements and Extension Act under Division B of Title I of the Tax Relief and Health Care Act of 2006 (MIEA–TRHCA) (Pub. L. 109–432), enacted on December 20, 2006; the Medicare, Medicaid, and SCHIP Extension Act of 2007 (MMSEA) (Pub. L. 110–173), enacted on December 29, 2007; the Medicare Improvements for Patients and Providers Act of 2008 (MIPPA) (Pub. L. 110–275), enacted on July 15, 2008; the Patient Protection and Affordable Care Act (Pub. L. 111–148), enacted on March 23, 2010, as amended by the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152), enacted on March 30, 2010 (these two public laws are collectively known as the Affordable Care Act); the Medicare and Medicaid Extenders Act of 2010 (MMEA, Pub. L. 111–309); the Temporary Payroll Tax Cut Continuation Act of 2011 (TPTCCA, Pub. L. 112–78), enacted on December 23, 2011; the Middle Class Tax Relief and Job Creation Act of 2012 (MCTRJCA, Pub. L. 112–96), enacted on February 22, 2012; the American Taxpayer Relief Act of 2012 (Pub. L. 112–240), enacted January 2, 2013; the Pathway for SGR Reform Act of 2013 (Pub. L. 113–67) enacted on December 26, 2013; the Protecting Access to Medicare Act of 2014 (PAMA, Pub. L. 113–93), enacted on March 27, 2014; the Medicare Access and CHIP Reauthorization Act (MACRA) of 2015 (Pub. L. 114–10), enacted April 16, 2015; the Bipartisan Budget Act of 2015 (Pub. L. 114–74), enacted November 2, 2015; the Consolidated Appropriations Act, 2016 (Pub. L. 114–113), enacted on December 18, 2015, and the 21st

Century Cures Act (Pub. L. 114–255), enacted on December 13, 2016.

Under the OPSS, we generally pay for hospital Part B services on a rate-per-service basis that varies according to the APC group to which the service is assigned. We use the Healthcare Common Procedure Coding System (HCPCS) (which includes certain Current Procedural Terminology (CPT) codes) to identify and group the services within each APC. The OPSS includes payment for most hospital outpatient services, except those identified in section I.C. of this final rule with comment period. Section 1833(t)(1)(B) of the Act provides for payment under the OPSS for hospital outpatient services designated by the Secretary (which includes partial hospitalization services furnished by CMHCs), and certain inpatient hospital services that are paid under Medicare Part B.

The OPSS rate is an unadjusted national payment amount that includes the Medicare payment and the beneficiary copayment. This rate is divided into a labor-related amount and a nonlabor-related amount. The labor-related amount is adjusted for area wage differences using the hospital inpatient wage index value for the locality in which the hospital or CMHC is located.

All services and items within an APC group are comparable clinically and with respect to resource use (section 1833(t)(2)(B) of the Act). In accordance with section 1833(t)(2) of the Act, subject to certain exceptions, items and services within an APC group cannot be considered comparable with respect to the use of resources if the highest median cost (or mean cost, if elected by the Secretary) for an item or service in the APC group is more than 2 times greater than the lowest median cost (or mean cost, if elected by the Secretary) for an item or service within the same APC group (referred to as the “2 times rule”). In implementing this provision, we generally use the cost of the item or service assigned to an APC group.

For new technology items and services, special payments under the OPSS may be made in one of two ways. Section 1833(t)(6) of the Act provides for temporary additional payments, which we refer to as “transitional pass-through payments,” for at least 2 but not more than 3 years for certain drugs, biological agents, brachytherapy devices used for the treatment of cancer, and categories of other medical devices. For new technology services that are not eligible for transitional pass-through payments, and for which we lack sufficient clinical information and cost data to appropriately assign them to a clinical APC group, we have established

special APC groups based on costs, which we refer to as New Technology APCs. These New Technology APCs are designated by cost bands which allow us to provide appropriate and consistent payment for designated new procedures that are not yet reflected in our claims data. Similar to pass-through payments, an assignment to a New Technology APC is temporary; that is, we retain a service within a New Technology APC until we acquire sufficient data to assign it to a clinically appropriate APC group.

C. Excluded OPSS Services and Hospitals

Section 1833(t)(1)(B)(i) of the Act authorizes the Secretary to designate the hospital outpatient services that are paid under the OPSS. While most hospital outpatient services are payable under the OPSS, section 1833(t)(1)(B)(iv) of the Act excludes payment for ambulance, physical and occupational therapy, and speech-language pathology services, for which payment is made under a fee schedule. It also excludes screening mammography, diagnostic mammography, and effective January 1, 2011, an annual wellness visit providing personalized prevention plan services. The Secretary exercises the authority granted under the statute to also exclude from the OPSS certain services that are paid under fee schedules or other payment systems. Such excluded services include, for example, the professional services of physicians and nonphysician practitioners paid under the Medicare Physician Fee Schedule (MPFS); certain laboratory services paid under the Clinical Laboratory Fee Schedule (CLFS); services for beneficiaries with end-stage renal disease (ESRD) that are paid under the ESRD prospective payment system; and services and procedures that require an inpatient stay that are paid under the hospital IPPS. In addition, section 1833(t)(1)(B)(v) of the Act does not include applicable items and services (as defined in subparagraph (A) of paragraph (21)) that are furnished on or after January 1, 2017 by an off-campus outpatient department of a provider (as defined in subparagraph (B) of paragraph (21)). We set forth the services that are excluded from payment under the OPSS in regulations at 42 CFR 419.22.

Under § 419.20(b) of the regulations, we specify the types of hospitals that are excluded from payment under the OPSS. These excluded hospitals include:

- Critical access hospitals (CAHs);

- Hospitals located in Maryland and paid under the Maryland All-Payer Model;
- Hospitals located outside of the 50 States, the District of Columbia, and Puerto Rico; and
- Indian Health Service (IHS) hospitals.

D. Prior Rulemaking

On April 7, 2000, we published in the **Federal Register** a final rule with comment period (65 FR 18434) to implement a prospective payment system for hospital outpatient services. The hospital OPSS was first implemented for services furnished on or after August 1, 2000. Section 1833(t)(9)(A) of the Act requires the Secretary to review certain components of the OPSS, not less often than annually, and to revise the groups, relative payment weights, and other adjustments that take into account changes in medical practices, changes in technologies, and the addition of new services, new cost data, and other relevant information and factors.

Since initially implementing the OPSS, we have published final rules in the **Federal Register** annually to implement statutory requirements and changes arising from our continuing experience with this system. These rules can be viewed on the CMS Web site at: <https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/HospitalOutpatientPPS/Hospital-Outpatient-Regulations-and-Notices.html>.

E. Advisory Panel on Hospital Outpatient Payment (the HOP Panel or the Panel)

1. Authority of the Panel

Section 1833(t)(9)(A) of the Act, as amended by section 201(h) of Public Law 106–113, and redesignated by section 202(a)(2) of Public Law 106–113, requires that we consult with an external advisory panel of experts to annually review the clinical integrity of the payment groups and their weights under the OPSS. In CY 2000, based on section 1833(t)(9)(A) of the Act, the Secretary established the Advisory Panel on Ambulatory Payment Classification Groups (APC Panel) to fulfill this requirement. In CY 2011, based on section 222 of the PHS Act which gives discretionary authority to the Secretary to convene advisory councils and committees, the Secretary expanded the panel's scope to include the supervision of hospital outpatient therapeutic services in addition to the APC groups and weights. To reflect this new role of the panel, the Secretary

changed the panel's name to the Advisory Panel on Hospital Outpatient Payment (the HOP Panel or the Panel). The HOP Panel is not restricted to using data compiled by CMS, and in conducting its review, it may use data collected or developed by organizations outside the Department.

2. Establishment of the Panel

On November 21, 2000, the Secretary signed the initial charter establishing the Panel, and at that time named the APC Panel. This expert panel is composed of appropriate representatives of providers (currently employed full-time, not as consultants, in their respective areas of expertise), reviews clinical data, and advises CMS about the clinical integrity of the APC groups and their payment weights. Since CY 2012, the Panel also is charged with advising the Secretary on the appropriate level of supervision for individual hospital outpatient therapeutic services. The Panel is technical in nature, and it is governed by the provisions of the Federal Advisory Committee Act (FACA). The current charter specifies, among other requirements, that the Panel—

- May advise on the clinical integrity of Ambulatory Payment Classification (APC) groups and their associated weights;
- May advise on the appropriate supervision level for hospital outpatient services;
- Continues to be technical in nature;
- Is governed by the provisions of the FACA;
- Has a Designated Federal Official (DFO); and
- Is chaired by a Federal Official designated by the Secretary.

The Panel's charter was amended on November 15, 2011, renaming the Panel and expanding the Panel's authority to include supervision of hospital outpatient therapeutic services and to add critical access hospital (CAH) representation to its membership. The Panel's charter was also amended on November 6, 2014 (80 FR 23009), and the number of members was revised from up to 19 to up to 15 members. The Panel's current charter was approved on November 21, 2016, for a 2-year period (81 FR 94378).

The current Panel membership and other information pertaining to the Panel, including its charter, **Federal Register** notices, membership, meeting dates, agenda topics, and meeting reports, can be viewed on the CMS Web site at: <https://www.cms.gov/Regulations-and-Guidance/Guidance/FACA/AdvisoryPanelonAmbulatoryPaymentClassificationGroups.html>.

3. Panel Meetings and Organizational Structure

The Panel has held multiple meetings, with the last meeting taking place on August 21, 2017. Prior to each meeting, we publish a notice in the **Federal Register** to announce the meeting and, when necessary, to solicit nominations for Panel membership, to announce new members and to announce any other changes of which the public should be aware. Beginning in CY 2017, we have transitioned to one meeting per year (81 FR 31941). Further information on the 2017 summer meeting can be found in the meeting notice titled "Medicare Program: Announcement of the Advisory Panel on Hospital Outpatient Payment (the Panel) Meeting on August 21–22, 2017" (82 FR 24128).

In addition, the Panel has established an operational structure that, in part, currently includes the use of three subcommittees to facilitate its required review process. The three current subcommittees include the following:

- APC Groups and Status Indicator Assignments Subcommittee, which advises the Panel on the appropriate status indicators to be assigned to HCPCS codes, including but not limited to whether a HCPCS code or a category of codes should be packaged or separately paid, as well as the appropriate APC assignment of HCPCS codes regarding services for which separate payment is made;
- Data Subcommittee, which is responsible for studying the data issues confronting the Panel and for recommending options for resolving them; and
- Visits and Observation

Subcommittee, which reviews and makes recommendations to the Panel on all technical issues pertaining to observation services and hospital outpatient visits paid under the OPSS.

Each of these subcommittees was established by a majority vote from the full Panel during a scheduled Panel meeting, and the Panel recommended at the August 21, 2017 meeting that the subcommittees continue. We accepted this recommendation.

In addition, discussions of the other recommendations made by the Panel at the August 21, 2017 Panel meeting are included in the sections of this final rule with comment period that are specific to each recommendation. For discussions of earlier Panel meetings and recommendations, we refer readers to previously published OPSS/ASC proposed and final rules, the CMS Web site mentioned earlier in this section, and the FACA database at <http://facadatabase.gov>.

We note that we received some public comments on the CY 2018 OPPS/ASC proposed rule related to the HOP Panel meeting presentations, which we address below.

Comment: One commenter supported CMS' extension of the HOP Panel meeting presentation submission deadline when there is a truncated submittal timeframe due to delayed publication of the OPPS/ASC proposed rule. However, to avoid the need to modify the submission deadline in the future, the commenter suggested that CMS revise the submission deadline in the **Federal Register** notice from a firm date to a fluid 21 days from the proposed rule display date to avoid this deadline issue in the future.

Response: We appreciate the commenter's request to modify the HOP Panel meeting submission deadline format. However, frequency, timing, and presentation deadlines are outside the scope of the proposed rule and are generally announced through either a separate **Federal Register** notice or subregulatory channel such as the CMS Web site, or both.

Comment: One commenter requested that CMS reinstate the winter Panel meetings as part of a multifaceted process that would allow for multiple proposal refinements with Panel input prior to finalization of a policy. The commenter also suggested that CMS use this winter meeting as a vehicle to allow stakeholders to review and discuss updated cost data for HCPCS codes and APCs prior to the release of the data in the proposed rule.

Response: We appreciate the commenter's request to modify the Panel meeting processes. However, the frequency of Panel meetings is outside the scope of the proposed rule; meetings are generally announced through either a separate **Federal Register** notice or a subregulatory channel such as the CMS Web site, or both.

F. Public Comments Received on the CY 2017 OPPS/ASC Final Rule With Comment Period

We received 39 timely pieces of correspondence on the CY 2017 OPPS/ASC final rule with comment period that appeared in the **Federal Register** on November 14, 2016 (81 FR 79562), some of which contained comments on the interim APC assignments and/or status indicators of new or replacement Level II HCPCS codes (identified with comment indicator "NI" in OPPS Addendum B, ASC Addendum AA, and ASC Addendum BB to that final rule), the potential limitation on clinical service line expansion or volume of service increases by nonexcepted off-

campus provider-based departments, and the Medicare Physician Fee Schedule (MPFS) payment rates for nonexcepted items and services furnished and billed by nonexcepted off-campus provider-based departments of hospitals. Summaries of the public comments are set forth in the CY 2018 proposed rule and this final rule with comment period under the appropriate subject matter headings. Summaries of public comments on the MPFS payment rates for nonexcepted items and services are set forth in the CY 2018 MPFS final rule with comment period.

II. Updates Affecting OPPS Payments

A. Recalibration of APC Relative Payment Weights

1. Database Construction

a. Database Source and Methodology

Section 1833(t)(9)(A) of the Act requires that the Secretary review not less often than annually and revise the relative payment weights for APCs. In the April 7, 2000 OPPS final rule with comment period (65 FR 18482), we explained in detail how we calculated the relative payment weights that were implemented on August 1, 2000 for each APC group.

In the CY 2018 OPPS/ASC proposed rule (82 FR 33568), for CY 2018, we proposed to recalibrate the APC relative payment weights for services furnished on or after January 1, 2018, and before January 1, 2019 (CY 2018), using the same basic methodology that we described in the CY 2017 OPPS/ASC final rule with comment period (81 FR 79574 through 79595). For this final rule with comment period, for CY 2018, we recalibrated the APC relative payment weights for services furnished on or after January 1, 2018, and before January 1, 2019 (CY 2018), using the same basic methodology that we described in the CY 2017 OPPS/ASC final rule with comment period, using updated CY 2016 claims data. That is, we recalibrate the relative payment weights for each APC based on claims and cost report data for hospital outpatient department (HOPD) services, using the most recent available data to construct a database for calculating APC group weights.

For the purpose of recalibrating the APC relative payment weights for CY 2018, we began with approximately 163 million final action claims (claims for which all disputes and adjustments have been resolved and payment has been made) for HOPD services furnished on or after January 1, 2016, and before January 1, 2017, before applying our exclusionary criteria and other methodological adjustments. After the

application of those data processing changes, we used approximately 86 million final action claims to develop the CY 2018 OPPS payment weights. For exact numbers of claims used and additional details on the claims accounting process, we refer readers to the claims accounting narrative under supporting documentation for this CY 2018 OPPS/ASC final rule with comment period on the CMS Web site at: <http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/HospitalOutpatientPPS/index.html>.

Addendum N to this final rule with comment period (which is available via the Internet on the CMS Web site) includes the list of bypass codes for CY 2018. The list of bypass codes contains codes that were reported on claims for services in CY 2016 and, therefore, includes codes that were in effect in CY 2016 and used for billing, but were deleted for CY 2017. We retained these deleted bypass codes on the CY 2018 bypass list because these codes existed in CY 2016 and were covered OPD services in that period, and CY 2016 claims data are used to calculate CY 2018 payment rates. Keeping these deleted bypass codes on the bypass list potentially allows us to create more "pseudo" single procedure claims for ratesetting purposes. "Overlap bypass codes" that are members of the multiple imaging composite APCs are identified by asterisks (*) in the third column of Addendum N to this final rule with comment period. HCPCS codes that we are adding for CY 2018 are identified by asterisks (*) in the fourth column of Addendum N.

Table 1 below contains the list of codes that we are removing from the CY 2018 bypass list.

TABLE 1—HCPCS CODES REMOVED FROM THE CY 2018 BYPASS LIST

HCPCS code	HCPCS short descriptor
77305	Teletx isodose plan simple.
77310	Teletx isodose plan intermed.
77315	Teletx isodose plan complex.
77327	Brachytx isodose calc intern.
90801	Psy dx interview.
90802	Intac psy dx interview.
90804	Psytx office 20–30 min.
90805	Psytx off 20–30 min w/e&m.
90806	Psytx off 45–50 min.
90807	Psytx off 45–50 min w/e&m.
90808	Psytx office 75–80 min.
90809	Psytx off 75–80 w/e&m.
90810	Intac psytx off 20–30 min.
90811	Intac psytx 20–40 w/e&m.
90812	Intac psytx off 45–50 min.
90857	Intac group psytx.
90862	Medication management.
95115	Immunotherapy one injection.
95117	Immunotherapy injections.

TABLE 1—HCPCS CODES REMOVED FROM THE CY 2018 BYPASS LIST—Continued

HCPCS code	HCPCS short descriptor
95144	Antigen therapy services.
95147	Antigen therapy services.
95165	Antigen therapy services.
96402	Chemo hormon antineopl sq/im.
99201	Office/outpatient visit new.
99202	Office/outpatient visit new.
99203	Office/outpatient visit new.
99204	Office/outpatient visit new.
99205	Office/outpatient visit new.
99212	Office/outpatient visit est.
99213	Office/outpatient visit est.
99214	Office/outpatient visit est.
C1300	Hyperbaric oxygen.
G0340	Robt lin-radsurg fractx 2–5.
G9141	Influenza A H1N1, admin w cou.
M0064	Visit for drug monitoring.

Medicare/Medicare-Fee-for-Service-Payment/HospitalOutpatientPPS/index.html.

To ensure the completeness of the revenue code-to-cost center crosswalk, we reviewed changes to the list of revenue codes for CY 2016 (the year of claims data we used to calculate the CY 2018 OPPS payment rates) and found that the National Uniform Billing Committee (NUBC) did not add any new revenue codes to the NUBC 2016 Data Specifications Manual.

In accordance with our longstanding policy, we calculate CCRs for the standard and nonstandard cost centers accepted by the electronic cost report database. In general, the most detailed level at which we calculate CCRs is the hospital-specific departmental level. For a discussion of the hospital-specific overall ancillary CCR calculation, we refer readers to the CY 2007 OPPS/ASC final rule with comment period (71 FR 67983 through 67985). The calculation of blood costs is a longstanding exception (since the CY 2005 OPPS) to this general methodology for calculation of CCRs used for converting charges to costs on each claim. This exception is discussed in detail in the CY 2007 OPPS/ASC final rule with comment period and discussed further in section II.A.2.a.(1) of this final rule with comment period.

In the CY 2014 OPPS/ASC final rule with comment period (78 FR 74840 through 74847), we finalized our policy of creating new cost centers and distinct CCRs for implantable devices, MRIs, CT scans, and cardiac catheterization. However, in response to the CY 2014 OPPS/ASC proposed rule, commenters reported that some hospitals currently use an imprecise “square feet” allocation methodology for the costs of large moveable equipment like CT scan and MRI machines. They indicated that while CMS recommended using two alternative allocation methods, “direct assignment” or “dollar value,” as a more accurate methodology for directly assigning equipment costs, industry

analysis suggested that approximately only half of the reported cost centers for CT scans and MRIs rely on these preferred methodologies. In response to concerns from commenters, we finalized a policy for the CY 2014 OPPS to remove claims from providers that use a cost allocation method of “square feet” to calculate CCRs used to estimate costs associated with the CT and MRI APCs (78 FR 74847). Further, we finalized a transitional policy to estimate imaging APC relative payment weights using only CT and MRI cost data from providers that do not use “square feet” as the cost allocation statistic. We provided that this finalized policy would sunset in 4 years to provide a sufficient time for hospitals to transition to a more accurate cost allocation method and for the related data to be available for ratesetting purposes (78 FR 74847). Therefore, beginning CY 2018, with the sunset of the transition policy, we will estimate the imaging APC relative payment weight using cost data from all providers, regardless of the cost allocation statistic employed.

As we discussed in the CY 2018 OPPS/ASC proposed rule (82 FR 33570), some stakeholders have raised concerns regarding using claims from all providers to calculate CT and MRI CCRs, regardless of the cost allocations statistic employed (78 FR 74840 through 74847). Stakeholders noted that providers continue to use the “square feet” cost allocation method and that including claims from such providers would cause significant reductions in imaging APC payment rates.

Table 2 below demonstrates the relative effect on imaging APC payments after removing cost data for providers that report CT and MRI standard cost centers using “square feet” as the cost allocation method by extracting HCRIS data on Worksheet B–1. Table 3 below provides statistical values based on the CT and MRI standard cost center CCRs using the different cost allocation methods.

b. Calculation and Use of Cost-to-Charge Ratios (CCRs)

For CY 2018, in this CY 2018 OPPS/ASC final rule with comment period, as we proposed, we are continuing to use the hospital-specific overall ancillary and departmental cost-to-charge ratios (CCRs) to convert charges to estimated costs through application of a revenue code-to-cost center crosswalk. To calculate the APC costs on which the CY 2018 APC payment rates are based, we calculated hospital-specific overall ancillary CCRs and hospital-specific departmental CCRs for each hospital for which we had CY 2016 claims data by comparing these claims data to the most recently available hospital cost reports, which, in most cases, are from CY 2015. For the final CY 2018 OPPS payment rates, we used the set of claims processed during CY 2016. We applied the hospital-specific CCR to the hospital’s charges at the most detailed level possible, based on a revenue code-to-cost center crosswalk that contains a hierarchy of CCRs used to estimate costs from charges for each revenue code. That crosswalk is available for review and continuous comment on the CMS Web site at: <http://www.cms.gov/>

TABLE 2—PERCENTAGE CHANGE IN ESTIMATE COST FOR CT AND MRI APCS WHEN EXCLUDING CLAIMS FROM PROVIDER USING “SQUARE FEET” AS THE COST ALLOCATION METHOD

APC	APC descriptor	Percentage change
5521	Level 1 Imaging without Contrast	–3.8
5522	Level 2 Imaging without Contrast	5.3
5523	Level 3 Imaging without Contrast	6.3
5524	Level 4 Imaging without Contrast	5.0
5571	Level 1 Imaging with Contrast	9.0
5572	Level 2 Imaging with Contrast	7.0
5573	Level 3 Imaging with Contrast	2.1
8005	CT and CTA without Contrast Composite	14.4
8006	CT and CTA with Contrast Composite	11.9

TABLE 2—PERCENTAGE CHANGE IN ESTIMATE COST FOR CT AND MRI APCS WHEN EXCLUDING CLAIMS FROM PROVIDER USING “SQUARE FEET” AS THE COST ALLOCATION METHOD—Continued

APC	APC descriptor	Percentage change
8007	MRI and MRA without Contrast Composite	7.2
8008	MRI and MRA with Contrast Composite	7.5

TABLE 3—CCR STATISTICAL VALUES BASED ON USE OF DIFFERENT COST ALLOCATION METHODS

Cost allocation method	CT		MRI	
	Median CCR	Mean CCR	Median CCR	Mean CCR
All Providers	0.0387	0.0538	0.0795	0.1059
Square Feet Only	0.0317	0.0488	0.0717	0.0968
Direct Assign	0.0557	0.0650	0.1032	0.1222
Dollar Value	0.0457	0.0603	0.0890	0.1178
Direct Assign and Dollar Value	0.0457	0.0603	0.0893	0.1175

Our analysis showed that since the CY 2014 OPSS in which we established the transition policy, the number of valid MRI CCRs has increased by 17.5 percent to 2,177 providers and the number of valid CT CCRs has increased by 15.1 percent to 2,251 providers. However, in the proposed rule, we noted that, as shown in Table 2 above, nearly all imaging APCs would see an increase in payment rates for CY 2018 if claims from providers that report “square feet” cost allocation method were removed. This can be attributed to the generally lower CCR values from providers that use a cost allocation method of “square feet” as shown in Table 3 above. We stated in the proposed rule that we believe that the imaging CCRs that we have are appropriate for ratesetting. However, in response to provider concerns and to provide added flexibility for hospitals to improve their cost allocation methods, we proposed to extend the transition policy an additional year, for the CY 2018 OPSS.

For the CY 2018 OPSS, we proposed to continue to remove claims from providers that use a cost allocation method of “square feet” to calculate CCRs used to estimate costs with the CT and MRI APCs identified in Table 2 above. Beginning in CY 2019, we would estimate the imaging APC relative payment weights using cost data from all providers, regardless of the cost allocation statistic employed.

Comment: Commenters supported CMS’ proposal to extend the transition policy an additional year, for the CY 2018 OPSS. Several commenters recommended that CMS continue to remove claims from providers that use a cost allocation method of “square feet” to calculate CT and MRI CCRs in subsequent calendar years.

Response: We thank the commenters for their support. As we discussed in the CY 2018 OPSS/ASC proposed rule (82 FR 33570), our analysis shows that the number of valid MRI and CT CCRs has increased since we established the transition policy. We believe extending our transition policy for 1 additional year will provide hospitals adequate time to implement a more accurate cost allocation method for the costs of large moveable equipment like CT scan and MRI machines.

Comment: Some commenters recommended that CMS discontinue the use of CT and MRI cost centers for developing CT and MRI CCRs. One commenter believed that creating separate CT and MRI cost centers has resulted in a decline in geometric means for imaging APCs which can be attributed to costs being dropped out and changes in hospital charging practices.

Response: We are not convinced that the change in CT and MRI CCRs over the previous years is a result of costs not being reported accurately. The standard cost centers for CT scans and MRIs have been in effect since cost reporting periods beginning on or after May 1, 2010, on the revised Medicare cost report Form CMS–2552–10. Therefore, the cost reports that we used to develop the CY 2018 OPSS relative payment weights were the fifth or sixth opportunity for hospitals to submit cost reports with the CT and MRI cost centers. However, we will continue to monitor cost reporting practices with respect to CT scan and MRI cost centers as well as trends in CT and MRI CCRs.

After consideration of the public comments we received, we are finalizing our proposal to extend our transition policy for 1 additional year and continue to remove claims from

providers that use a cost allocation method of “square feet” to calculate CT and MRI CCRs for the CY 2018 OPSS.

2. Data Development Process and Calculation of Costs Used for Ratesetting

In this section of this final rule with comment period, we discuss the use of claims to calculate the OPSS payment rates for CY 2018. The Hospital OPSS page on the CMS Web site on which this final rule with comment period is posted (<http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/HospitalOutpatientPPS/index.html>) provides an accounting of claims used in the development of the payment rates. That accounting provides additional detail regarding the number of claims derived at each stage of the process. In addition, below in this section we discuss the file of claims that comprises the data set that is available upon payment of an administrative fee under a CMS data use agreement. The CMS Web site, <http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/HospitalOutpatientPPS/index.html>, includes information about obtaining the “OPSS Limited Data Set,” which now includes the additional variables previously available only in the OPSS Identifiable Data Set, including ICD–10–CM diagnosis codes and revenue code payment amounts. This file is derived from the CY 2016 claims that were used to calculate the payment rates for the CY 2018 OPSS.

In the history of the OPSS, we have traditionally established the scaled relative weights on which payments are based using APC median costs, which is a process described in the CY 2012 OPSS/ASC final rule with comment period (76 FR 74188). However, as discussed in more detail in section II.A.2.f. of the CY 2013 OPSS/ASC final

rule with comment period (77 FR 68259 through 68271), we finalized the use of geometric mean costs to calculate the relative weights on which the CY 2013 OPPS payment rates were based. While this policy changed the cost metric on which the relative payments are based, the data process in general remained the same, under the methodologies that we used to obtain appropriate claims data and accurate cost information in determining estimated service cost. For CY 2018, in this CY 2018 OPPS/ASC final rule with comment period, as we proposed, we are continuing to use geometric mean costs to calculate the relative weights on which the CY 2018 OPPS payment rates are based.

We used the methodology described in sections II.A.2.a. through II.A.2.c. of this final rule with comment period to calculate the costs we used to establish the relative payment weights used in calculating the OPPS payment rates for CY 2018 shown in Addenda A and B to this final rule with comment period (which are available via the Internet on the CMS Web site). We refer readers to section II.A.4. of this final rule with comment period for a discussion of the conversion of APC costs to scaled payment weights.

For details of the claims process used in this final rule with comment period, we refer readers to the claims accounting narrative under supporting documentation for this CY 2018 OPPS/ASC final rule with comment period on the CMS Web site at: <http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/HospitalOutpatientPPS/index.html>.

a. Calculation of Single Procedure APC Criteria-Based Costs

(1) Blood and Blood Products

(a) Methodology

Since the implementation of the OPPS in August 2000, we have made separate payments for blood and blood products through APCs rather than packaging payment for them into payments for the procedures with which they are administered. Hospital payments for the costs of blood and blood products, as well as for the costs of collecting, processing, and storing blood and blood products, are made through the OPPS payments for specific blood product APCs.

In the CY 2018 OPPS/ASC proposed rule (82 FR 33571), we proposed to continue to establish payment rates for blood and blood products using our blood-specific CCR methodology, which utilizes actual or simulated CCRs from the most recently available hospital cost reports to convert hospital charges for

blood and blood products to costs. This methodology has been our standard ratesetting methodology for blood and blood products since CY 2005. It was developed in response to data analysis indicating that there was a significant difference in CCRs for those hospitals with and without blood-specific cost centers, and past public comments indicating that the former OPPS policy of defaulting to the overall hospital CCR for hospitals not reporting a blood-specific cost center often resulted in an underestimation of the true hospital costs for blood and blood products. Specifically, in order to address the differences in CCRs and to better reflect hospitals' costs, we proposed to continue to simulate blood CCRs for each hospital that does not report a blood cost center by calculating the ratio of the blood-specific CCRs to hospitals' overall CCRs for those hospitals that do report costs and charges for blood cost centers. We also proposed to apply this mean ratio to the overall CCRs of hospitals not reporting costs and charges for blood cost centers on their cost reports in order to simulate blood-specific CCRs for those hospitals. We proposed to calculate the costs upon which the proposed CY 2018 payment rates for blood and blood products are based using the actual blood-specific CCR for hospitals that reported costs and charges for a blood cost center and a hospital-specific, simulated blood-specific CCR for hospitals that did not report costs and charges for a blood cost center.

We continue to believe that the hospital-specific, simulated blood-specific CCR methodology better responds to the absence of a blood-specific CCR for a hospital than alternative methodologies, such as defaulting to the overall hospital CCR or applying an average blood-specific CCR across hospitals. Because this methodology takes into account the unique charging and cost accounting structure of each hospital, we believe that it yields more accurate estimated costs for these products. We continue to believe that this methodology in CY 2018 would result in costs for blood and blood products that appropriately reflect the relative estimated costs of these products for hospitals without blood cost centers and, therefore, for these blood products in general.

We note that, as discussed in section II.A.2.e. of the CYs 2014 through 2017 OPPS/ASC final rules with comment period (78 FR 74861 through 74910, 79 FR 66798 through 66810, 80 FR 70325 through 70339, and 81 FR 79580 through 79585, respectively), we defined a comprehensive APC (C-APC)

as a classification for the provision of a primary service and all adjunctive services provided to support the delivery of the primary service. Under this policy, we include the costs of blood and blood products when calculating the overall costs of these C-APCs. In the CY 2018 OPPS/ASC proposed rule (82 FR 33571), we proposed to continue to apply the blood-specific CCR methodology described in this section when calculating the costs of the blood and blood products that appear on claims with services assigned to the C-APCs. Because the costs of blood and blood products would be reflected in the overall costs of the C-APCs (and, as a result, in the proposed payment rates of the C-APCs), we proposed to not make separate payments for blood and blood products when they appear on the same claims as services assigned to the C-APCs (we refer readers to the CY 2015 OPPS/ASC final rule with comment period (79 FR 66796)).

We also referred readers to Addendum B to the proposed rule (which is available via the Internet on the CMS Web site) for the proposed CY 2018 payment rates for blood and blood products (which are identified with status indicator "R"). For a more detailed discussion of the blood-specific CCR methodology, we refer readers to the CY 2005 OPPS proposed rule (69 FR 50524 through 50525). For a full history of OPPS payment for blood and blood products, we refer readers to the CY 2008 OPPS/ASC final rule with comment period (72 FR 66807 through 66810).

We invited public comments on our proposals.

Comment: Several commenters continued to support using the blood-specific CCR methodology to establish payment rates for blood and blood products, which utilizes actual or simulated CCRs from the most recently available hospital cost reports to convert hospital charges for blood and blood products to costs. The commenters also supported using a blood-specific APC with a separate APC for each blood and blood product service code. The commenters viewed the blood-specific CCR methodology as the best current methodology to report the costs of blood and blood products.

Response: We appreciate the commenters' support.

Comment: Several commenters expressed concerns about reduced payment for several blood and blood products HCPCS codes, including HCPCS codes P9010 (Blood (whole), for transfusion, per unit), P9011 (Blood, split unit), P9012 (Cryoprecipitate, each

unit), P9016 (Red blood cells, leukocytes reduced, each unit), P9023 (Plasma, pooled multiple donor, solvent/detergent treated, frozen, each unit), P9035 (Platelets, pheresis, leukocytes reduced, each unit), P9043 (Infusion, plasma protein fraction (human), 5%, 50 ml), P9048 (Infusion, plasma protein fraction (human), 5%, 250 ml), P9055 (Platelets, leukocytes reduced, cmv-negative, apheresis/pheresis, each unit), and P9060 (Fresh frozen plasma, donor retested, each unit). Commenters supported the higher payment rates for several HCPCS codes, including HCPCS codes P9019 (Platelets, each unit) and P9034 (Platelets, pheresis, each unit).

Response: We used claims data from CY 2016 and the same blood-specific CCR methodology we used in previous years to calculate these proposed payment rates and believe the changes in costs for the services mentioned by these commenters are a result of normal variations in the claims data.

Comment: Two commenters expressed concern that the proposed payment rate for HCPCS code P9070 (Plasma, pooled multiple donor, pathogen reduced, frozen, each unit) does not accurately reflect the cost of the blood product.

Response: HCPCS code P9070 was established on January 1, 2016, and for CY 2016 and CY 2017, we linked the payment of HCPCS code P9070 to a blood product, HCPCS code P9059 (Fresh frozen plasma between 8–24 hours of collection, each unit), that we believed would have a comparable cost to HCPCS code P9070. CY 2018 is the first year for which we have claims data that will allow us to directly determine the cost of HCPCS code P9070. In this case, the payment rate for HCPCS code P9070 in CY 2018 is lower than the CY 2017 payment rate. However, we believe the CY 2018 payment rate is appropriate because it is based on actual claims data for HCPCS code P9070 rather than for HCPCS code P9059.

Comment: Commenters requested that CMS immediately include the cost of newly implemented FDA blood safety measures for blood and blood products prior to receiving claims data that would contain the costs for the new safety measures.

Response: As stated earlier in this section, the OPPTS covers hospital payments for the costs of blood and blood products, as well as for the costs of collecting, processing, and storing blood and blood products. The cost of blood and blood products is determined using claims data and blood-specific CCRs from hospitals. To the extent that compliance with blood safety measures

is included in hospital reporting of the cost of collecting, processing and storing blood and blood products, these costs would be reflected in the hospital rates. It is not possible to estimate the potential costs of new safety measures outside of claims data.

Comment: Several commenters resubmitted the comments they made in response to a solicitation for public comments in the CY 2017 OPPTS/ASC proposed rule (81 FR 45617 through 45618) and summarized in the CY 2017 OPPTS/ASC final rule with comment period (81 FR 79577) on the current set of active HCPCS P-codes that describe blood products regarding how the code descriptors could be revised and updated (if necessary) to reflect the current blood products provided to hospital outpatients.

The commenters supported a thorough examination of the current set of HCPCS P-codes for blood products as a necessary undertaking because the HCPCS P-codes were created several years ago. Several commenters recommended that CMS convene a stakeholder group that includes representatives of hospitals, blood banks, the American Red Cross, and others to discuss a framework to systematically review and revise the HCPCS P-codes for blood products. Commenters also suggested that CMS establish a “not otherwise classified (NOC)” code for blood products, which would allow hospitals to begin immediately billing for a new blood product that is not described by a specific HCPCS P-code. One commenter supported the use of broader descriptions for HCPCS P-codes when more granular language is no longer meaningful for differentiating between different types of blood and blood products, and where the costs and volume of the HCPCS P-codes are similar. Other commenters suggested specific modifications to the order, classification, and code descriptors of the blood and blood product HCPCS P-codes.

Response: We appreciate the commenters’ detailed responses. The safety of the nation’s blood supply continues to be among the highest priorities, and we will work with the commenters and other stakeholders to ensure that any future updates to the HCPCS P-codes will support our goal of maintaining the safety of the blood supply.

After consideration of the public comments we received, we are finalizing our proposal, without modification, to establish payment rates for blood and blood products using our blood-specific CCR methodology.

Addendum B to this final rule with comment period (which is available via the Internet on the CMS Web site) contains the final CY 2018 payment rates for blood and blood products (which are identified with status indicator “R”).

(b) Pathogen-Reduced Platelets and Rapid Bacterial Testing for Platelets

In March 2016, the Food and Drug Administration (FDA) issued draft guidance for blood collection establishments and transfusion services entitled “Bacterial Risk Control Strategies for Blood Collection Establishments and Transfusion Services to Enhance the Safety and Availability of Platelets for Transfusion” (available at: <https://www.fda.gov/downloads/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/Blood/UCM425952.pdf>). This draft guidance recommended, among other things, the use of rapid bacterial testing devices secondary to testing using a culture-based bacterial detection device or the implementation of pathogen-reduction technology for platelets to adequately control the risk of bacterial contamination of platelets.

In the CY 2016 OPPTS/ASC final rule with comment period (80 FR 70322), we established HCPCS code P9072 (Platelets, pheresis, pathogen reduced, each unit). The CMS HCPCS Workgroup later revised HCPCS code P9072 to include the use of pathogen-reduction technology or rapid bacterial testing. Specifically, the descriptor for this code was revised, effective January 1, 2017, to read as follows: HCPCS code P9072 (Platelets, pheresis, pathogen reduced or rapid bacterial tested, each unit). The payment rate for HCPCS code P9072 is based on a crosswalk to HCPCS code P9037 (Platelets, pheresis, leukocyte reduced, irradiated, each unit). We refer readers to the CY 2016 OPPTS/ASC final rule with comment period for a further discussion of crosswalks for pathogen-reduced blood products (80 FR 70323).

As discussed in the CY 2018 OPPTS/ASC proposed rule (82 FR 33571 and 33572), after the release of the CY 2017 OPPTS/ASC final rule with comment period, several blood and blood product stakeholders expressed concerns about the revised code descriptor for HCPCS code P9072. The stakeholders believed that the revision to HCPCS code P9072 to describe both pathogen reduction and rapid bacterial testing was an inappropriate code descriptor. They stated that separate coding is needed to describe each service because each service is distinct. The stakeholders also noted that the code descriptor for

HCPCS code P9072 results in hospitals receiving the same payment rate for platelets undergoing rapid bacterial testing that the hospitals receive for platelets treated with pathogen reduction technology, despite the fact that pathogen reduction is significantly more expensive than rapid bacterial testing.

After review of the concerns expressed by the blood and blood product stakeholders, the CMS HCPCS Workgroup deactivated HCPCS code P9072 for Medicare reporting and replaced the code with two new HCPCS codes effective July 1, 2017. Specifically, effective July 1, 2017, HCPCS code Q9988 (Platelets, pheresis, pathogen reduced, each unit) is used to report the use of pathogen-reduction technology and HCPCS code Q9987 (Pathogen(s) test for platelets) is used to report rapid bacterial testing or other pathogen tests for platelets, instead of HCPCS code P9072. We note that HCPCS code Q9987 should be reported to describe the test used for the detection of bacterial contamination in platelets as well as any other test that may be used to detect pathogen contamination. HCPCS code Q9987 should not be used for reporting donation testing for infectious agents such as viruses. The coding changes associated with these codes were published on the CMS HCPCS Quarterly Update Web site, effective July 2017, at: <https://www.cms.gov/Medicare/Coding/HCPCSReleaseCodeSets/HCPCS-Quarterly-Update.html>. In addition, for OPSS, we announced the new HCPCS codes that were effective July 1, 2017 through the July 2017 OPSS quarterly update Change Request (Transmittal 3783, Change Request 10122, dated May 26, 2017). We note that, effective July 1, 2017, HCPCS code Q9988 is assigned to APC 9536 (Pathogen Reduced Platelets), with a payment rate of \$647.12, and HCPCS code Q9987 is assigned to New Technology APC 1493, with a payment rate of \$25.50.

In the CY 2016 OPSS/ASC final rule with comment period (80 FR 70322 through 70323), we reiterated that we calculate payment rates for blood and blood products using our blood-specific CCR methodology, which utilizes actual or simulated CCRs from the most recently available hospital cost reports to convert hospital charges for blood and blood products to costs. Because HCPCS code P9072 was new for CY 2016, there were no claims data available on the charges and costs for this blood product upon which to apply our blood-specific CCR methodology. Therefore, we established an interim payment rates for this HCPCS code

based on a crosswalk to existing blood product HCPCS code P9037, which we believed provided the best proxy for the costs of the new blood product. In addition, we stated that once we had claims data for HCPCS code P9072, we would calculate its payment rate using the claims data that should be available for the code beginning in CY 2018, which is our practice for other blood product HCPCS codes for which claims data have been available for 2 years.

We stated in the proposed rule that, although our standard practice for new codes involves using claims data to set payment rates once claims data become available, we are concerned that there may have been confusion among the provider community about the services that HCPCS code P9072 described. That is, as early as 2016, there were discussions about changing the descriptor for HCPCS code P9072 to include the phrase “or rapid bacterial tested”, which is a much less costly technology than pathogen reduction. In addition, as noted above, effective January 2017, the code descriptor for HCPCS code P9072 was, in fact, changed to also describe rapid bacterial testing of platelets and, effective July 1, 2017, the descriptor for the temporary successor code for HCPCS code P9072 (that is, HCPCS code Q9988) was changed again back to the original descriptor for HCPCS code P9072 that was in place for 2016.

Based on the ongoing discussions involving changes to the original HCPCS code P9072 established in CY 2016, we believe that claims for pathogen reduced platelets may potentially reflect certain claims for rapid bacterial testing of platelets. The geometric mean costs based on submitted claims for HCPCS code P9072 based on available claims data from CY 2016 is \$491.53, which is a 24-percent reduction from the CY 2017 payment rate of \$647.12. Because we believe that there may have been confusion related to ongoing discussions about changes to the original code descriptor for HCPCS code P9072, we believe it is appropriate to continue to crosswalk the payment amount for at least 1 additional year. Therefore, in the CY 2018 OPSS/ASC proposed rule (82 FR 33571 and 33572), we proposed for CY 2018 to determine the payment rate for HCPCS code Q9988 (the successor code to HCPCS code P9072) by continuing to use the payment rate that has been crosswalked from HCPCS code P9037 of \$647.12.

In the CY 2018 OPSS/ASC proposed rule, we solicited public comments on the proposed APC and status indicator assignments for HCPCS codes Q9987 and Q9988 for the CY 2018 OPSS

update. The proposed payment rates for HCPCS codes Q9987 and Q9988 were included in Addendum B to the proposed rule (which is available via the Internet on the CMS Web site).

Comment: Commenters expressed their appreciation to CMS for working collaboratively with the American Red Cross and other stakeholders in the blood banking community to respond to their concerns about HCPCS code P9072. The commenters supported the actions of CMS to deactivate HCPCS code P9072 and replace it with HCPCS codes Q9987 and Q9988 to have coding options that more accurately reflect available technologies. The commenters also appreciated that separate payment for each code was established in the OPSS and is proposed to continue in CY 2018.

Response: We appreciate the support for our actions in CY 2017 and our proposal for CY 2018.

Comment: One commenter requested that the description of HCPCS code Q9987 (Pathogen(s) test for platelets) be modified by adding the word “secondary” to clarify in the procedure code descriptor that HCPCS code Q9987 is intended to be used for secondary bacterial testing of platelets.

Response: We believe the guidance we have provided through the CY 2018 proposed rule (82 FR 33571 and 33572) and associated subregulatory guidance (Pub. 100-04 Medicare Claims Processing, Transmittal 3783, Change Request 10122) are sufficient for providers to understand how to appropriately report HCPCS code Q9987. We do not agree with the suggestion to modify the descriptor of HCPCS code Q9987, as we want the code to have the flexibility to be used to report new tests that may be developed in the future that are designed to identify pathogen contamination of platelets.

After consideration of the public comments we received, we are finalizing our CY 2018 proposal for reporting pathogen-reduced platelets and rapid bacterial testing for platelets. The only changes are to replace HCPCS code Q9987 (Pathogen(s) test for platelets) with HCPCS code P9100 (Pathogen(s) test for platelets) and to replace HCPCS code Q9988 (Platelets, pheresis, pathogen-reduced, each unit) with HCPCS code P9073 (Platelets, pheresis, pathogen-reduced, each unit). Details of the replacement of HCPCS codes Q9987 and Q9988 with HCPCS codes P9100 and P9073, respectively, are found in Table 4 below. The final payment rates for HCPCS codes P9100 and P9073 can be found in Addendum B to this final rule with comment period

(which is available via the Internet on the CMS Web site).

TABLE 4—REPLACEMENT CODES FOR HCPCS CODES Q9987 AND Q9988 AS OF JANUARY 1, 2018

CY 2017 HCPCS code	CY 2018 HCPCS code	CY 2018 long descriptor	Final CY 2018 SI	Final CY 2018 APC
Q9987	P9100	Pathogen(s) test for platelets	S	1493
Q9988	P9073	Platelets, pheresis, pathogen-reduced, each unit	R	9536

(2) Brachytherapy Sources

Section 1833(t)(2)(H) of the Act mandates the creation of additional groups of covered OPD services that classify devices of brachytherapy consisting of a seed or seeds (or radioactive source) (“brachytherapy sources”) separately from other services or groups of services. The statute provides certain criteria for the additional groups. For the history of OPSS payment for brachytherapy sources, we refer readers to prior OPSS final rules, such as the CY 2012 OPSS/ASC final rule with comment period (77 FR 68240 through 68241). As we have stated in prior OPSS updates, we believe that adopting the general OPSS prospective payment methodology for brachytherapy sources is appropriate for a number of reasons (77 FR 68240). The general OPSS methodology uses costs based on claims data to set the relative payment weights for hospital outpatient services. This payment methodology results in more consistent, predictable, and equitable payment amounts per source across hospitals by averaging the extremely high and low values, in contrast to payment based on hospitals’ charges adjusted to costs. We believe that the OPSS methodology, as opposed to payment based on hospitals’ charges adjusted to cost, also would provide hospitals with incentives for efficiency in the provision of brachytherapy services to Medicare beneficiaries. Moreover, this approach is consistent with our payment methodology for the vast majority of items and services paid under the OPSS. We refer readers to the CY 2016 OPSS/ASC final rule with comment period (80 FR 70323 through 70325) for further discussion of the history of OPSS payment for brachytherapy sources.

In the CY 2018 OPSS/ASC proposed rule (82 FR 33572), for CY 2018, we proposed to use the costs derived from CY 2016 claims data to set the proposed CY 2018 payment rates for brachytherapy sources because CY 2016 is the same year of data we proposed to use to set the proposed payment rates for most other items and services that would be paid under the CY 2018 OPSS.

We proposed to base the payment rates for brachytherapy sources on the geometric mean unit costs for each source, consistent with the methodology that we proposed for other items and services paid under the OPSS, as discussed in section II.A.2. of the proposed rule. We also proposed to continue the other payment policies for brachytherapy sources that we finalized and first implemented in the CY 2010 OPSS/ASC final rule with comment period (74 FR 60537). We proposed to pay for the stranded and nonstranded not otherwise specified (NOS) codes, HCPCS codes C2698 and C2699, at a rate equal to the lowest stranded or nonstranded prospective payment rate for such sources, respectively, on a per source basis (as opposed to, for example, a per mCi), which is based on the policy we established in the CY 2008 OPSS/ASC final rule with comment period (72 FR 66785). We also proposed to continue the policy we first implemented in the CY 2010 OPSS/ASC final rule with comment period (74 FR 60537) regarding payment for new brachytherapy sources for which we have no claims data, based on the same reasons we discussed in the CY 2008 OPSS/ASC final rule with comment period (72 FR 66786; which was delayed until January 1, 2010 by section 142 of Pub. L. 110–275). Specifically, this policy is intended to enable us to assign new HCPCS codes for new brachytherapy sources to their own APCs, with prospective payment rates set based on our consideration of external data and other relevant information regarding the expected costs of the sources to hospitals.

The proposed CY 2018 payment rates for brachytherapy sources were included in Addendum B to the proposed rule (which is available via the Internet on the CMS Web site) and were identified with status indicator “U”. For CY 2018, we proposed to assign status indicator “E2” (Items and Services for Which Pricing Information and Claims Data Are Not Available) to HCPCS code C2645 (Brachytherapy planar, palladium-103, per square millimeter) because this code was not

reported on CY 2016 claims. Therefore, we are unable to calculate a proposed payment rate based on the general OPSS ratesetting methodology described earlier. Although HCPCS code C2645 became effective January 1, 2016, and although we would expect that if a hospital furnished a brachytherapy source described by this code in CY 2016, HCPCS code C2645 should appear on the CY 2016 claims, there were no CY 2016 claims reporting this code available for the proposed rule. In addition, unlike our policy for new brachytherapy sources HCPCS codes, we did not consider external data to determine a proposed payment rate for HCPCS code C2645 for CY 2018. Therefore, we proposed to assign status indicator “E2” to HCPCS code C2645.

In addition, we assigned status indicator “E2” to HCPCS code C2644 (Brachytherapy, cesium-131 chloride, per square millimeter) because this code was not reported on any CY 2015 claims (that is, there were no Medicare claims submitted by any hospitals in 2015 that reported this HCPCS code). In our review of CY 2016 claims (which are used to set rates for CY 2018), we found that one hospital submitted one claim reporting HCPCS code C2644. Therefore, we proposed to assign status indicator “U” to HCPCS code C2644.

We invited public comments on our proposals.

Comment: One commenter suggested that CMS set the CY 2018 APC payment rate for HCPCS code C2636 (Brachytherapy linear, non-stranded, palladium-103, per 1mm) at \$26.99 per millimeter.

Response: As noted in past rulemaking cycles and in the CY 2018 OPSS/ASC proposed rule (82 FR 33572), we believe that adopting the general OPSS prospective payment methodology for brachytherapy sources is consistent with our payment methodology for the vast majority of items and services paid under the OPSS. Further, while we assign new HCPCS codes for new brachytherapy sources to their own APCs, with prospective payment rates set based on our consideration of external data and other

relevant information regarding the expected costs of the sources to hospitals, HCPCS code C2636 is neither new nor lacks claim information. HCPCS code C2636 became effective July 1, 2007. The final CY 2018 APC payment rate for HCPCS code C2636 is \$27.08 based on data for the 8 claims we received for the CY 2018 OPSS standard ratesetting process and can be found in Addendum B to this final rule with comment period (which is available via the Internet on the CMS Web site).

Comment: Some commenters suggested that HCPCS code C2645 (Brachytherapy, planar, palladium-103) had been incorrectly assigned status indicator “E2” (Items and Services for Which Pricing Information and Claims Data Are Not Available). These commenters stated that CMS has considered external data and other relevant information where no claims data exist for new HCPCS codes for new brachytherapy sources. For example, commenters included the following excerpt from the CY 2008 OPSS/ASC final rule with comment period regarding CMS’ policy with respect to establishing a payment rate for HCPCS code C2637 (Brachytherapy non-stranded, yttrium-169, per source) for which CMS lacked claims data: “if in public comments to the proposed rule or later in CYs 2007 or 2008, we would receive relevant and reliable information on the hospital cost for yttrium-169 and information that this source is being marketed, we could establish a prospective payment rate for the source in the CY 2008 final rule with comment period or in a quarterly OPSS update, respectively” (72 FR 66786).

In addition, commenters noted that, for CY 2016 and CY 2017, HCPCS code C2645 was assigned an OPSS status indicator of “U” (Brachytherapy Sources, Paid under OPSS; separate APC payment) and a payment rate of \$4.69 per mm² and that the payment rate was based upon external pricing data previously supplied by the developer of the brachytherapy source described by HCPCS code C2645. The developer of the brachytherapy source noted that there were no outpatient claims from CY 2016 for HCPCS code C2645 because all of the cases in CY 2016 that used the brachytherapy source were inpatient cases. However, the commenter noted its expectation that such source would begin to be used in the hospital outpatient department setting beginning approximately in mid-2018. This commenter noted that the “E2” status indicator would effectively render the outpatient payment rate as \$0 for CY 2018. The commenter supplied

external invoices to support maintaining the current payment rate of \$4.69 per mm².

Response: We note that the CY 2008 final rule with comment period preamble language that the commenters referenced to support their argument that external data have been used in the past was in reference to a brachytherapy source for which there appeared to have been erroneous claims submitted since the claims were from 2006, but the brachytherapy source did not come to market until 2007. This is distinguishable from the situation with HCPCS code C2645 which has been on the market since August 29, 2014 and had a code effective date of January 1, 2016. Nonetheless, as the commenters noted, there are no Medicare claims data available at this time. While this brachytherapy source is no longer “new,” the absence of even a single Medicare claim in the outpatient hospital data leads us to agree with the commenter that using an external source of data would be appropriate at this time. Accordingly, for CY 2018, we are assigning status indicator “U” to HCPCS code C2645 and are using external data (invoice prices) and other relevant information to establish the APC payment rate for HCPCS code C2645. Specifically, we are setting the payment rate at \$4.69 per mm², the same rate that was in effect for CYs 2016 and 2017.

After consideration of the public comments we received, we are finalizing our proposal to assign status indicator “U” to HCPCS code C2636 (Brachytherapy linear, non-stranded, palladium-103, per 1mm) and assigning an APC payment rate for HCPCS code C2636 at \$27.08 based on the 8 claims we received for the CY 2018 OPSS standard ratesetting process. We also are finalizing our proposal to assign status indicator “U” to HCPCS code C2644 (Brachytherapy, cesium-131 chloride, per millicurie) and are modifying our proposal to assign status indicator “E2” to HCPCS code C2645 (Brachytherapy planar, palladium-103, per square millimeter) and instead adopting a status indicator of “U” for CY 2018. The final CY 2018 payment rates for brachytherapy sources can be found in Addendum B to this final rule with comment period (which is available via the Internet on the CMS Web site) and are identified with status indicator “U”.

We continue to invite hospitals and other parties to submit recommendations to us for new codes to describe new brachytherapy sources. Such recommendations should be directed to the Division of Outpatient Care, Mail Stop C4-01-26, Centers for Medicare and Medicaid Services, 7500

Security Boulevard, Baltimore, MD 21244. We will continue to add new brachytherapy source codes and descriptors to our systems for payment on a quarterly basis.

b. Comprehensive APCs (C-APCs) for CY 2018

(1) Background

In the CY 2014 OPSS/ASC final rule with comment period (78 FR 74861 through 74910), we finalized a comprehensive payment policy that packages payment for adjunctive and secondary items, services, and procedures into the most costly primary procedure under the OPSS at the claim level. The policy was finalized in CY 2014, but the effective date was delayed until January 1, 2015, to allow additional time for further analysis, opportunity for public comment, and systems preparation. The comprehensive APC (C-APC) policy was implemented effective January 1, 2015, with modifications and clarifications in response to public comments received regarding specific provisions of the C-APC policy (79 FR 66798 through 66810).

A C-APC is defined as a classification for the provision of a primary service and all adjunctive services provided to support the delivery of the primary service. We established C-APCs as a category broadly for OPSS payment and implemented 25 C-APCs beginning in CY 2015 (79 FR 66809 through 66810). In the CY 2016 OPSS/ASC final rule with comment period (80 FR 70332), we finalized 10 additional C-APCs to be paid under the existing C-APC payment policy and added one additional level to both the Orthopedic Surgery and Vascular Procedures clinical families. In the CY 2017 OPSS/ASC final rule with comment period (81 FR 79584 through 79585), we finalized another 25 C-APCs.

Under this policy, we designate a service described by a HCPCS code assigned to a C-APC as the primary service when the service is identified by OPSS status indicator “J1”. When such a primary service is reported on a hospital outpatient claim, taking into consideration the few exceptions that are discussed below, we make payment for all other items and services reported on the hospital outpatient claim as being integral, ancillary, supportive, dependent, and adjunctive to the primary service (hereinafter collectively referred to as “adjunctive services”) and representing components of a complete comprehensive service (78 FR 74865 and 79 FR 66799). Payments for adjunctive services are packaged into

the payments for the primary services. This results in a single prospective payment for each of the primary, comprehensive services based on the costs of all reported services at the claim level.

Services excluded from the C-APC policy under the OPSS include services that are not covered OPD services, services that cannot by statute be paid for under the OPSS, and services that are required by statute to be separately paid. This includes certain mammography and ambulance services that are not covered OPD services in accordance with section 1833(t)(1)(B)(iv) of the Act; brachytherapy seeds, which also are required by statute to receive separate payment under section 1833(t)(2)(H) of the Act; pass-through payment drugs and devices, which also require separate payment under section 1833(t)(6) of the Act; self-administered drugs (SADs) that are not otherwise packaged as supplies because they are not covered under Medicare Part B under section 1861(s)(2)(B) of the Act; and certain preventive services (78 FR 74865 and 79 FR 66800 through 66801). A list of services excluded from the C-APC policy is included in Addendum J to this final rule with comment period (which is available via the Internet on the CMS Web site).

The C-APC policy payment methodology set forth in the CY 2014 OPSS/ASC final rule with comment period for the C-APCs and modified and implemented beginning in CY 2015 is summarized as follows (78 FR 74887 and 79 FR 66800):

Basic Methodology. As stated in the CY 2015 OPSS/ASC final rule with comment period, we define the C-APC payment policy as including all covered OPD services on a hospital outpatient claim reporting a primary service that is assigned to status indicator “J1”, excluding services that are not covered OPD services or that cannot by statute be paid for under the OPSS. Services and procedures described by HCPCS codes assigned to status indicator “J1” are assigned to C-APCs based on our usual APC assignment methodology by evaluating the geometric mean costs of the primary service claims to establish resource similarity and the clinical characteristics of each procedure to establish clinical similarity within each APC.

In the CY 2016 OPSS/ASC final rule with comment period, we expanded the C-APC payment methodology to qualifying extended assessment and management encounters through the “Comprehensive Observation Services” C-APC (C-APC 8011). Services within

this APC are assigned status indicator “J2”. Specifically, we make a payment through C-APC 8011 for a claim that:

- Does not contain a procedure described by a HCPCS code to which we have assigned status indicator “T” that is reported with a date of service on the same day or 1 day earlier than the date of service associated with services described by HCPCS code G0378;

- Contains 8 or more units of services described by HCPCS code G0378 (Observation services, per hour);

- Contains services provided on the same date of service or 1 day before the date of service for HCPCS code G0378 that are described by one of the following codes: HCPCS code G0379 (Direct referral of patient for hospital observation care) on the same date of service as HCPCS code G0378; CPT code 99281 (Emergency department visit for the evaluation and management of a patient (Level 1)); CPT code 99282 (Emergency department visit for the evaluation and management of a patient (Level 2)); CPT code 99283 (Emergency department visit for the evaluation and management of a patient (Level 3)); CPT code 99284 (Emergency department visit for the evaluation and management of a patient (Level 4)); CPT code 99285 (Emergency department visit for the evaluation and management of a patient (Level 5)) or HCPCS code G0380 (Type B emergency department visit (Level 1)); HCPCS code G0381 (Type B emergency department visit (Level 2)); HCPCS code G0382 (Type B emergency department visit (Level 3)); HCPCS code G0383 (Type B emergency department visit (Level 4)); HCPCS code G0384 (Type B emergency department visit (Level 5)); CPT code 99291 (Critical care, evaluation and management of the critically ill or critically injured patient; first 30–74 minutes); or HCPCS code G0463 (Hospital outpatient clinic visit for assessment and management of a patient); and

- Does not contain services described by a HCPCS code to which we have assigned status indicator “J1”.

The assignment of status indicator “J2” to a specific combination of services performed in combination with each other allows for all other OPSS payable services and items reported on the claim (excluding services that are not covered OPD services or that cannot by statute be paid for under the OPSS) to be deemed adjunctive services representing components of a comprehensive service and resulting in a single prospective payment for the comprehensive service based on the costs of all reported services on the claim (80 FR 70333 through 70336).

Services included under the C-APC payment packaging policy, that is, services that are typically adjunctive to the primary service and provided during the delivery of the comprehensive service, include diagnostic procedures, laboratory tests, and other diagnostic tests and treatments that assist in the delivery of the primary procedure; visits and evaluations performed in association with the procedure; uncoded services and supplies used during the service; durable medical equipment as well as prosthetic and orthotic items and supplies when provided as part of the outpatient service; and any other components reported by HCPCS codes that represent services that are provided during the complete comprehensive service (78 FR 74865 and 79 FR 66800).

In addition, payment for hospital outpatient department services that are similar to therapy services and delivered either by therapists or nontherapists is included as part of the payment for the packaged complete comprehensive service. These services that are provided during the perioperative period are adjunctive services and are deemed not to be therapy services as described in section 1834(k) of the Act, regardless of whether the services are delivered by therapists or other nontherapist health care workers. We have previously noted that therapy services are those provided by therapists under a plan of care in accordance with section 1835(a)(2)(C) and section 1835(a)(2)(D) of the Act and are paid for under section 1834(k) of the Act, subject to annual therapy caps as applicable (78 FR 74867 and 79 FR 66800). However, certain other services similar to therapy services are considered and paid for as hospital outpatient department services. Payment for these nontherapy outpatient department services that are reported with therapy codes and provided with a comprehensive service is included in the payment for the packaged complete comprehensive service. We note that these services, even though they are reported with therapy codes, are hospital outpatient department services and not therapy services. Therefore, the requirement for functional reporting under the regulations at 42 CFR 410.59(a)(4) and 42 CFR 410.60(a)(4) does not apply. We refer readers to the July 2016 OPSS Change Request 9658 (Transmittal 3523) for further instructions on reporting these services in the context of a C-APC service.

Items included in the packaged payment provided in conjunction with the primary service also include all

drugs, biologicals, and radiopharmaceuticals, regardless of cost, except those drugs with pass-through payment status and SADs, unless they function as packaged supplies (78 FR 74868 through 74869 and 74909 and 79 FR 66800). We refer readers to Section 50.2M, Chapter 15, of the Medicare Benefit Policy Manual for a description of our policy on SADs treated as hospital outpatient supplies, including lists of SADs that function as supplies and those that do not function as supplies.

We define each hospital outpatient claim reporting a single unit of a single primary service assigned to status indicator “J1” as a single “J1” unit procedure claim (78 FR 74871 and 79 FR 66801). Line item charges for services included on the C-APC claim are converted to line item costs, which are then summed to develop the estimated APC costs. These claims are then assigned one unit of the service with status indicator “J1” and later used to develop the geometric mean costs for the C-APC relative payment weights. (We note that we use the term “comprehensive” to describe the geometric mean cost of a claim reporting “J1” service(s) or the geometric mean cost of a C-APC, inclusive of all of the items and services included in the C-APC service payment bundle.) Charges for services that would otherwise be separately payable are added to the charges for the primary service. This process differs from our traditional cost accounting methodology only in that all such services on the claim are packaged (except certain services as described above). We apply our standard data trims, which exclude claims with extremely high primary units or extreme costs.

The comprehensive geometric mean costs are used to establish resource similarity and, along with clinical similarity, dictate the assignment of the primary services to the C-APCs. We establish a ranking of each primary service (single unit only) to be assigned to status indicator “J1” according to its comprehensive geometric mean costs. For the minority of claims reporting more than one primary service assigned to status indicator “J1” or units thereof, we identify one “J1” service as the primary service for the claim based on our cost-based ranking of primary services. We then assign these multiple “J1” procedure claims to the C-APC to which the service designated as the primary service is assigned. If the reported “J1” services on a claim map to different C-APCs, we designate the “J1” service assigned to the C-APC with the highest comprehensive geometric

mean cost as the primary service for that claim. If the reported multiple “J1” services on a claim map to the same C-APC, we designate the most costly service (at the HCPCS code level) as the primary service for that claim. This process results in initial assignments of claims for the primary services assigned to status indicator “J1” to the most appropriate C-APCs based on both single and multiple procedure claims reporting these services and clinical and resource homogeneity.

Complexity Adjustments. We use complexity adjustments to provide increased payment for certain comprehensive services. We apply a complexity adjustment by promoting qualifying paired “J1” service code combinations or paired code combinations of “J1” services and certain add-on codes (as described further below) from the originating C-APC (the C-APC to which the designated primary service is first assigned) to the next higher paying C-APC in the same clinical family of C-APCs. We apply this type of complexity adjustment when the paired code combination represents a complex, costly form or version of the primary service according to the following criteria:

- Frequency of 25 or more claims reporting the code combination (frequency threshold); and
- Violation of the 2 times rule in the originating C-APC (cost threshold).

These criteria identify paired code combinations that occur commonly and exhibit materially greater resource requirements than the primary service. The CY 2017 OPPI/ASC final rule with comment period (81 FR 79582) included a revision to the complexity adjustment eligibility criteria. Specifically, we finalized a policy to discontinue the requirement that a code combination (that qualifies for a complexity adjustment by satisfying the frequency and cost criteria thresholds described above) also not create a 2 times rule violation in the higher level or receiving APC.

After designating a single primary service for a claim, we evaluate that service in combination with each of the other procedure codes reported on the claim assigned to status indicator “J1” (or certain add-on codes) to determine if there are paired code combinations that meet the complexity adjustment criteria. For a new HCPCS code, we determine initial C-APC assignment and qualification for a complexity adjustment using the best available information, crosswalking the new HCPCS code to a predecessor code(s) when appropriate.

Once we have determined that a particular code combination of “J1” services (or combinations of “J1” services reported in conjunction with certain add-on codes) represents a complex version of the primary service because it is sufficiently costly, frequent, and a subset of the primary comprehensive service overall according to the criteria described above, we promote the claim including the complex version of the primary service as described by the code combination to the next higher cost C-APC within the clinical family, unless the primary service is already assigned to the highest cost APC within the C-APC clinical family or assigned to the only C-APC in a clinical family. We do not create new APCs with a comprehensive geometric mean cost that is higher than the highest geometric mean cost (or only) C-APC in a clinical family just to accommodate potential complexity adjustments. Therefore, the highest payment for any claim including a code combination for services assigned to a C-APC would be the highest paying C-APC in the clinical family (79 FR 66802).

We package payment for all add-on codes into the payment for the C-APC. However, certain primary service add-on combinations may qualify for a complexity adjustment. As noted in the CY 2016 OPPI/ASC final rule with comment period (80 FR 70331), all add-on codes that can be appropriately reported in combination with a base code that describes a primary “J1” service are evaluated for a complexity adjustment.

To determine which combinations of primary service codes reported in conjunction with an add-on code may qualify for a complexity adjustment for CY 2018, in the CY 2018 OPPI/ASC proposed rule (82 FR 33575), we proposed to apply the frequency and cost criteria thresholds discussed above, testing claims reporting one unit of a single primary service assigned to status indicator “J1” and any number of units of a single add-on code for the primary “J1” service. If the frequency and cost criteria thresholds for a complexity adjustment are met and reassignment to the next higher cost APC in the clinical family is appropriate (based on meeting the criteria outlined above), we make a complexity adjustment for the code combination; that is, we reassign the primary service code reported in conjunction with the add-on code to the next higher cost C-APC within the same clinical family of C-APCs. As previously stated, we package payment for add-on codes into the C-APC

payment rate. If any add-on code reported in conjunction with the “J1” primary service code does not qualify for a complexity adjustment, payment for the add-on service continues to be packaged into the payment for the primary service and is not reassigned to the next higher cost C–APC. We listed the complexity adjustments proposed for “J1” and add-on code combinations for CY 2018, along with all of the other proposed complexity adjustments, in Addendum J to the proposed rule (which is available via the Internet on the CMS Web site).

Addendum J to the proposed rule included the cost statistics for each code combination that would qualify for a complexity adjustment (including primary code and add-on code combinations). Addendum J to the proposed rule also contained summary cost statistics for each of the paired code

combinations that describe a complex code combination that would qualify for a complexity adjustment and were proposed to be reassigned to the next higher cost C–APC within the clinical family. The combined statistics for all proposed reassigned complex code combinations were represented by an alphanumeric code with the first 4 digits of the designated primary service followed by a letter. For example, the proposed geometric mean cost listed in Addendum J for the code combination described by complexity adjustment assignment 3320R, which is assigned to C–APC 5224 (Level 4 Pacemaker and Similar Procedures), included all paired code combinations that were proposed to be reassigned to C–APC 5224 when CPT code 33208 is the primary code. Providing the information contained in Addendum J to the proposed rule allowed stakeholders the opportunity to

better assess the impact associated with the proposed reassignment of claims with each of the paired code combinations eligible for a complexity adjustment.

Comment: Several commenters requested exceptions to the current complexity adjustment criteria of 25 or more claims reporting the code combination (frequency) and a violation of the 2 times rule in the originating C–APC (cost) to allow claims with code combinations that do not currently meet these criteria to be paid at the next higher paying C–APC. The C–APC complexity adjustments requested by the commenters are listed in Table 5 below. We did not propose for claims with these code combinations to receive complexity adjustments because they failed to meet either the cost or frequency criteria.

TABLE 5—C–APC COMPLEXITY ADJUSTMENTS REQUESTED BY THE COMMENTERS

Primary “J1” HCPCS code	Secondary “J1” HCPCS code	Primary APC assignment	Requested complexity adjusted APC assignment
20983 (Ablation therapy for reduction or eradication of 1 or more bone tumors (e.g., metastasis including adjacent soft tissue when involved by tumor extension, percutaneous, including imaging guidance when performed; radio frequency)).	22513 (Percutaneous vertebral augmentation, including cavity creation (fracture reduction and bone biopsy included when performed) using mechanical device (e.g., kyphoplasty), 1 vertebral body, unilateral or bilateral cannulation, inclusive of all imaging guidance; thoracic).	5114	5115
20983 (Ablation therapy for reduction or eradication of 1 or more bone tumors (e.g., metastasis including adjacent soft tissue when involved by tumor extension, percutaneous, including imaging guidance when performed; radio frequency)).	22514 (Percutaneous vertebral augmentation, including cavity creation (fracture reduction and bone biopsy included when performed) using mechanical device (e.g., kyphoplasty), 1 vertebral body, unilateral or bilateral cannulation, inclusive of all imaging guidance; lumbar).	5114	5115
28297 (Correction, hallux valgus (bunionectomy), with sesamoidectomy, when performed; with first metatarsal and medial cuneiform joint with arthrodesis, any method).	28285 (Correction, hammertoe (e.g., interphalangeal fusion, partial or total phalangectomy)).	5114	5115
28297 (Correction, hallux valgus (bunionectomy), with sesamoidectomy, when performed; with first metatarsal and medial cuneiform joint with arthrodesis, any method).	28292 (Correction, hallux valgus (bunionectomy), with sesamoidectomy, when performed; with resection of proximal phalanx base, when performed, any method).	5114	5115
28740 (Arthrodesis, midtarsal or tarsometatarsal, single joint).	28285 (Correction, hammertoe (e.g., interphalangeal fusion, partial or total phalangectomy)).	5114	5115
61885 (Insertion or replacement of cranial nuerostimulator pulse generator or receiver, direct or inductive coupling; with connection to a single electrode array).	61885 (Insertion or replacement of cranial nuerostimulator pulse generator or receiver, direct or inductive coupling; with connection to a single electrode array).	5463	5464
28740 (Arthrodesis, midtarsal or tarsometatarsal, single joint).	28292 (Correction, hallux valgus (bunionectomy), with sesamoidectomy, when performed; with resection of proximal phalanx base, when performed, any method).	5114	5115
52234 (Cystourethroscopy, with biopsy(s))	C9738* (Adjunctive blue light cystoscopy with fluorescent imaging agent (List separately in addition to code for primary procedure)).	5374	5375
52235 (Cystourethroscopy, with fulguration (including cryosurgery or laser surgery) of trigone, bladder neck, prostatic fossa, urethra, or periurethral glands).	C9738* (Adjunctive blue light cystoscopy with fluorescent imaging agent (List separately in addition to code for primary procedure)).	5374	5375
52240 (Cystourethroscopy with fulguration (including cryosurgery or laser surgery) or treatment of MINOR (less than 0.5 cm) lesion(s) with or without biopsy).	C9738* (Adjunctive blue light cystoscopy with fluorescent imaging agent (List separately in addition to code for primary procedure)).	5375	5376

* HCPCS code C9738 was identified in the proposed rule as HCPCS code C97XX.

Other commenters requested various changes to the complexity adjustment criteria. One commenter requested that CMS amend the current cost criterion for a complexity adjustment to allow for code combinations that have qualified for a complexity adjustment in the previous year to qualify for a complexity adjustment for the subsequent year if the code combination is within 5 percent of the cost criterion for the subsequent year. Another commenter requested that CMS eliminate the criterion that the code combination must create a violation of the 2 times rule in the originating C-APC in order to qualify for a complexity adjustment.

Some commenters recommended that CMS create a complexity adjustment for endoscopic sinus surgery claims that include a drug or device code (C-code or a J-code), or more than two "J1" procedures. Other commenters requested that CMS revise its complexity adjustment methodology to account for the higher costs that essential hospitals incur when performing complex procedures and treating sicker patients.

Response: We appreciate these comments. However, at this time, we do not believe changes to the C-APC complexity adjustment criteria are necessary or that we should make exceptions to the criteria to allow claims with the code combinations suggested by the commenters to receive complexity adjustments. As stated previously (81 FR 79582), we continue to believe that the complexity adjustment criteria, which require a frequency of 25 or more claims reporting a code combination and a violation of the 2 times rule in the originating C-APC in order to receive payment in the next higher cost C-APC within the clinical family, are adequate to determine if a combination of procedures represents a complex, costly subset of the primary service. If a code combination meets these criteria, the combination receives payment at the next higher cost C-APC. Code combinations that do not meet these criteria receive the C-APC payment rate associated with the primary "J1" service.

A minimum of 25 claims is already very low for a national payment system. Lowering the minimum of 25 claims further could lead to unnecessary complexity adjustments for service combinations that are rarely performed. The complexity adjustment cost threshold compares the code combinations to the lowest cost significant procedure assigned to the APC. If the cost of the code combination does not exceed twice the cost of the

lowest cost significant procedure within the APC, no complexity adjustment is made. Lowering or eliminating this threshold could remove so many claims from the accounting for the primary "J1" service that the geometric mean costs attributed to the primary procedure could be skewed.

Regarding the request for a code combination that qualified previously for a complexity adjustment to qualify for the subsequent year if the code combination is within 5 percent of the cost criterion for the subsequent year, we evaluate code combinations each year against our complexity adjustment criteria using the latest available data. We do not believe it is necessary to expand the ability for code combinations to meet the cost criterion in this manner.

We also do not believe that it is necessary to adjust the complexity adjustment criteria to allow claims that include a drug or device code, more than two "J1" procedures, or procedures performed at certain hospitals to qualify for a complexity adjustment. As mentioned earlier, we believe the current criteria are adequate to determine if a combination of procedures represents a complex, costly subset of the primary service.

Comment: Some commenters noted that there were certain code combinations that met the complexity adjustment criteria that were not included in Addendum J of the CY 2018 OPPI/ASC proposed rule. Specifically, commenters noted that the combinations of procedures described by the following codes were not included in Addendum J:

- CPT code 22510 (Percutaneous vertebroplasty (bone biopsy included when performed), 1 vertebral body, unilateral or bilateral injection, inclusive of all imaging guidance; cervicothoracic) and CPT code 22512 (Percutaneous vertebroplasty (bone biopsy included when performed), 1 vertebral body, unilateral or bilateral injection, inclusive of all imaging guidance; each additional cervicothoracic or lumbosacral vertebral body) for multi-level vertebroplasty in the cervicothoracic region);

- CPT code 22511 (Percutaneous vertebroplasty (bone biopsy included when performed), 1 vertebral body, unilateral or bilateral injection, inclusive of all imaging guidance; lumbosacral) and CPT code 22512 (Percutaneous vertebroplasty (bone biopsy included when performed), 1 vertebral body, unilateral or bilateral injection, inclusive of all imaging guidance; each additional

cervicothoracic or lumbosacral vertebral body); and

- CPT code 22511 (Percutaneous vertebroplasty (bone biopsy included when performed), 1 vertebral body, unilateral or bilateral injection, inclusive of all imaging guidance; lumbosacral) and CPT code 20982 (Ablation therapy for reduction or eradication of 1 or more bone tumors (e.g., metastasis), including adjacent soft tissue when involved by tumor extension, percutaneous, including imaging guidance when performed; radiofrequency).

Response: These code combinations were inadvertently excluded from Addendum J to the CY 2018 OPPI/ASC proposed rule. These code combinations and all other code combinations that qualify for complexity adjustments are included in Addendum J to this final rule with comment period.

Comment: One commenter stated that CMS should have included the following add-on CPT codes in the complexity adjustment evaluation:

- CPT code 92978 (Endoluminal imaging of coronary vessel or graft using intravascular ultrasound (IVUS) or optical coherence tomography (OCT) during diagnostic evaluation and/or therapeutic intervention including imaging supervision, interpretation and report; initial vessel (List separately in addition to code for primary procedure));

- CPT code 92979 (Endoluminal imaging of coronary vessel or graft using intravascular ultrasound (IVUS) or optical coherence tomography (OCT) during diagnostic evaluation and/or therapeutic intervention including imaging supervision, interpretation and report; each additional vessel (List separately in addition to code for primary procedure));

- CPT code 93571 (Intravascular Doppler velocity and/or pressure derived coronary flow reserve measurement (coronary vessel or graft) during coronary angiography including pharmacologically induced stress; initial vessel (List separately in addition to code for primary procedure)); and

- CPT code 93572 (Intravascular Doppler velocity and/or pressure derived coronary flow reserve measurement (coronary vessel or graft) during coronary angiography including pharmacologically induced stress; each additional vessel (List separately in addition to code for primary procedure)) in the complexity adjustment evaluation.

Response: We note that CPT codes 92978 and 93571 were both included in the complexity adjustment evaluation in Addendum J to the CY 2018 OPPI/ASC proposed rule. However, CPT codes

92979 and 93572 are not add-on codes to primary “J1” services. As stated in the CY 2018 OPPS/ASC proposed rule, to determine the code combinations that qualify for complexity adjustments, we apply the established frequency and cost criteria thresholds and tests claims reporting one unit of a single primary service assigned to status indicator “J1” and any number of units of a single add-on code for the primary “J1” service (82 FR 33575). Accordingly, because CPT codes 92979 and 93572 are not add-on codes for any primary “J1” services, it would not have been appropriate to include them in our complexity adjustment evaluation.

After consideration of the public comments we received, we are applying the complexity adjustment criteria as proposed. The finalized complexity adjustments for CY 2018 can be found in Addendum J to this final rule with comment period (which is available via the Internet on the CMS Web site).

(2) C-APCs for CY 2018

For CY 2018 and subsequent years, in the CY 2018 OPPS/ASC proposed rule (82 FR 33576), we proposed to continue to apply the C-APC payment policy methodology made effective in CY 2015 and updated with the implementation of status indicator “J2” in CY 2016. A discussion of the C-APC payment policy methodology can be found at 81 FR 79583.

As a result of our annual review of the services and APC assignments under the OPPS, we did not propose any additional C-APCs to be paid under the existing C-APC payment policy beginning in CY 2018. Table 4 of the proposed rule listed the proposed C-APCs for CY 2018, all of which were established in past rules. All C-APCs were displayed in Addendum J to the proposed rule (which is available via the Internet on the CMS Web site). Addendum J to the proposed rule also contained all of the data related to the C-APC payment policy methodology, including the list of proposed complexity adjustments and other information.

Comment: Several commenters supported the proposed C-APCs for CY 2018.

Response: We appreciate the commenters’ support.

Comment: Several commenters noted that CPT code 67027 (Implantation of intravitreal drug delivery system (e.g., ganciclovir implant), includes concomitant removal of vitreous) is assigned to a single-procedure C-APC (C-APC 5494 (Level 4 Intraocular Procedures)) with status indicator “J1”. The commenters stated that the C-APC

policy packages payment for adjunctive services into the payment for the primary “J1” procedure at the claim level, and that when the drug Retisert (described by HCPCS code J7311) is included on the claim with CPT code 62707, payment for the drug is packaged into the C-APC payment. The commenters noted that the costs of claims for the procedure, including the drug (approximately \$18,433), were more than twice the proposed CY 2018 geometric mean cost for C-APC 5494 (approximately \$9,134) and that, as such, this represents a violation of the 2 times rule. The commenters suggested that CMS address this issue by either separately paying for Retisert (described by HCPCS code J7311) or creating a unique APC for procedures with which HCPCS code J7311 may be billed.

Response: As stated in the CY 2017 OPPS/ASC final rule with comment period (81 FR 79612), section 1833(t)(2) of the Act provides that items and services within an APC group cannot be considered comparable with respect to the use of resources if the highest cost for an item or service in the APC group is more than 2 times greater than the lowest cost for an item or service within the same APC group (the 2 times rule). In accordance with section 1833(t)(2) of the Act and § 419.31 of the regulations, we annually review the items and services within an APC group to determine if there are any APC violations of the 2 times rule and whether there are any appropriate revisions to APC assignments that may be necessary or exceptions to be made. In determining the APCs with a 2 times rule violation, we consider only those HCPCS codes that are significant based on the number of claims.

It is the cost of the primary item or service that drives assignment to an APC group. In this case, the primary service is described by CPT code 67027, which is the only CPT code assigned to C-APC 5494 (Level 4 Intraocular Procedures). The costs of drugs or other packaged ancillary items or services that may be used with a primary service are packaged into the costs of the primary service and are not separately paid. In this case, because CPT code 67027 is assigned to a C-APC, the costs of drugs, such as Retisert, and any other items or services that are billed with the “J1” service are packaged into the geometric mean cost for HCPCS code 67027 and are bundled into the C-APC payment. The geometric mean cost is based on reported costs for all hospitals paid under the OPPS; to the extent that Retisert or other items are billed with the primary service, those costs are also reflected in the cost of the primary

service. Therefore, because the cost of the Retisert drug is packaged into the cost of CPT code 67027, assignment of HCPCS code 67027 to C-APC 5494 does not create a 2 times rule violation.

In addition, with regard to the packaging of the drug Retisert based on the C-APC policy, as stated in previous rules (78 FR 74868 through 74869 and 74909 and 79 FR 66800), items included in the packaged payment provided with the primary “J1” service include all drugs, biologicals, and radiopharmaceuticals, regardless of cost, except those drugs with pass-through payment status and SADs, unless they function as packaged supplies. Therefore, we believe that HCPCS code J3711 is appropriately packaged, and we are not providing separate payment for the drug.

Comment: One commenter suggested that APC 5491 (Level 1 Intraocular Procedures) no longer be labeled a C-APC and instead be considered a traditional APC. The commenter noted that there was little cost difference for APC 5491 if it is considered a C-APC or a traditional APC and that no specific justification was given for making APC 5491 a C-APC. The commenter suggested that only higher level Intraocular Procedure APCs have enough complexity to suggest that they should be classified as C-APCs.

Response: We continue to believe that the procedures assigned to C-APC 5491 are appropriately paid through a comprehensive APC. As stated in the CY 2017 OPPS/ASC final rule with comment period (81 FR 79584), procedures assigned to C-APCs are primary services (mostly major surgical procedures) that are typically the focus of the hospital outpatient stay. Therefore, we believe that these procedures are appropriately assigned to a C-APC.

Comment: One commenter expressed concern that the proposal to continue to assign status indicator “J2” to CPT code 99291 (Critical care, evaluation and management of the critically ill or critically injured patient; first 30–74 minutes) and to assign it to C-APC 8011 (Comprehensive Observation Services) when certain criteria are met would have negative effects on critical care (CPT codes 99291 and 99292 (Critical care, evaluation and management of the critically ill or critically injured patient; each additional 30 minutes)) provided in the intensive care unit ICU). Specifically, the commenter was concerned that the proposal would impact payment for tests that were ordered and furnished in the emergency room when they are appropriately repeated in the ICU and urged CMS to

move with caution, and provide transparency and impact tables for hospitals, in continuing C-APC 8011.

Response: We appreciate this comment and will continue to monitor the impact of this C-APC on critical care services. We note that in situations where a patient receives critical care services in the hospital outpatient setting and is subsequently transferred to the ICU as part of an appropriate hospital inpatient admission, payment for the services furnished in the hospital outpatient setting, including critical care services, may be bundled into the Part A hospital inpatient claim via the

“Payment Window for Outpatient Services Treated as Inpatient Services (also known as the 3-day payment rule), when certain criteria are met. In addition, when a patient receiving critical care services in the hospital outpatient setting is transferred to the ICU but is not admitted to the hospital as an inpatient, payment for all eligible services is made through C-APC 8011, when certain criteria are met. We also note that CPT code 99292 is an add-on code which is packaged under the OPPI and is not one of the codes eligible to trigger payment through C-APC 8011.

After consideration of the public comments we received, we are finalizing the proposed C-APCs for CY 2018. Table 6 below lists the final C-APCs for CY 2018, all of which were established in past rules. All C-APCs are displayed in Addendum J to this final rule with comment period (which is available via the Internet on the CMS Web site). Addendum J to this final rule with comment period also contains all of the data related to the C-APC payment policy methodology, including the list of complexity adjustments and other information for CY 2018.

TABLE 6—CY 2018 C-APCs

C-APC	CY 2018 APC title	Clinical family
5072	Level 2 Excision/Biopsy/Incision and Drainage	EBIDX
5073	Level 3 Excision/Biopsy/Incision and Drainage	EBIDX
5091	Level 1 Breast/Lymphatic Surgery and Related Procedures	BREAS
5092	Level 2 Breast/Lymphatic Surgery and Related Procedures	BREAS
5093	Level 3 Breast/Lymphatic Surgery & Related Procedures	BREAS
5094	Level 4 Breast/Lymphatic Surgery & Related Procedures	BREAS
5112	Level 2 Musculoskeletal Procedures	ORTHO
5113	Level 3 Musculoskeletal Procedures	ORTHO
5114	Level 4 Musculoskeletal Procedures	ORTHO
5115	Level 5 Musculoskeletal Procedures	ORTHO
5116	Level 6 Musculoskeletal Procedures	ORTHO
5153	Level 3 Airway Endoscopy	AENDO
5154	Level 4 Airway Endoscopy	AENDO
5155	Level 5 Airway Endoscopy	AENDO
5164	Level 4 ENT Procedures	ENTXX
5165	Level 5 ENT Procedures	ENTXX
5166	Cochlear Implant Procedure	COCHL
5191	Level 1 Endovascular Procedures	VASCX
5192	Level 2 Endovascular Procedures	VASCX
5193	Level 3 Endovascular Procedures	VASCX
5194	Level 4 Endovascular Procedures	VASCX
5200	Implantation Wireless PA Pressure Monitor	WPMXX
5211	Level 1 Electrophysiologic Procedures	EPHYS
5212	Level 2 Electrophysiologic Procedures	EPHYS
5213	Level 3 Electrophysiologic Procedures	EPHYS
5222	Level 2 Pacemaker and Similar Procedures	AICDP
5223	Level 3 Pacemaker and Similar Procedures	AICDP
5224	Level 4 Pacemaker and Similar Procedures	AICDP
5231	Level 1 ICD and Similar Procedures	AICDP
5232	Level 2 ICD and Similar Procedures	AICDP
5244	Level 4 Blood Product Exchange and Related Services	SCTXX
5302	Level 2 Upper GI Procedures	GIXXX
5303	Level 3 Upper GI Procedures	GIXXX
5313	Level 3 Lower GI Procedures	GIXXX
5331	Complex GI Procedures	GIXXX
5341	Abdominal/Peritoneal/Biliary and Related Procedures	GIXXX
5361	Level 1 Laparoscopy & Related Services	LAPXX
5362	Level 2 Laparoscopy & Related Services	LAPXX
5373	Level 3 Urology & Related Services	UROXX
5374	Level 4 Urology & Related Services	UROXX
5375	Level 5 Urology & Related Services	UROXX
5376	Level 6 Urology & Related Services	UROXX
5377	Level 7 Urology & Related Services	UROXX
5414	Level 4 Gynecologic Procedures	GYNXX
5415	Level 5 Gynecologic Procedures	GYNXX
5416	Level 6 Gynecologic Procedures	GYNXX
5431	Level 1 Nerve Procedures	NERVE
5432	Level 2 Nerve Procedures	NERVE
5462	Level 2 Neurostimulator & Related Procedures	NSTIM
5463	Level 3 Neurostimulator & Related Procedures	NSTIM
5464	Level 4 Neurostimulator & Related Procedures	NSTIM
5471	Implantation of Drug Infusion Device	PUMPS
5491	Level 1 Intraocular Procedures	INEYE

TABLE 6—CY 2018 C-APCs—Continued

C-APC	CY 2018 APC title	Clinical family
5492	Level 2 Intraocular Procedures	INEYE
5493	Level 3 Intraocular Procedures	INEYE
5494	Level 4 Intraocular Procedures	INEYE
5495	Level 5 Intraocular Procedures	INEYE
5503	Level 3 Extraocular, Repair, and Plastic Eye Procedures	EXEYE
5504	Level 4 Extraocular, Repair, and Plastic Eye Procedures	EXEYE
5627	Level 7 Radiation Therapy	RADTX
5881	Ancillary Outpatient Services When Patient Dies	N/A
8011	Comprehensive Observation Services	N/A

C-APC Clinical Family Descriptor Key: AENDO = Airway Endoscopy; AICDP = Automatic Implantable Cardiac Defibrillators, Pacemakers, and Related Devices; BREAS = Breast Surgery; COCHL = Cochlear Implant; EBIDX = Excision/Biopsy/Incision and Drainage; ENTXX = ENT Procedures; EPHYS = Cardiac Electrophysiology; EXEYE = Extraocular Ophthalmic Surgery; GIXXX = Gastrointestinal Procedures; GYNXX = Gynecologic Procedures; INEYE = Intraocular Surgery; LAPXX = Laparoscopic Procedures; NERVE = Nerve Procedures; NSTIM = Neurostimulators; ORTHO = Orthopedic Surgery; PUMPS = Implantable Drug Delivery Systems; RADTX = Radiation Oncology; SCTXX = Stem Cell Transplant; UROXX = Urologic Procedures; VASCX = Vascular Procedures; WPMXX = Wireless PA Pressure Monitor.

(3) Brachytherapy Insertion Procedures

In the CY 2017 OPPI/ASC final rule with comment period (81 FR 79584), we finalized 25 new C-APCs. Some of the HCPCS codes assigned to the C-APCs established for CY 2017 described surgical procedures for inserting brachytherapy catheters/needles and other related brachytherapy procedures such as the insertion of tandem and/or ovoids and the insertion of Heyman capsules. In the CY 2017 OPPI/ASC final rule with comment period (81 FR 79583), we stated that we received public comments which noted that claims that included several insertion codes for brachytherapy devices often did not also contain a brachytherapy treatment delivery code (CPT codes 77750 through 77799). The brachytherapy insertion codes that commenters asserted were not often billed with a brachytherapy treatment code included the following:

- CPT code 57155 (Insertion of uterine tandem and/or vaginal ovoids for clinical brachytherapy);
- CPT code 20555 (Placement of needles or catheters into muscle and/or soft tissue for subsequent interstitial radioelement application (at the time of or subsequent to the procedure));
- CPT code 31643 (Bronchoscopy, rigid or flexible, including fluoroscopic guidance, when performed; with placement of catheter(s) for intracavitary radioelement application);
- CPT code 41019 (Placement of needles, catheters, or other device(s) into the head and/or neck region (percutaneous, transoral, or transnasal) for subsequent interstitial radioelement application);
- CPT code 43241 (Esophagogastroduodenoscopy, flexible, transoral; with insertion of intraluminal tube catheter);

- CPT code 55920 (Placement of needles or catheters into pelvic organs and/or genitalia (except prostate) for subsequent interstitial radioelement application); and
- CPT code 58346 (Insertion of Heyman capsules for clinical brachytherapy).

The commenters concluded that brachytherapy delivery charges are being underrepresented in ratesetting under the C-APC methodology because a correctly coded claim should typically include an insertion and treatment delivery code combination. The commenters stated that the insertion procedure and brachytherapy treatment delivery generally occur on the same day or within the same week and therefore the services should appear on a claim together. In the CY 2017 OPPI/ASC final rule with comment period, we indicated that we would not exclude claims from the CY 2017 ratesetting calculation because we generally do not remove claims from the claims accounting when stakeholders believe that hospitals included incorrect information on some claims (81 FR 79583). However, we stated that we would examine the claims for the brachytherapy insertion codes in question and determine if any future adjustment to the methodology (or possibly code edits) would be appropriate.

As discussed in the CY 2018 OPPI/ASC proposed rule (82 FR 33577 through 33578), we analyzed the claims that include brachytherapy insertion codes assigned to status indicator “J1” and that received payment through a C-APC, and we determined that several of these codes are frequently billed without an associated brachytherapy treatment code. As mentioned above, stakeholders have expressed concerns that using claims for ratesetting for

brachytherapy insertion procedures that do not also include a brachytherapy treatment code may not capture all of the costs associated with the insertion procedure. To address this issue and base payment on claims for the most common clinical scenario, for CY 2018 and subsequent years, we indicated in the CY 2018 OPPI/ASC proposed rule (82 FR 33578) that we were establishing a code edit that requires a brachytherapy treatment code when a brachytherapy insertion code is billed.

As noted in section II.A.2.c. of the proposed rule and this final rule with comment period, we also proposed to delete composite APC 8001 (LDR Prostate Brachytherapy Composite) and assign HCPCS code 55875 (Transperineal placement of needles or catheters into prostate for interstitial radioelement application, with or without cystoscopy) to status indicator “J1” and to provide payment for this procedure through the C-APC payment methodology, similar to the payment methodology for other surgical insertion procedures related to brachytherapy. Specifically, when HCPCS code 55875 is the primary service reported on a hospital outpatient claim, we proposed to package payments for all adjunctive services reported on the claim into the payment for HCPCS code 55875. We proposed to assign HCPCS code 55875 to C-APC 5375 (Level 5 Urology and Related Services). The code edit for claims with brachytherapy services described above that will be effective January 1, 2018, will require the brachytherapy application HCPCS code 77778 (Interstitial radiation source application; complex) to be included on the claim with the brachytherapy insertion procedure (HCPCS code 55875).

Comment: Several commenters opposed the implementation of a code

edit that requires a brachytherapy treatment code when a brachytherapy insertion code is billed. These commenters noted that, in some cases, the insertion procedure and the brachytherapy treatment are performed on different days and reported on separate claims. The commenters also noted that the brachytherapy insertion procedure and radiation treatment delivery are not always performed in the same facility, in which case they would be on different claims. The commenters stated that this practice pattern is especially common in the treatment of breast cancer and related breast brachytherapy catheter codes.

Response: We appreciate the commenters' views. We intended to address the concerns raised by commenters in CY 2017 rulemaking regarding ratesetting for C-APCs for brachytherapy insertion procedures by establishing a code edit to require a brachytherapy treatment code when a brachytherapy insertion code is billed. This was largely based on information received from commenters last year, in which commenters had suggested that brachytherapy insertion procedures and brachytherapy radiation treatment are often performed on the same day or within the same week and are often billed on the same claim. However, based on comments received in response to the code edit, it appears that there may be some clinical scenarios where that is not the case. Accordingly, in light of the numerous comments opposing this code edit and the information provided by commenters that suggests that brachytherapy insertion and treatment services may be appropriately furnished on different dates and different claims, we have decided not to implement an edit which would require a brachytherapy treatment code when a brachytherapy insertion code is billed. As we have previously stated, we rely on hospitals to bill all HCPCS codes accurately in accordance with their code descriptors and CPT and CMS instructions, as applicable, and to report charges on claims and charges and costs on their Medicare hospital cost reports appropriately (77 FR 68324). We will continue to examine the issues involving ratesetting for brachytherapy insertion procedures assigned to C-APCs and welcome the public's input regarding alternative payment policies that could appropriately address the issue while maintaining the C-APC policy.

Comment: Some commenters requested that CMS discontinue the C-APC payment policy for all brachytherapy insertion codes identified

in the CY 2018 OPPI/ASC proposed rule. These commenters expressed concerns that hospital billing practices for radiation oncology services are variable and inconsistent with the C-APC policy which packages services at the claim level. The commenters stated that, in some cases, needles or catheters are surgically placed prior to the brachytherapy treatment delivery, which consists of multiple fractions over several days or weeks and may be delivered at a different site of service. The commenters also requested that CMS continue the composite APC for Low Dose Rate Brachytherapy instead of assigning CPT code 55875 (Transperineal placement of needles or catheters into prostate for interstitial radioelement application, with or without cystoscopy) to a C-APC (Level 5 Urology and Related Services). The commenters stated that CPT codes 55920 and 19298 should be assigned to a different C-APC if CMS maintained the C-APC payment policy for brachytherapy insertion procedures in CY 2018.

Response: We continue to believe that the C-APC payment policy is appropriately applied to brachytherapy insertion procedures, including the procedure described by CPT code 55875. These procedures, like other procedures assigned to C-APCs, are primary services (mostly major surgical procedures) that are typically the focus of the hospital outpatient stay. As mentioned previously, we welcome input on alternative payment policies to address concerns surrounding the variation in hospital billing practices for radiation oncology while maintaining the C-APC policy, and we will continue to monitor this issue. The APC assignments for CPT codes 55920 and 19298 are discussed in greater detail in section XII.D.2. of this final rule with comment period.

Comment: Some commenters requested that CMS continue to provide payment for the brachytherapy insertion procedures through the C-APC policy, but exclude all radiation oncology codes on the claim (defined as CPT codes 77261 through 77799) and make separate payment for the brachytherapy treatment delivery and related planning and preparation services in addition to the C-APC payment for the brachytherapy insertion procedures. These commenters stated that this was similar to the C-APC policy for stereotactic radiosurgery (SRS) treatment.

Response: The policy intent of C-APCs is to bundle payment for all services related and adjunctive to the primary "J1" procedure. We do not

believe that providing separate payment for radiation oncology codes that are included on a claim with a brachytherapy insertion procedure assigned to status indicator "J1" is in accordance with the C-APC policy. With regard to the SRS treatment policy to pay separately for the planning and preparation procedures, as stated in the CY 2017 OPPI/ASC final rule with comment period (81 FR 79583), this policy is a temporary special exception to the C-APC packaging policy that packages all adjunctive services (with a few exceptions listed in Addendum J to this final rule with comment period).

After consideration of the public comments we received, we are not establishing a code edit that requires a brachytherapy treatment code when a brachytherapy insertion code is billed. We are finalizing our proposal to delete composite APC 8001 (LDR Prostate Brachytherapy Composite) and assign HCPCS code 55875 (Transperineal placement of needles or catheters into prostate for interstitial radioelement application, with or without cystoscopy) to status indicator "J1" and to provide payment for this procedure through the C-APC payment methodology, similar to the payment methodology for other surgical insertion procedures related to brachytherapy.

(4) C-APC 5627 (Level 7 Radiation Therapy) Stereotactic Radiosurgery (SRS)

Stereotactic radiosurgery (SRS) is a type of radiation therapy that targets multiple beams of radiation to precisely deliver radiation to a brain tumor while sparing the surrounding normal tissue. SRS treatment can be delivered by Cobalt-60-based (also referred to as gamma knife) technology or robotic linear accelerator-based (LINAC)-based technology. As stated in the CY 2016 OPPI/ASC final rule with comment period (80 FR 70336), section 634 of the American Taxpayer Relief Act (ATRA) of 2012 (Pub. L. 112-240) amended section 1833(t)(16) of the Act by adding a new subparagraph (D) to require that OPPI payments for Cobalt-60-based SRS be reduced to equal that of payments for LINAC-based SRS for covered OPD services furnished on or after April 1, 2013. Because section 1833(t)(16)(D) of the Act requires equal payment for SRS treatment delivered by Cobalt-60-based or LINAC-based technology, the two types of services involving SRS delivery instruments (which are described by HCPCS code 77371 (Radiation treatment delivery, stereotactic radiosurgery [SRS], complete course of treatment cranial lesion(s) consisting of 1 session; multi-source Cobalt 60-based) and

HCPCS code 77372 (Linear accelerator-based)) are assigned to the same C-APC (C-APC 5627 Level 7 Radiation Therapy).

In the CY 2016 OPPI/ASC final rule with comment period (80 FR 70336), we stated that we had identified differences in the billing patterns for SRS procedures delivered using Cobalt-60-based and LINAC-based technologies. In particular, our claims data analysis revealed that services involving SRS delivered by Cobalt-60-based technologies (as described by HCPCS code 77371) typically included SRS treatment planning services (for example, imaging studies, radiation treatment aids, and treatment planning) and the actual deliveries of SRS treatment on the same date of service and reported on the same claim. In contrast, claims data analysis results revealed that services involving SRS delivered by LINAC-based technologies (as described by HCPCS code 77372) frequently included services related to SRS treatment (for example, imaging studies, radiation treatment aids, and treatment planning) that were provided on different dates of service and reported on claims separate from the actual delivery of SRS treatment.

We stated in the CY 2016 OPPI/ASC final rule with comment period (80 FR 70336) that the intent of the C-APC policy is to package payment for all services adjunctive to the primary "J1" procedure and that we believed that all essential planning and preparation services related to the SRS treatment are adjunctive to the SRS treatment delivery procedure. Therefore, payment for these adjunctive services should be packaged into the C-APC payment for the SRS treatment instead of reported on a different claim and paid separately. To identify services that are adjunctive to the primary SRS treatment described by HCPCS codes 77371 and 77372, but reported on a different claim, we established modifier "CP" which became effective in CY 2016 and required the use of the modifier for CY 2016 and CY 2017.

To ensure appropriate ratesetting for the SRS C-APC, we believed it was necessary to unbundle payment for the adjunctive services for CY 2016 and CY 2017. Therefore, we finalized a policy to change the payment for SRS treatment for the 10 SRS planning and preparation services identified in our claims data (HCPCS codes 70551, 70552, 70553, 77011, 77014, 77280, 77285, 77290, 77295, and 77336) that were reported differentially using HCPCS codes 77371 and 77372 both on the same claim as the SRS services and on claims 1 month prior to the delivery of SRS services.

These codes were removed from the geometric mean cost calculations for C-APC 5627. In addition, for CY 2016 and CY 2017, we provided separate payment for the 10 planning and preparation services adjunctive to the delivery of the SRS treatment using either the Cobalt-60-based or LINAC-based technology, even when the planning service was included on the same claim as the primary "J1" SRS treatment service. The use of the modifier "CP" was not required to identify these 10 planning and preparation codes.

As discussed in the CY 2018 OPPI/ASC proposed rule (82 FR 33564 and 33465), the data collection period for SRS claims with modifier "CP" began on January 1, 2016 and concludes on December 31, 2017. Based on our analysis of preliminary data collected with modifier "CP", we have identified some additional services that are adjunctive to the primary SRS treatment and reported on a different claim outside of the 10 SRS planning and preparation codes that were removed from the SRS C-APC costs calculations and paid separately.

However, the "CP" modifier has been used by a small number of providers since its establishment. In addition, our analysis showed that several of the HCPCS codes that were billed with modifier "CP" belonged to the group of 10 SRS planning and preparation codes that we pay separately and do not require the use of modifier "CP". Also, some providers erroneously included the modifier when reporting the HCPCS code for the delivery of the LINAC-based SRS treatment. As stated above, the data collection period for SRS claims with modifier "CP" was set to conclude on December 31, 2017. Accordingly, for CY 2018, we are deleting this modifier and discontinuing its required use.

For CY 2018, we also proposed to continue to make separate payments for the 10 planning and preparation services adjunctive to the delivery of the SRS treatment using either the Cobalt-60-based or LINAC-based technology when furnished to a beneficiary within 1 month of the SRS treatment. The continued separate payment of these services will allow us to complete our analysis of the claims data including modifier "CP" from both CY 2016 and CY 2017 claims. As stated in the CY 2017 OPPI/ASC final rule with comment period (81 FR 79583), we will consider in the future whether repackaging all adjunctive services (planning, preparation, and imaging, among others) back into cranial single session SRS is appropriate.

We invited public comments on these proposals.

Comment: Commenters generally supported the proposal to continue to make separate payments for the planning and preparation services adjunctive to the delivery of the SRS treatment and requested that CMS continue to pay separately for these services in the future. Commenters also supported the deletion of modifier "CP".

Response: We appreciate the commenters' support.

After consideration of the public comments we received, we are finalizing our proposal to make separate payments for the 10 planning and preparation services adjunctive to the delivery of the SRS treatment using either the Cobalt-60-based or LINAC-based technology when furnished to a beneficiary within 1 month of the SRS treatment.

(5) Complexity Adjustment for Blue Light Cystoscopy Procedures

As discussed in prior OPPI/ASC final rules with comment period, and most recently in the CY 2017 OPPI/ASC final rule with comment period (81 FR 79668), we continue to believe that Cysview® (hexaminolevulinate HCl) (described by HCPCS code C9275) is a drug that functions as a supply in a diagnostic test or procedure and is therefore packaged with payment for the primary procedure. In addition, as discussed in section II.A.2.b.(1) of the CY 2018 OPPI/ASC proposed rule and this final rule with comment period, drugs that are not eligible for pass-through payment are always packaged when billed with a comprehensive service. To maintain the integrity of the OPPI, we believe it is generally not appropriate to allow exceptions to our drug packaging policy or comprehensive APC policy that would result in separate payment for the drug based on the product's ASP+6 percent payment rate. While we did not propose in the CY 2018 proposed rule to pay separately for Cysview®, we have heard concerns from stakeholders that the payment for blue light cystoscopy procedures involving Cysview® may be creating a barrier to beneficiaries receiving access to reasonable and necessary care for which there may not be a clinically comparable alternative. Therefore, as we stated in the proposed rule, we revisited our payment policy for blue light cystoscopy procedures. As described in more detail below, we believe certain code combinations for blue light cystoscopy procedures should be eligible to qualify for a complexity

adjustment, given the unique properties of the procedure and resource costs.

Traditionally, white light (or standard) cystoscopy, typically performed by urologists, has been the gold standard for diagnosing bladder cancer. Enhanced bladder cancer diagnostics, such as narrow band imaging or blue light cystoscopy, increase tumor detection in nonmuscle invasive bladder cancer over white light cystoscopy alone, thus enabling more precise tumor removal by the urologist. Blue light cystoscopy can only be performed after performance of white light cystoscopy. Because blue light cystoscopy requires specialized imaging equipment to view cellular uptake of the dye that is not otherwise used in white light cystoscopy procedures, some practitioners consider blue light cystoscopy to be a distinct and adjunctive procedure to white light cystoscopy. However, the current CPT coding structure for cystoscopy procedures does not identify blue light cystoscopy in the coding descriptions separate from white light cystoscopy. Therefore, the existing cystoscopy CPT codes do not distinguish cystoscopy procedures involving only white light cystoscopy from those involving both white and blue light cystoscopy, which require additional resources compared to white light cystoscopy alone.

As discussed in the CY 2018 OPPTS/ASC proposed rule, after discussion with our clinical advisors (including a urologist), we believe that blue light cystoscopy represents an additional elective but distinguishable service as compared to white light cystoscopy that, in some cases, may allow greater detection of bladder tumors in beneficiaries relative to white light cystoscopy alone. Given the additional equipment, supplies, operating room time, and other resources required to perform blue light cystoscopy in addition to white light cystoscopy, for CY 2018, in the proposed rule, we proposed to create a new HCPCS C-code to describe blue light cystoscopy and to allow for a complexity adjustment to APC 5374 (Level 4 Urology and Related Services) for certain code combinations in APC 5373 (Level 3 Urology and Related Services). (In the proposed rule, we cited HCPCS code "C97XX" as a placeholder for the new code. However, for ease of reading, hereafter in this section, we refer to the replacement code HCPCS code C9738 (Adjunctive blue light cystoscopy with fluorescent imaging agent (List separately in addition to code for primary procedure)) instead of the placeholder code.) Specifically, to determine which code pair combinations of a procedure

described by proposed new HCPCS code C9738 and a cystoscopy procedure would qualify for a complexity adjustment, we first crosswalked the costs of the procedure described by HCPCS code C9275

(Hexaminolevulinate hcl) to the procedure described by proposed new HCPCS code C9738 assigned status indicator "N". Next, we identified the procedure codes used to describe white light cystoscopy of the bladder which include the following CPT codes and APC assignments:

- APC 5372 (Level 2 Urology and Related Services)
 - CPT code 52000
- APC 5373 (Level 3 Urology and Related Services)
 - CPT code 52204
 - CPT code 52214
 - CPT code 52224
- APC 5374 (Level 4 Urology and Related Services)
 - CPT code 52234
 - CPT code 52235
- APC 5375 (Level 5 Urology and Related Services)
 - CPT code 52240

Because APC 5372 is not a C-APC, cystoscopy procedures assigned to Level 2 Urology are not eligible for a complexity adjustment, and therefore, we did not analyze these codes to determine whether they met the criteria for this adjustment. We modeled the data to determine which code pair combinations exceed the claim frequency and cost threshold in APC 5373, APC 5374, and APC 5375, which are all C-APCs. In the proposed rule, we stated that the results of our analysis indicate that the code pair combination of procedures described by proposed new HCPCS code C9738 and cystoscopy procedures assigned to APC 5373 would be eligible for a complexity adjustment based on current criteria and cost data because they meet the frequency and cost criteria thresholds. Likewise, our results indicated that the combination of procedures described by proposed new HCPCS code C9738 and cystoscopy procedures assigned to APC 5374 and APC 5375 would not qualify for a complexity adjustment because they do not meet the frequency and cost criteria thresholds.

We indicated in the proposed rule that, under the C-APC policy, blue light cystoscopy would be packaged, but when performed with a cystoscopy procedure in APC 5373 and reported with proposed new HCPCS code C9738 in addition to the cystoscopy CPT code, there would be a complexity adjustment to the next higher level APC in the series, resulting in a higher payment

than for the white light cystoscopy procedure alone. That is, if the code pair combination of proposed new HCPCS code C9738 with CPT code 52204, 52214, or 52224 is reported on a claim, the claim will qualify for payment reassignment from APC 5373 to APC 5374. We stated that we plan to track the utilization and the costs associated with white light/blue light cystoscopy procedure combinations that will receive a complexity adjustment.

We invited public comments on our CY 2018 proposal to allow for a complexity adjustment when a white light cystoscopy procedure followed by a blue light cystoscopy procedure is performed. In addition, we sought public comments on whether alternative procedures, such as narrow band imaging, may be disadvantaged by this proposed policy.

Comment: One commenter agreed that there are differences in resource utilization between cystoscopy procedures involving white light only and cystoscopy procedures involving both white light and blue light. However, the commenter recommended that a proposal to expand the cystoscopy CPT codes be submitted to the American Medical Association (AMA) to capture the resource distinction. The commenter stated that the use of CPT codes and HCPCS C-codes (for example, the proposed HCPCS code C9738) to capture cystoscopy procedures is duplicative, administratively burdensome, and can affect the quality of claims data.

Response: We appreciate the commenter's concerns. However, we proposed to establish this code based on programmatic need under the OPPTS to accurately describe blue light cystoscopy procedures. Given that a CPT code that describes blue light cystoscopy with an optical imaging agent does not exist in the CY 2018 CPT code set published by the AMA, it is unclear to us why the commenter believes HCPCS code C9738 would be duplicative, administratively burdensome, or affect the quality of claims data. Moreover, it is the combination of two different procedures that trigger a complexity adjustment; therefore, two distinct CPT or HCPCS codes are necessary to effectuate a complexity adjustment. If the AMA establishes a CPT code that describes blue light cystoscopy with an optical imaging agent, we would consider recognizing that CPT code under the OPPTS as a replacement for HCPCS code C9738.

Comment: A few commenters generally supported the proposal to allow for a complexity adjustment for

blue light cystoscopy with Cysview procedures. Many commenters, including several commenters with experience utilizing blue light cystoscopy with Cysview, shared their views on how this procedure has positively affected patient care management. These commenters recommended that CMS apply a complexity adjustment to all blue light cystoscopy with Cysview procedures performed in HOPDs to improve utilization and beneficiary access to care. Alternatively, the commenters recommended that CMS pay separately for Cysview to allow access in both white light and blue light cystoscopies in HOPD and ASC settings or establish a payment methodology conceptually similar to the device-intensive payment procedure for ASCs. The commenters suggested that a “device-intensive like” payment for a cystoscopy procedure performed in the ASC would be set based on the service cost and the drug cost (as determined by the manufacturer-reported average sales price).

Response: We appreciate the commenters’ support. In developing the blue light cystoscopy procedure complexity adjustment payment proposal, we considered the unique properties and resources required to perform blue light cystoscopy with Cysview. As described in the proposal, we approximated the costs for the additional resources required to perform blue light cystoscopy by crosswalking the costs associated with HCPCS code C9275 to HCPCS code C9738. We then applied the established complexity adjustment criteria to determine which cystoscopy procedures, when performed with blue light cystoscopy, would qualify for a complexity adjustment. For this final rule with comment period, we repeated the analysis to determine which code pair combinations of HCPCS code C9738 with a cystoscopy procedure CPT code satisfied the complexity adjustment criteria. Consistent with the proposed rule results, based on the updated final rule with comment period claims data, the code pair combination of HCPCS code C9738 with CPT code 52204, 52214, or 52224 each will qualify for a complexity adjusted payment from APC 5373 to APC 5374. Because APC 5372 is not a C–APC, cystoscopy procedures assigned to Level 2 Urology are not eligible for a complexity adjustment. Therefore, we did not analyze these codes to determine whether they were eligible for a complexity adjustment. Likewise, our analysis of the final rule claims data indicated that the combination of

proposed HCPCS code C9738 and cystoscopy procedures assigned to APC 5374 and APC 5375 would not qualify for a complexity adjustment because they do not meet the frequency and cost criteria thresholds.

We did not propose and the commenters did not provide evidence to support waiving application of the complexity adjustment criteria and allowing for a complexity adjustment whenever a blue light cystoscopy procedure is performed with any white light cystoscopy procedure. To allow for a complexity adjustment under any circumstance would require a change to the complexity adjustment criteria, which we did not propose. Therefore, we are finalizing the blue light cystoscopy complexity adjustment proposal, without modification. In addition we are establishing HCPCS code C9738 (Adjunctive blue light cystoscopy with fluorescent imaging agent (List separately in addition to code for primary procedure)), which replaces proposed HCPCS code C97XX. For CY 2018, the code pair combination of HCPCS code C9738 with CPT code 52204, 52214, or 52224 will qualify for a complexity adjusted payment from APC 5373 to APC 5374.

With respect to the public comments on unpackaging Cysview to allow for separate payment in both the HOPD and ASC settings, as we stated in the background section for the proposal, we continue to believe that Cysview is a drug that functions as a supply in a diagnostic test or procedure and therefore is packaged with payment for the primary procedure. In the CY 2018 OPPI/ASC proposed rule, we did not propose to make any changes to the “drugs that function as a supply” packaging policy or make any corresponding proposals to pay separately for Cysview in the HOPD and ASC settings. Therefore, Cysview will remain packaged.

With respect to the recommendation that we establish a payment methodology for blue light cystoscopy with Cysview procedures conceptually similar to the ASC device intensive payment policy, we did not propose revisions to the ASC device-intensive procedure policy. In addition, it is unclear to us exactly how such a policy would work and to what precise procedures in addition to blue light cystoscopy it might apply. Further, we believe that the C–APC payment adequately reflects the average resources expended by hospitals as reflected in hospital claims data. In addition, for especially costly cases, we believe our proposed policy appropriately recognizes the additional costs of blue

light cystoscopy with white light cystoscopy through the complexity adjustment. We will continue to analyze the data and evaluate whether refinements to the C–APC policy, including the complexity adjustment criteria, should be considered in future rulemaking.

Comment: A few commenters responded to the solicitation for public comments on whether an alternative procedure, such as narrow band imaging, would be disadvantaged by the blue light cystoscopy with Cysview complexity adjustment proposal. One commenter, the manufacturer of Cysview, requested that CMS not establish a complexity adjustment for narrow band imaging because this imaging does not require a drug, additional technology, or additional resource. The commenter stated that the equipment used in narrow band imaging cystoscopy procedures is not different than the equipment for white light cystoscopy and does not require more resource time, expense, or cost to the hospital because narrow band imaging technology is part of the standard equipment available for cystoscopic procedures. Another commenter, the developer of narrow band imaging, contended that the procedure shares many clinical and procedural similarities with blue light cystoscopy with Cysview procedures, and therefore narrow band imaging should be eligible for a complexity adjustment. In addition, the commenter expressed concern that a complexity adjustment for blue light cystoscopy with Cysview and not narrow band imaging would provide a financial incentive for providers to choose one technology over the other. However, the commenter did not provide cost information for narrow band imaging.

Response: We appreciate the commenters’ responses. We do not believe that the information presented supports a complexity adjustment for narrow band imaging. The lack of cost information for narrow band imaging and the fact that narrow band imaging does not require use of a contrast agent (and, therefore, avoids the cost of contrast and the time associated with the administration of contrast) lead us to question whether the resource costs of narrow band imaging are the same as those of blue light cystoscopy with Cysview. For these reasons, we do not believe it is appropriate to modify the proposal to allow for a complexity adjustment when narrow band imaging is performed with white light cystoscopy.

After consideration of the public comments we received, we are

finalizing our proposal, without modification, to allow for a complexity adjustment when HCPCS code C9738 is reported on the same claim as CPT code 52204, 52214, or 52224. The result of billing any one of these three code pair combinations is a payment reassignment from APC 5373 to APC 5374.

(6) Analysis of C-APC Packaging Under the OPSS

In the CY 2017 OPSS/ASC final rule with comment period (81 FR 79584), we accepted a recommendation made at the August 22, 2016 HOP Panel meeting to analyze the effects of C-APCs. The HOP panel recommendation did not elucidate specific concerns with the C-APC policy or provide detailed recommendations on particular aspects of the policy to analyze. Therefore, we took a broad approach in studying HCPCS codes and APCs subject to the C-APC policy to determine whether aberrant trends in the data existed. Overall, we observed no such aberrancies and believe that the C-APC policy is working as intended.

As discussed in the CY 2018 OPSS/ASC proposed rule (82 FR 33580), specifically, using OPSS claims data for the CY 2016 final rule with comment period, the CY 2017 final rule with comment period, and the CY 2018 proposed rule, which reflect an observation period of CY 2014 to CY 2016, we examined the effects of C-APCs and their impact on OPSS payments. We started with all hospital outpatient claims billed on the 13X claim-type and, from that, separately identified HCPCS codes and APCs that were subject to the comprehensive methodology in CYs 2015 and 2016 (that is, HCPCS codes or APCs assigned status indicator “J1” or “J2”). Next, we analyzed the claims to create a subset of claims that contain the HCPCS codes and APCs that were subject to the comprehensive methodology. Using the claims noted above, we analyzed claim frequency, line frequency, number of billing units, and the total OPSS payment between CYs 2014 and 2016 for each HCPCS code and APC that had been previously identified. In reviewing the cost statistics for HCPCS codes for procedures with status indicator “S”, “T”, or “V” in CY 2014 that were assigned to a C-APC in either CY 2015 or CY 2016, overall, we observed an increase in claim line frequency, units billed, and Medicare payment, which suggest that the C-APC payment policy did not adversely affect access to care or reduce payments to hospitals. Decreases in these cost statistics would suggest our comprehensive packaging logic is not working as intended and/or the C-APC

payment rates were inadequate, resulting in lower volume due to migration of services to other settings or the cessation of providing these services. Likewise, because the cost statistics of major separately payable codes (that is, HCPCS codes with status indicator “S”, “T”, or “V”) that were packaged into a C-APC prospectively were consistent with the cost statistics of the codes packaged on the claim, in actuality, indicate that costs were appropriately redistributed, we believe the C-APC payment methodology is working as intended.

Comment: A few commenters appreciated CMS’ analysis of C-APC packaging under the OPSS and urged CMS to continue to monitor the data and report on any changes in billing patterns or utilization for particular items or services.

Response: We appreciate the commenters’ support. We will continue to monitor the impact of our C-APC policy on OPSS rate setting and evaluate if future adjustments are needed.

c. Calculation of Composite APC Criteria-Based Costs

As discussed in the CY 2008 OPSS/ASC final rule with comment period (72 FR 66613), we believe it is important that the OPSS enhance incentives for hospitals to provide necessary, high quality care as efficiently as possible. For CY 2008, we developed composite APCs to provide a single payment for groups of services that are typically performed together during a single clinical encounter and that result in the provision of a complete service. Combining payment for multiple, independent services into a single OPSS payment in this way enables hospitals to manage their resources with maximum flexibility by monitoring and adjusting the volume and efficiency of services themselves. An additional advantage to the composite APC model is that we can use data from correctly coded multiple procedure claims to calculate payment rates for the specified combinations of services, rather than relying upon single procedure claims which may be low in volume and/or incorrectly coded. Under the OPSS, we currently have composite policies for low dose rate (LDR) prostate brachytherapy, mental health services, and multiple imaging services. We refer readers to the CY 2008 OPSS/ASC final rule with comment period for a full discussion of the development of the composite APC methodology (72 FR 66611 through 66614 and 66650 through 66652) and the CY 2012 OPSS/ASC final rule with comment period (76 FR 74163) for more recent background.

In the CY 2018 OPSS/ASC proposed rule (82 FR 33580), for CY 2018 and subsequent years, we proposed to continue our composite APC payment policies for mental health services and multiple imaging services, as discussed below. As discussed in section II.A.2.b. of the proposed rule and this final rule with comment period, we proposed to assign CPT code 55875 (Transperineal placement of needs or catheters into prostate for interstitial radioelement application, with or without cystoscopy) a status indicator of “J1” and assign it to a C-APC. In conjunction with this proposal, we also proposed to delete the low dose rate (LDR) prostate brachytherapy composite APC for CY 2018 and subsequent years. We refer readers to section II.A.2.b. of the CY 2018 OPSS/ASC proposed rule and this final rule with comment period for our discussion on our low dose rate (LDR) prostate brachytherapy APC proposal for CY 2018 and subsequent years.

(1) Mental Health Services Composite APC

In the CY 2018 OPSS/ASC proposed rule (82 FR 33580), we proposed to continue our longstanding policy of limiting the aggregate payment for specified less resource-intensive mental health services furnished on the same date to the payment for a day of partial hospitalization services provided by a hospital, which we consider to be the most resource intensive of all outpatient mental health services. We refer readers to the April 7, 2000 OPSS final rule with comment period (65 FR 18452 through 18455) for the initial discussion of this longstanding policy and the CY 2012 OPSS/ASC final rule with comment period (76 FR 74168) for more recent background.

In the CY 2017 OPSS/ASC final rule with comment period (81 FR 79588 through 79589), we finalized a policy to combine the existing Level 1 and Level 2 hospital-based PHP APCs into a single hospital-based PHP APC and, thereby, discontinue APCs 5861 (Level 1 Partial Hospitalization (3 services) for Hospital-Based PHPs) and 5862 (Level 2 Partial Hospitalization (4 or more services) for Hospital-Based PHPs) and replace them with APC 5863 (Partial Hospitalization (3 or more services per day)). For CY 2018, and subsequent years, we proposed that when the aggregate payment for specified mental health services provided by one hospital to a single beneficiary on a single date of service, based on the payment rates associated with the APCs for the individual services, exceeds the maximum per diem payment rate for partial hospitalization services provided

by a hospital, those specified mental health services would be paid through composite APC 8010 (Mental Health Services Composite) for CY 2018. In addition, we proposed to set the payment rate for composite APC 8010 for CY 2018 at the same payment rate that we proposed for APC 5863, which is the maximum partial hospitalization per diem payment rate for a hospital, and that the hospital continue to be paid the payment rate for composite APC 8010. Under this policy, the I/OCE would continue to determine whether to pay for these specified mental health services individually, or to make a single payment at the same payment rate established for APC 5863 for all of the specified mental health services furnished by the hospital on that single date of service. We stated that we continue to believe that the costs associated with administering a partial hospitalization program at a hospital represent the most resource intensive of all outpatient mental health services. Therefore, we do not believe that we should pay more for mental health services under the OPSS than the highest partial hospitalization per diem payment rate for hospitals.

We did not receive any public comments on these proposals. Therefore, we are finalizing our CY 2018 proposal, without modification, that when aggregate payment for specified mental health services provided by one hospital to a single beneficiary on a date of service, based on the payment rates with the APCs for the individual services, exceeds the maximum per diem payment rate for partial hospitalization services provided by a hospital, those specified mental health services will be paid through composite APC 8010 for CY 2018. In addition, we are finalizing our CY 2018 proposal, without modification, to set the payment rate for composite APC 8010 for CY 2018 at the same payment rate that we established for APC 5863, which is the maximum partial hospitalization per diem payment rate for a hospital, and that the hospital continue to be paid the payment rate for composite APC 8010.

(2) Multiple Imaging Composite APCs (APCs 8004, 8005, 8006, 8007, and 8008)

Effective January 1, 2009, we provide a single payment each time a hospital submits a claim for more than one imaging procedure within an imaging family on the same date of service, in order to reflect and promote the efficiencies hospitals can achieve when performing multiple imaging procedures during a single session (73 FR 41448

through 41450). We utilize three imaging families based on imaging modality for purposes of this methodology: (1) Ultrasound; (2) computed tomography (CT) and computed tomographic angiography (CTA); and (3) magnetic resonance imaging (MRI) and magnetic resonance angiography (MRA). The HCPCS codes subject to the multiple imaging composite policy and their respective families are listed in Table 12 of the CY 2014 OPSS/ASC final rule with comment period (78 FR 74920 through 74924).

While there are three imaging families, there are five multiple imaging composite APCs due to the statutory requirement under section 1833(t)(2)(G) of the Act that we differentiate payment for OPSS imaging services provided with and without contrast. While the ultrasound procedures included under the policy do not involve contrast, both CT/CTA and MRI/MRA scans can be provided either with or without contrast. The five multiple imaging composite APCs established in CY 2009 are:

- APC 8004 (Ultrasound Composite);
- APC 8005 (CT and CTA without Contrast Composite);
- APC 8006 (CT and CTA with Contrast Composite);
- APC 8007 (MRI and MRA without Contrast Composite); and
- APC 8008 (MRI and MRA with Contrast Composite).

We define the single imaging session for the “with contrast” composite APCs as having at least one or more imaging procedures from the same family performed with contrast on the same date of service. For example, if the hospital performs an MRI without contrast during the same session as at least one other MRI with contrast, the hospital will receive payment based on the payment rate for APC 8008, the “with contrast” composite APC.

We make a single payment for those imaging procedures that qualify for payment based on the composite APC payment rate, which includes any packaged services furnished on the same date of service. The standard (noncomposite) APC assignments continue to apply for single imaging procedures and multiple imaging procedures performed across families. For a full discussion of the development of the multiple imaging composite APC methodology, we refer readers to the CY 2009 OPSS/ASC final rule with comment period (73 FR 68559 through 68569).

In the CY 2018 OPSS/ASC proposed rule (82 FR 33581), we proposed, for CY 2018 and subsequent years, to continue

to pay for all multiple imaging procedures within an imaging family performed on the same date of service using the multiple imaging composite APC payment methodology. We stated that we continue to believe that this policy would reflect and promote the efficiencies hospitals can achieve when performing multiple imaging procedures during a single session.

The proposed CY 2018 payment rates for the five multiple imaging composite APCs (APCs 8004, 8005, 8006, 8007, and 8008) were based on proposed geometric mean costs calculated from a partial year of CY 2016 claims available for the CY 2018 OPSS/ASC proposed rule that qualified for composite payment under the current policy (that is, those claims reporting more than one procedure within the same family on a single date of service). To calculate the proposed geometric mean costs, we used the same methodology that we used to calculate the final geometric mean costs for these composite APCs since CY 2014, as described in the CY 2014 OPSS/ASC final rule with comment period (78 FR 74918). The imaging HCPCS codes referred to as “overlap bypass codes” that we removed from the bypass list for purposes of calculating the proposed multiple imaging composite APC geometric mean costs, in accordance with our established methodology as stated in the CY 2014 OPSS/ASC final rule with comment period (78 FR 74918), were identified by asterisks in Addendum N to the CY 2018 OPSS/ASC proposed rule (which is available via the Internet on the CMS Web site) and were discussed in more detail in section II.A.1.b. of the CY 2018 OPSS/ASC proposed rule.

For the CY 2018 OPSS/ASC proposed rule, we were able to identify approximately 634,918 “single session” claims out of an estimated 1.7 million potential claims for payment through composite APCs from our ratesetting claims data, which represents approximately 36 percent of all eligible claims, to calculate the proposed CY 2018 geometric mean costs for the multiple imaging composite APCs. Table 6 of the CY 2018 OPSS/ASC proposed rule listed the proposed HCPCS codes that would be subject to the multiple imaging composite APC policy and their respective families and approximate composite APC proposed geometric mean costs for CY 2018.

Comment: One commenter supported the composite APC policy for imaging services and recommended that CMS pay composite imaging APCs separately when billed on a claim with a service

that has been assigned a “J1” status indicator, that is, as a C-APC.

Response: We appreciate the commenter’s support. Regarding the recommendation about paying for composite APCs separately when billed on a claim with a service that has been assigned a “J1” status indicator, procedures assigned to C-APCs are primary services that are typically the focus of the hospital outpatient stay. As discussed in section II.A.2.b. of this final rule with comment period, our C-

APC policy packages payment for adjunctive and secondary items, services, and procedures, including diagnostic procedures, into the most costly procedure under the OPPTS at the claim level. We believe that paying for composite APCs separately when billed with a service that has been assigned a “J1” status indicator would be in conflict with the intent of our C-APC policy and would not be appropriate.

After consideration of the public comments we received, we are

finalizing our proposal to continue the use of multiple imaging composite APCs to pay for services providing more than one imaging procedure from the same family on the same date, without modification. Table 7 below lists the HCPCS codes that will be subject to the multiple imaging composite APC policy and their respective families and approximate composite APC proposed geometric mean costs for CY 2018.

TABLE 7—OPPS IMAGING FAMILIES AND MULTIPLE IMAGING PROCEDURE COMPOSITE APCS

CY 2018 APC 8004 (ultrasound composite)	CY 2018 approximate APC geometric mean cost = \$300
Family 1—Ultrasound	
76700	Us exam, abdom, complete.
76705	Echo exam of abdomen.
76770	Us exam abdo back wall, comp.
76776	Us exam k transpl w/Doppler.
76831	Echo exam, uterus.
76856	Us exam, pelvic, complete.
76857	Us exam, pelvic, limited.
CY 2018 APC 8005 (CT and CTA without contrast composite) *	CY 2018 approximate APC geometric mean cost = \$275
Family 2—CT and CTA with and without Contrast	
70450	Ct head/brain w/o dye.
70480	Ct orbit/ear/fossa w/o dye.
70486	Ct maxillofacial w/o dye.
70490	Ct soft tissue neck w/o dye.
71250	Ct thorax w/o dye.
72125	Ct neck spine w/o dye.
72128	Ct chest spine w/o dye.
72131	Ct lumbar spine w/o dye.
72192	Ct pelvis w/o dye.
73200	Ct upper extremity w/o dye.
73700	Ct lower extremity w/o dye.
74150	Ct abdomen w/o dye.
74261	Ct colonography, w/o dye.
74176	Ct angio abd & pelvis.
CY 2018 APC 8006 (CT and CTA with contrast composite)	CY 2018 approximate APC geometric mean cost = \$501
70487	Ct maxillofacial w/dye.
70460	Ct head/brain w/dye.
70470	Ct head/brain w/o & w/dye.
70481	Ct orbit/ear/fossa w/dye.
70482	Ct orbit/ear/fossa w/o & w/dye.
70488	Ct maxillofacial w/o & w/dye.
70491	Ct soft tissue neck w/dye.
70492	Ct sft tsue nck w/o & w/dye.
70496	Ct angiography, head.
70498	Ct angiography, neck.
71260	Ct thorax w/dye.
71270	Ct thorax w/o & w/dye.
71275	Ct angiography, chest.
72126	Ct neck spine w/dye.
72127	Ct neck spine w/o & w/dye.
72129	Ct chest spine w/dye.
72130	Ct chest spine w/o & w/dye.
72132	Ct lumbar spine w/dye.
72133	Ct lumbar spine w/o & w/dye.
72191	Ct angiograph pelv w/o & w/dye.
72193	Ct pelvis w/dye.
72194	Ct pelvis w/o & w/dye.
73201	Ct upper extremity w/dye.
73202	Ct uppr extremity w/o & w/dye.
73206	Ct angio upr extrm w/o & w/dye.
73701	Ct lower extremity w/dye.

TABLE 7—OPPS IMAGING FAMILIES AND MULTIPLE IMAGING PROCEDURE COMPOSITE APCs—Continued

73702	Ct lwr extremity w/o & w/dye.
73706	Ct angio lwr extr w/o & w/dye.
74160	Ct abdomen w/dye.
74170	Ct abdomen w/o & w/dye.
74175	Ct angio abdom w/o & w/dye.
74262	Ct colonography, w/dye.
75635	Ct angio abdominal arteries.
74177	Ct angio abd & pelv w/contrast.
74178	Ct angio abd & pelv 1+ regns.

* If a “without contrast” CT or CTA procedure is performed during the same session as a “with contrast” CT or CTA procedure, the I/OCE assigns the procedure to APC 8006 rather than APC 8005.

CY 2018 APC 8007 (MRI and MRA without contrast composite)*	CY 2018 approximate APC geometric mean cost = \$556
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Family 3—MRI and MRA with and without Contrast

70336	Magnetic image, jaw joint.
70540	Mri orbit/face/neck w/o dye.
70544	Mr angiography head w/o dye.
70547	Mr angiography neck w/o dye.
70551	Mri brain w/o dye.
70554	Fmri brain by tech.
71550	Mri chest w/o dye.
72141	Mri neck spine w/o dye.
72146	Mri chest spine w/o dye.
72148	Mri lumbar spine w/o dye.
72195	Mri pelvis w/o dye.
73218	Mri upper extremity w/o dye.
73221	Mri joint upr extrem w/o dye.
73718	Mri lower extremity w/o dye.
73721	Mri jnt of lwr extre w/o dye.
74181	Mri abdomen w/o dye.
75557	Cardiac mri for morph.
75559	Cardiac mri w/stress img.
C8901	MRA w/o cont, abd.
C8904	MRI w/o cont, breast, uni.
C8907	MRI w/o cont, breast, bi.
C8910	MRA w/o cont, chest.
C8913	MRA w/o cont, lwr ext.
C8919	MRA w/o cont, pelvis.
C8932	MRA, w/o dye, spinal canal.
C8935	MRA, w/o dye, upper extr.

CY 2018 APC 8008 (MRI and MRA with contrast composite)	CY 2018 approximate APC geometric mean cost = \$871
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70549	Mr angiograph neck w/o & w/dye.
70542	Mri orbit/face/neck w/dye.
70543	Mri orb/fac/nck w/o & w/dye.
70545	Mr angiography head w/dye.
70546	Mr angiograph head w/o & w/dye.
70547	Mr angiography neck w/o dye.
70548	Mr angiography neck w/dye.
70552	Mri brain w/dye.
70553	Mri brain w/o & w/dye.
71551	Mri chest w/dye.
71552	Mri chest w/o & w/dye.
72142	Mri neck spine w/dye.
72147	Mri chest spine w/dye.
72149	Mri lumbar spine w/dye.
72156	Mri neck spine w/o & w/dye.
72157	Mri chest spine w/o & w/dye.
72158	Mri lumbar spine w/o & w/dye.
72196	Mri pelvis w/dye.
72197	Mri pelvis w/o & w/dye.
73219	Mri upper extremity w/dye.
73220	Mri uppr extremity w/o & w/dye.
73222	Mri joint upr extrem w/dye.
73223	Mri joint upr extr w/o & w/dye.
73719	Mri lower extremity w/dye.
73720	Mri lwr extremity w/o & w/dye.
73722	Mri joint of lwr extr w/dye.
73723	Mri joint lwr extr w/o & w/dye.
74182	Mri abdomen w/dye.
74183	Mri abdomen w/o & w/dye.

TABLE 7—OPPS IMAGING FAMILIES AND MULTIPLE IMAGING PROCEDURE COMPOSITE APCs—Continued

75561	Cardiac mri for morph w/dye.
75563	Card mri w/stress img & dye.
C8900	MRA w/cont, abd.
C8902	MRA w/o fol w/cont, abd.
C8903	MRI w/cont, breast, uni.
C8905	MRI w/o fol w/cont, brst, un.
C8906	MRI w/cont, breast, bi.
C8908	MRI w/o fol w/cont, breast.
C8909	MRA w/cont, chest.
C8911	MRA w/o fol w/cont, chest.
C8912	MRA w/cont, lwr ext.
C8914	MRA w/o fol w/cont, lwr ext.
C8918	MRA w/cont, pelvis.
C8920	MRA w/o fol w/cont, pelvis.
C8931	MRA, w/dye, spinal canal.
C8933	MRA, w/o&w/dye, spinal canal.
C8934	MRA, w/dye, upper extremity.
C8936	MRA, w/o&w/dye, upper extr.

* If a “without contrast” MRI or MRA procedure is performed during the same session as a “with contrast” MRI or MRA procedure, the I/OCE assigns the procedure to APC 8008 rather than APC 8007.

3. Changes to Packaged Items and Services

a. Background and Rationale for Packaging in the OPPS

Like other prospective payment systems, the OPPS relies on the concept of averaging to establish a payment rate for services. The payment may be more or less than the estimated cost of providing a specific service or a bundle of specific services for a particular patient. The OPPS packages payments for multiple interrelated items and services into a single payment to create incentives for hospitals to furnish services most efficiently and to manage their resources with maximum flexibility. Our packaging policies support our strategic goal of using larger payment bundles in the OPPS to maximize hospitals’ incentives to provide care in the most efficient manner. For example, where there are a variety of devices, drugs, items, and supplies that could be used to furnish a service, some of which are more costly than others, packaging encourages hospitals to use the most cost-efficient item that meets the patient’s needs, rather than to routinely use a more expensive item, which often occurs if separate payment is provided for the item.

Packaging also encourages hospitals to effectively negotiate with manufacturers and suppliers to reduce the purchase price of items and services or to explore alternative group purchasing arrangements, thereby encouraging the most economical health care delivery. Similarly, packaging encourages hospitals to establish protocols that ensure that necessary services are furnished, while scrutinizing the services ordered by

practitioners to maximize the efficient use of hospital resources. Packaging payments into larger payment bundles promotes the predictability and accuracy of payment for services over time. Finally, packaging may reduce the importance of refining service-specific payment because packaged payments include costs associated with higher cost cases requiring many ancillary items and services and lower cost cases requiring fewer ancillary items and services. Because packaging encourages efficiency and is an essential component of a prospective payment system, packaging payments for items and services that are typically integral, ancillary, supportive, dependent, or adjunctive to a primary service has been a fundamental part of the OPPS since its implementation in August 2000. For an extensive discussion of the history and background of the OPPS packaging policy, we refer readers to the CY 2000 OPPS final rule (65 FR 18434), the CY 2008 OPPS/ASC final rule with comment period (72 FR 66580), the CY 2014 OPPS/ASC final rule with comment period (78 FR 74925), the CY 2015 OPPS/ASC final rule with comment period (79 FR 66817), the CY 2016 OPPS/ASC final rule with comment period (80 FR 70343), and the CY 2017 OPPS/ASC final rule with comment period (81 FR 79592). As we continue to develop larger payment groups that more broadly reflect services provided in an encounter or episode of care, we have expanded the OPPS packaging policies. Most, but not necessarily all, items and services currently packaged in the OPPS are listed in 42 CFR 419.2(b). Our overarching goal is to make OPPS payments for all services paid under the OPPS more consistent with those of a

prospective payment system and less like those of a per-service fee schedule, which pays separately for each coded item. As a part of this effort, we have continued to examine the payment for items and services provided under the OPPS to determine which OPPS services can be packaged to further achieve the objective of advancing the OPPS toward a more prospective payment system.

For CY 2018, we examined the items and services currently provided under the OPPS, reviewing categories of integral, ancillary, supportive, dependent, or adjunctive items and services for which we believe payment would be appropriately packaged into payment of the primary service that they support. Specifically, we examined the HCPCS code definitions (including CPT code descriptors) and outpatient hospital billing patterns to determine whether there were categories of codes for which packaging would be appropriate according to existing OPPS packaging policies or a logical expansion of those existing OPPS packaging policies. In the CY 2018 OPPS/ASC proposed rule (82 FR 33584 through 33585), for CY 2018, we proposed to conditionally package the costs of selected newly identified ancillary services into payment with a primary service where we believe that the packaged item or service is integral, ancillary, supportive, dependent, or adjunctive to the provision of care that was reported by the primary service HCPCS code. Below we discuss the items and services that we proposed to package beginning in CY 2018.

b. Drug Administration Packaging Policy

(1) Background of Drug Administration Packaging Policy

In the CY 2014 OPPTS/ASC final rule with comment period (78 FR 74942 through 74945), we finalized a policy to unconditionally package procedures described by add-on codes. Procedures described by add-on codes represent an extension or continuation of a primary procedure, which means that they are typically supportive, dependent, or adjunctive to a primary service. The primary code defines the purpose and typical scope of the patient encounter and the add-on code describes incremental work, when the extent of the procedure encompasses a range rather than a single defined endpoint applicable to all patients. Given the dependent nature and adjunctive characteristics of procedures described by add-on codes and in light of longstanding OPPTS packaging principles, we finalized a policy to unconditionally package add-on codes with the primary procedure. However, in response to stakeholder comments on the appropriateness of packaging drug administration add-on codes, we did not finalize our proposal to package drug administration add-on codes (78 FR 74945).

In the CY 2015 OPPTS/ASC final rule with comment period (79 FR 66819 through 66822), we conditionally packaged payment for ancillary services assigned to APCs with a geometric mean cost of less than or equal to \$100 (prior to application of the conditional packaging status indicator). The ancillary services that we identified are primarily minor diagnostic tests and procedures that are often performed with a primary service, although there are instances where hospitals provide such services alone and without another primary service during the same encounter. Under this policy, we assigned the conditionally packaged services to status indicator "Q1", which indicates that the service is separately payable when not billed on the same claim as a HCPCS code assigned status indicator "S", "T", or "V". Exclusions to this ancillary service packaging policy include preventive services, certain psychiatric and counseling-related services, and certain low-cost drug administration services. In the CY 2015 OPPTS/ASC final rule with comment period (79 FR 66819), we indicated that we did not propose to package certain low-cost drug administration services because we were examining various alternative payment policies for drug

administration, including the associated drug administration add-on codes.

(2) Packaging of Level 1 and Level 2 Drug Administration Services

As stated earlier, our overarching goal is to make OPPTS payments for all services paid under the OPPTS more consistent with those of a prospective payment system and less like those of a per-service fee schedule. To achieve this goal, it is important that we are consistent in our approach to packaging items and services under the established packaging categories. Although we excluded packaging of low-cost drug administration services from the ancillary services packaging policy in the CY 2015 rulemaking, separate payment for drug administration services is an example of inconsistent application of our packaging policy where we are continuing to pay separately for a service, regardless of cost and performance with another service. Given the frequency of drug administration in hospital outpatient care, in the CY 2018 OPPTS/ASC proposed rule, we stated that we believe it is appropriate for us to reconsider whether payment for drug administration services with a geometric mean cost of less than or equal to \$100 (prior to application of the conditional packaging status indicator) should continue to be excluded from the ancillary services packaging policy.

As part of our review of CY 2016 claims data used for ratesetting in the CY 2018 OPPTS/ASC proposed rule, we examined drug administration billing patterns and payment for drug administration services under the OPPTS. Based on our analysis of CY 2016 claims data used for the CY 2018 proposed rule ratesetting, we found that the geometric mean cost for APC 5691 (Level 1 Drug Administration) is approximately \$37 and the geometric mean cost for APC 5692 (Level 2 Drug Administration) is approximately \$59. In addition, we observed that drug administration services in APC 5692 are frequently reported on the same claim with other separately payable services, such as an emergency department or clinic visit, while drug administration services in APC 5691 are sometimes reported with other separately payable services. Accordingly, Medicare data show that these drug administration services are currently being provided as part of another separately payable service for which two separate payments are made, and support that packaging these services, when they are reported with another separately payable service, is appropriate. Further, packaging for Levels 1 and 2 Drug Administration

services is consistent with the ancillary packaging policy that was adopted in CY 2015, as noted earlier in this section. Therefore, given the low geometric mean costs of drug administration services in APC 5691 and APC 5692 as well as their associated billing patterns, we stated in the CY 2018 OPPTS/ASC proposed rule that we believe that when these services are performed with another separately payable service, they should be packaged, but that they should be separately paid when performed alone. That is, we stated that we believe it is no longer necessary to exclude low-cost drug administration services from packaging under the ancillary services packaging policy adopted in CY 2015.

In addition, as we examine payment differences between the hospital outpatient department and the physician office for similar services, under the OPPTS, hospitals may receive separate payments for a clinic (office) visit and a drug administration service. In contrast, physicians are not eligible to receive payment for an office visit when a drug administration service is also provided. As a result, for furnishing the same drug administration service, hospitals receive an additional payment for which physician offices are not eligible. We stated in the proposed rule that we believe that conditional packaging of drug administration services would promote equitable payment between the physician office and the hospital outpatient hospital department. Accordingly, for CY 2018, we proposed to conditionally package payment for HCPCS codes describing drug administration services in APC 5691 and APC 5692, except for add-on codes and preventive services, when these services are performed with another service.

Because preventive services are excluded from our packaging policies, we proposed to continue to pay separately for Medicare Part B vaccine administration services. In addition, at that time, we did not propose to package any drug administration services in APC 5693 (Level 3 Drug Administration) or APC 5694 (Level 4 Drug Administration), but indicated our interest in public comments pertaining to whether payment for the services in these APCs may be appropriate for packaging. The proposed status indicators for drug administration services in APC 5691 and APC 5692 were listed in Table 7 of the proposed rule.

Comment: Numerous commenters disagreed with CMS' proposal to conditionally package low-cost drug administration services assigned to APC

5691 and APC 5692. The commonly cited concerns among the commenters who opposed the proposal were as follows:

- Low-cost drug administration services are dissimilar from other low cost ancillary services in that drug administration services are separate and distinct stand-alone services and not adjunctive, supportive, or dependent to a primary procedure.
- The proposal would not promote equitable payment between the physician's office and the hospital outpatient department because, in accordance with CMS guidelines, there are clinical circumstances where a physician may receive payment for both a drug administration service and an office visit.
- Because all drugs are separately payable in the physician's office, unlike under the OPSS, the proposal, if implemented, would exacerbate differences in payment between the hospital outpatient department and the physician office setting. Commenters expressed doubt that the full cost of a packaged drug administration service or drug would be appropriately and accurately reflected in the payment for another separately payable procedure.
- Packaging drug administration services with other services could result in hospitals scheduling patients for multiple visits, thereby reducing access to care and quality of care.
- Further analysis of the impact packaging drug administration services would have on APCs should be conducted prior to making a policy change.
- In general, packaging discourages full reporting of hospital costs, which impacts the accuracy of cost data that are used to calculate OPSS payment rates.

In addition, at the summer 2017 meeting of the HOP Panel, the HOP Panel recommended that CMS not implement its proposal to package drug administration services described under APC 5691 (Level 1 Drug Administration) and APC 5692 (Level 2 Drug Administration).

Response: We appreciate the detailed responses to our proposal and agree with the statements concerning the importance of payment accuracy to maintain access to care. However, we disagree that conditional packaging of low-level drug administration services, which are commonly furnished both in the hospital outpatient setting and in the physician office setting, would lead to payment inaccuracy for hospital rates for these services (which would include the packaged costs of these services) or to decreased access to drug

administration services. As stated in the proposed rule, we believe it is no longer necessary to exclude low-cost drug administration services from packaging under the ancillary services packaging policy adopted in CY 2015, which is supported by our analysis of drug administration billing patterns. As described earlier in the introduction to this section, our analysis of CY 2016 OPSS claims data showed that low-cost drug administration services are currently being provided as part of another separately payable service for which two separate payments are made, and supported a policy that packaging low-cost drug administration services, when they are reported with another separately payable service, is appropriate. In response to the commenters who raised concerns regarding potential behavioral changes by providers as a consequence of the proposal, we will continue to monitor the data for changes in drug administration billing patterns.

Furthermore, regarding the comments that low-cost drug administration services are separate and distinct standalone services and not adjunctive, supportive, or dependent to a primary procedure, we disagree based on typical billing patterns for these services. As stated earlier in the introduction to this section, ancillary services are often performed with a primary service. Because these low-cost drug administration services are typically furnished with another primary service and are assigned to APCs with a geometric mean cost of less than or equal to \$100 (prior to the application of the conditional packaging status indicator), we believe these services fall under the ancillary services packaging policy.

In addition, as stated in the proposed rule, we believe that conditional packaging of drug administration services will promote equitable payment between the physician office and the hospital outpatient department. However, we clarify that while typically physicians are not eligible to receive payment for an office visit when a drug administration service is also provided, we acknowledge that Medicare will pay for both services when the office visit CPT code is reported with Modifier 25 (Significant, separately identifiable evaluation and management services by the same physician on the day of the procedure).

With respect to data availability and general requests for further CMS analysis, we believe that the data made available to the public as part of the proposed rule were appropriate, clear, and sufficient for interested parties to

conduct analyses to evaluate facility-specific impacts of the proposed policy. It is unclear what the commenters meant by requesting that CMS further analyze the effects of the proposal on APCs, as the commenters did not specify any particular analysis that CMS should conduct or data that CMS should provide that is not already available to the public. Because the OPSS is a budget neutral payment system, packaging a procedure does not remove its costs from ratesetting.

With respect to commenters' concerns on reporting of hospital costs for packaged services, we remind commenters that hospitals are expected to report all HCPCS codes that describe the services provided, regardless of whether or not those services are separately paid or their payment is packaged. The calculation of OPSS relative payment weights that reflect the relative resources required for HOPD services is the foundation of the OPSS. We rely on hospitals to bill all HCPCS codes accurately in accordance with their code descriptors and CPT and CMS instructions, as applicable, and to report charges on claims and charges and costs on their Medicare hospital cost report appropriately (77 FR 68324).

Therefore, for the reasons stated above, we believe that it is appropriate, and a logical expansion of our ancillary services policy, to finalize our proposal to unconditionally package low-cost drug administration services assigned to APCs 5691 and 5692. Accordingly, we are not accepting the HOP Panel's recommendation to not finalize our proposal.

Comment: One commenter stated that the packaging proposal is a logical expansion of the current ancillary packaging policy but recommended a 1-year implementation delay to allow providers time to assess the administrative and fiscal impact.

Response: We appreciate the commenter's support. Packaging is a longstanding payment principle under the OPSS and CMS has packaged a number of items and services through the years and makes OPSS data available to all interested parties on its Web site. Therefore, we do not see a reason to delay implementation of the policy. With each proposed and final rule release, CMS posts on its Web site various public use files (PUFs), including payment rates and cost statistics for applicable items and procedures. Stakeholders interested in a more comprehensive analysis of OPSS claims data used to derive the CY 2018 OPSS/ASC payment rates may purchase the "OPSS Limited Data Set" (LDS) that is available on the CMS Web site at:

<https://www.cms.gov/Research-Statistics-Data-and-Systems/Files-for-Order/LimitedDataSets/HospitalOPPS.html>. We believe the information contained in the PUF and LDS files is sufficient to allow stakeholders to analyze the effects of our policies on their areas of interest. Therefore, we are finalizing our proposal to conditionally package low-cost drug administration services assigned to APC 5691 and APC 5692, effective January 1, 2018.

Comment: Some commenters believed that the proposal would conditionally package Medicare Part B vaccine administration. In addition, some commenters believed that if a hospital provides a low-cost drug administration service for a drug that is unconditionally packaged, CMS would make no payment to the hospital.

Response: We believe that some commenters may have misunderstood

the proposal. Consistent with our existing policy to exclude preventive services from packaging, administration of Part B vaccines—influenza, pneumococcal, and hepatitis B—are exempt from packaging and will continue to be paid separately. With respect to payment for a conditionally packaged low-cost drug administration service and an unconditionally packaged drug, the drug administration service is separately payable when not billed on the same claim as a HCPCS code with status indicator “S”, “T”, or “V”. Payment for the threshold-packaged drug would be packaged with the payment for the highest paying separately payable procedure reported on the claim. For example, if a threshold-packaged drug, a low-cost drug administration service, and a clinic visit are reported on the same claim,

payment for the drug and drug administration service would be packaged with the clinic visit payment.

In summary, after consideration of the public comments we received, we are finalizing, without modification, the proposed policy to conditionally package low-cost drug administration services assigned to APC 5691 and APC 5692.

Because preventive services are excluded from our packaging policies, we are continuing to pay separately for Medicare Part B vaccine administration services. In addition, at this time, we are not packaging any drug administration services assigned to APC 5693 (Level 3 Drug Administration) or APC 5694 (Level 4 Drug Administration). The status indicators for drug administration services in APC 5691 and APC 5692 for CY 2018 are listed in Table 8 below.

TABLE 8—CY 2018 STATUS INDICATORS FOR DRUG ADMINISTRATION SERVICES IN LEVEL 1 AND LEVEL 2 DRUG ADMINISTRATION APCs

HCPCS code	Short descriptor	CY 2018 status indicator
APC 5691—Level 1 Drug Administration		
95115	Immunotherapy one injection	Q1
95117	Immunotherapy injections	Q1
95144	Antigen therapy services	Q1
95145	Antigen therapy services	Q1
95146	Antigen therapy services	Q1
95165	Antigen therapy services	Q1
95170	Antigen therapy services	Q1
96361	Hydrate iv infusion add-on	S
96366	Ther/proph/diag iv inf addon	S
96370	Sc ther infusion addl hr	S
96375	Tx/pro/dx inj new drug addon	S
96377	Application on-body injector	Q1
96379	Ther/prop/diag inj/inf proc	Q1
96423	Chemo ia infuse each addl hr	S
96549	Chemotherapy unspecified	Q1
G0008	Admin influenza virus vac	S
G0009	Admin pneumococcal vaccine	S
G0010	Admin hepatitis b vaccine	S
APC 5692—Level 2 Drug Administration		
90471	Immunization admin	Q1
90473	Immune admin oral/nasal	Q1
95147	Antigen therapy services	Q1
95148	Antigen therapy services	Q1
95149	Antigen therapy services	Q1
96367	Tx/proph/dg addl seq iv inf	S
96371	Sc ther infusion reset pump	Q1
96372	Ther/proph/diag inj sc/im	Q1
96401	Chemo anti-neopl sq/im	Q1
96402	Chemo hormon antineopl sq/im	Q1
96405	Chemo intralesional up to 7	Q1
96411	Chemo iv push addl drug	S
96415	Chemo iv infusion addl hr	S
96417	Chemo iv infus each addl seq	S

(3) Discussion of Comment Solicitation Regarding Unconditionally Packaging Drug Administration Add-On Codes

With respect to drug administration add-on codes, as discussed in the CY 2014 OPPS/ASC proposed rule (78 FR 43573), we proposed to unconditionally package all drug administration services described by add-on codes. In response to the proposal, commenters objected to packaging drug administration add-on codes, which typically describe each additional hour of infusion or each additional intravenous push, among others, in addition to the initial drug administration service. The commenters believed that such a policy could disadvantage providers of longer drug administration services, which are often protocol-driven and are not necessarily dictated by the hospital, but by the characteristics of the specific drug or biological being administered to the patient. In response to these comments, we stated in the CY 2014 OPPS/ASC final rule with comment period (78 FR 74945) that, given the frequency of drug administration services in the hospital outpatient department and their use in such a wide variety of different drug treatment protocols for various diseases in all types of hospitals, further study of the payment methodology for these services was warranted at that time. Therefore, we did not finalize our proposal to package the drug administration add-on codes in CY 2014. However, we stated we would continue to explore other payment options, including packaging and variations on packaging, in future years.

In the CY 2018 OPPS/ASC proposed rule, we did not propose to package drug administration add-on codes for CY 2018 because we wanted stakeholder input on a payment methodology that supports the principles of a prospective payment system while ensuring patient access to prolonged infusion services. Instead, we solicited public comment on whether conditionally or unconditionally packaging such codes would create access to care issues or have other unintended consequences. Specifically, we requested public comments on the following: (1) Whether we should conditionally or unconditionally package drug administration services add-on codes; (2) how we should consider or incorporate the varied clinical drug protocols that result in different infusion times into a drug administration service add-on code payment proposal; and (3) other recommendations on an encounter-based payment approach for drug administration services that are

described by add-on codes when furnished in the hospital outpatient department setting.

Comment: Many commenters raised concerns about the appropriateness of packaging drug administration services add-on codes, given the variation in clinical treatment protocols. The commenters believed that packaging drug administration services add-on codes could create a barrier to access for drugs or biologicals with a long infusion time. Without explicit incremental payment for additional hours of infusion, some commenters suggested hospitals could discontinue offering the infusion. A few commenters suggested that CMS consider the creation of a drug administration C-APC for common drug administration encounters but did not provide details on what specific services should comprise the C-APC.

Response: We appreciate the comments we received on this topic and will take them into consideration for future rulemaking.

c. Analysis of Packaging of Pathology Services in the OPPS

At the August 22, 2016 HOP Panel meeting, a stakeholder expressed concern regarding conditional packaging of multiple pathology services. When multiple conditionally packaged services are billed on the same claim, the costs of the lowest paying services are bundled into the cost of the highest paying service and payment is made based on the highest single payable service. The stakeholder requested that CMS create a pathology composite APC to more appropriately pay for claims with only multiple pathology services and no other separately payable service such as a surgical procedure or a clinic visit. The HOP panel recommended that CMS develop a composite APC for pathology services when multiple pathology services are provided on a claim with no other payable services. The HOP Panel also requested that CMS take into consideration the stakeholder presentation comments made at the August 22, 2016 HOP Panel meeting regarding hospital pathology laboratories as CMS evaluates conditional packaging to determine whether an accommodation can be made. Specifically, the stakeholder expressed concern with conditional packaging of pathology services, particularly when payment is limited to the single highest paying code, regardless of the number of services provided or specimens tested.

In response to these HOP Panel requests and recommendation, we stated that we may consider the

stakeholders' request for a pathology composite APC as well as additional composite APCs for future rulemaking (81 FR 79588). In light of these requests and recommendation, in development of the CY 2018 OPPS/ASC proposed rule, we evaluated and considered a pathology composite APC when multiple pathology services are performed and billed without a separately payable service on the same claim. To understand the frequency of billing multiple pathology services and no other separately payable codes on the same claim by hospital outpatient departments, we examined currently available claims data to identify the frequency distribution of pathology codes within the CPT code range 88300 to 88361. The claim frequency breakdown was displayed in Table 8 of the proposed rule (82 FR 33587).

Based on our analysis of claims data for the proposed rule, the majority of pathology only OPPS claims are reported with one pathology code. Therefore, as we stated in the CY 2018 OPPS/ASC proposed rule (82 FR 33588), we believe that it is neither a frequent occurrence nor a common occurrence for a provider to submit a claim for payment under the OPPS with multiple pathology services and no other separately payable service.

With regard to the HOP Panel's recommendation to develop a composite APC for pathology services when multiple pathology services are provided on a claim with no other payable services, we used CY 2016 claims data available for the CY 2018 OPPS/ASC proposed rule to model four hypothetical pathology composite APCs. That is, following our standard packaging methodology, we modeled four hypothetical pathology composite APCs based on the following clinical scenarios that were specifically requested by a stakeholder at the August 2016 HOP Panel meeting:

- Hypothetical Composite APC A: Claims that contain 2–4 pathology units (CPT codes 88302 through 88309) with or without special stains (CPT codes 88312 through 88314);
- Hypothetical Composite APC B: Claims that contain 5 or more pathology units (CPT codes 88302 through 88309) with or without special stains (CPT codes 88312 through 88314);
- Hypothetical Composite APC C: Claims that contain 2–4 pathology units (CPT codes 88302 through 88309) with immunostains (CPT codes 88341, 88342, 88346, 88350, 88360, 88361); and
- Hypothetical Composite APC D: Claims that contain 5 or more pathology units (CPT codes 88302 through 88309)

with immunostains (CPT codes 88341, 88342, 88346, 88350, 88360, 88361).

In addition, for the proposed rule, we evaluated the volume of services and costs for each hypothetical composite. Results from modeling the four composite scenarios showed low claim volume, which indicates that the suggested pathology code combinations are infrequently billed by hospital outpatient departments and which may mean that these are not likely clinical scenarios in hospital outpatient departments. A summary of the results from our composite analysis was presented in Table 9 of the proposed rule (82 FR 33587). We refer readers to Addendum B to the CY 2018 OPPS/ASC proposed rule (which is available via the Internet on the CMS Web site) for the CPT code descriptors.

As we move toward larger payment bundles under the OPPS, the necessity of composite APCs diminishes. For example, in the CY 2018 OPPS/ASC proposed rule, we proposed to delete composite APC 8001 (LDR Prostate Brachytherapy Composite) and to provide payment for the component procedures through the C-APC payment methodology. Composite APCs were a precursor to C-APCs. In CY 2008, we implemented composite APCs to provide a single payment for groups of services that are typically performed together during a single clinical encounter and that result in the provision of a complete service (72 FR 66650 through 66652). Because a C-APC would treat all individually reported codes as representing components of the comprehensive service, all of the elements of the composite service are included in the C-APC payment. In addition, given the infrequent occurrence of multiple pathology services on the same claim without a separately payable service, we do not believe a composite APC is necessary or warranted.

Therefore, for CY 2018, we did not propose to create a pathology composite APC or additional composite APCs for stakeholder-requested services, such as X-ray services, respiratory services, cardiology services, or allergy testing services. However, we solicited public comments on our packaging policies, as discussed under section II.A.3.d. of this final rule with comment period.

We did not receive any public comments on our analysis of packaging of pathology services.

d. Summary of Public Comments and Our Responses Regarding Packaging of Items and Services Under the OPPS

As previously noted, packaging is an inherent principle of a prospective

payment system. The OPPS, like other prospective payment systems, relies on the concept of averaging, where the payment may be more or less than the estimated costs of providing a service or package of services for a particular patient, but with the exception of outlier cases, is adequate to ensure access to appropriate care. Packaging and bundling payments for multiple unrelated services into a single payment create incentives for providers to furnish services in the most efficient way by enabling hospitals to manage their resources with maximum flexibility, thereby encouraging long-term cost containment. Decisions about packaging and bundling payment involve a balance between ensuring some separate payment for individual services or items while establishing incentives for efficiency through larger units of payment.

As the OPPS continues to move toward prospectively determined encounter-based payments and away from separate fee schedule-like payments, we continue to hear concerns from stakeholders that our packaging policies may be hampering patient access or resulting in other undesirable consequences. However, we have not observed significant fluctuations in our data that show a sharp decline of the volume of packaged items and services, nor have we heard from Medicare beneficiaries specifically about access issues or other concerns with packaged items and services. However, given that aggregate spending and utilization continue to increase for covered hospital outpatient services, it is unclear what, if any, adverse effect packaging has on beneficiary access to care. Specifically, in the CY 2018 OPPS/ASC proposed rule (82 FR 33588), within the framework of existing packaging categories, such as drugs that function as supplies in a surgical procedure or diagnostic test or procedure, we expressed interest in stakeholder feedback on common clinical scenarios involving currently packaged HCPCS codes for which stakeholders believe packaged payment is not appropriate under the OPPS. Likewise, outside the framework of existing packaging categories, we expressed interest in stakeholder feedback on common clinical scenarios involving separately payable HCPCS codes for which payment would be most appropriately packaged under the OPPS. In the proposed rule, we solicited public comments from a broad cross-section of stakeholders, including beneficiaries, patient advocates, hospital providers,

clinicians, manufacturers, and other interested parties.

Comment: Commenters expressed a variety of views on packaging under the OPPS. The comments ranged from requests to unpackage most items and services that are either conditionally or unconditionally packaged under the OPPS, including drugs and devices, to specific requests to unpackage a specific drug or device.

Response: We appreciate the comments received and will review them as we continue to explore and evaluate packaging policies that apply under the OPPS and take them into consideration for future rulemaking.

4. Calculation of OPPS Scaled Payment Weights

We established a policy in the CY 2013 OPPS/ASC final rule with comment period (77 FR 68283) of using geometric mean-based APC costs to calculate relative payment weights under the OPPS. In the CY 2017 OPPS/ASC final rule with comment period (81 FR 79594 through 79595), we applied this policy and calculated the relative payment weights for each APC for CY 2017 that were shown in Addenda A and B to that final rule with comment period (which were made available via the Internet on the CMS Web site) using the APC costs discussed in sections II.A.1. and II.A.2. of that final rule with comment period. For CY 2018, as we did for CY 2017, we proposed to continue to apply the policy established in CY 2013 and calculate relative payment weights for each APC for CY 2018 using geometric mean-based APC costs (82 FR 33588).

For CY 2012 and CY 2013, outpatient clinic visits were assigned to one of five levels of clinic visit APCs, with APC 0606 representing a mid-level clinic visit. In the CY 2014 OPPS/ASC final rule with comment period (78 FR 75036 through 75043), we finalized a policy that created alphanumeric HCPCS code G0463 (Hospital outpatient clinic visit for assessment and management of a patient), representing any and all clinic visits under the OPPS. HCPCS code G0463 was assigned to APC 0634 (Hospital Clinic Visits). We also finalized a policy to use CY 2012 claims data to develop the CY 2014 OPPS payment rates for HCPCS code G0463 based on the total geometric mean cost of the levels one through five CPT E/M codes for clinic visits previously recognized under the OPPS (CPT codes 99201 through 99205 and 99211 through 99215). In addition, we finalized a policy to no longer recognize a distinction between new and established patient clinic visits.

For CY 2016, we deleted APC 0634 and reassigned the outpatient clinic visit HCPCS code G0463 to APC 5012 (Level 2 Examinations and Related Services) (80 FR 70351). In the CY 2018 OPPS/ASC proposed rule (82 FR 33588), for CY 2018, as we did for CY 2017, we proposed to continue to standardize all of the relative payment weights to APC 5012. We stated that we believe that standardizing relative payment weights to the geometric mean of the APC to which HCPCS code G0463 is assigned maintains consistency in calculating unscalded weights that represent the cost of some of the most frequently provided OPPS services. For CY 2018, as we did for CY 2017, we proposed to assign APC 5012 a relative payment weight of 1.00 and to divide the geometric mean cost of each APC by the geometric mean cost for APC 5012 to derive the unscalded relative payment weight for each APC. The choice of the APC on which to standardize the relative payment weights does not affect payments made under the OPPS because we scale the weights for budget neutrality.

We did not receive any public comments on our proposal to use the geometric mean cost of APC 5012 to standardize relative payment weights for CY 2018. Therefore, we are finalizing our proposal and assigning APC 5012 the relative payment weight of 1.00, and using the relative payment weight for APC 5012 to derive the unscalded relative payment weight for each APC for CY 2018.

Section 1833(t)(9)(B) of the Act requires that APC reclassification and recalibration changes, wage index changes, and other adjustments be made in a budget neutral manner. Budget neutrality ensures that the estimated aggregate weight under the OPPS for CY 2018 is neither greater than nor less than the estimated aggregate weight that would have been made without the changes. To comply with this requirement concerning the APC changes, in the CY 2018 OPPS/ASC proposed rule (82 FR 33588), we proposed to compare the estimated aggregate weight using the CY 2017 scaled relative payment weights to the estimated aggregate weight using the proposed CY 2018 unscalded relative payment weights.

For CY 2017, we multiplied the CY 2017 scaled APC relative payment weight applicable to a service paid under the OPPS by the volume of that service from CY 2016 claims to calculate the total relative payment weight for each service. We then added together the total relative payment weight for each of these services in order to calculate an estimated aggregate weight

for the year. For CY 2018, we proposed to apply the same process using the estimated CY 2018 unscalded relative payment weights rather than scaled relative payment weights. We proposed to calculate the weight scalar by dividing the CY 2017 estimated aggregate weight by the unscalded CY 2018 estimated aggregate weight.

For a detailed discussion of the weight scalar calculation, we refer readers to the OPPS claims accounting document available on the CMS Web site at: <http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/HospitalOutpatientPPS/index.html>. Click on the CY 2018 OPPS final rule link and open the claims accounting document link at the bottom of the page.

We proposed to compare the estimated unscalded relative payment weights in CY 2018 to the estimated total relative payment weights in CY 2017 using CY 2016 claims data, holding all other components of the payment system constant to isolate changes in total weight. Based on this comparison, we proposed to adjust the calculated CY 2018 unscalded relative payment weights for purposes of budget neutrality. We proposed to adjust the estimated CY 2018 unscalded relative payment weights by multiplying them by a proposed weight scalar of 1.328 to ensure that the proposed CY 2018 relative payment weights are scaled to be budget neutral. The proposed CY 2018 relative payment weights listed in Addenda A and B to the proposed rule (which are available via the Internet on the CMS Web site) were scaled and incorporated the recalibration adjustments discussed in sections II.A.1. and II.A.2. of the proposed rule.

The final CY 2018 relative payment weights listed in Addenda A and B to the final rule with comment period (which are available via the Internet on the CMS Web site) were scaled and incorporate the recalibration adjustments discussed in sections II.A.1. and II.A.2. of this final rule with comment period.

Section 1833(t)(14) of the Act provides the payment rates for certain SCODs. Section 1833(t)(14)(H) of the Act provides that additional expenditures resulting from this paragraph shall not be taken into account in establishing the conversion factor, weighting, and other adjustment factors for 2004 and 2005 under paragraph (9), but shall be taken into account for subsequent years. Therefore, the cost of those SCODs (as discussed in section V.B.2. of this final rule with comment period) is included in the budget neutrality calculations for the CY 2018 OPPS.

We did not receive any public comments on the proposed weight scalar calculation. Therefore, we are finalizing our proposal to use the calculation process described in the proposed rule, without modification, for CY 2018. Using updated final rule claims data, we are updating the estimated CY 2018 unscalded relative payment weights by multiplying them by a weight scalar of 1.4457 to ensure that the final CY 2018 relative payment weights are scaled to be budget neutral.

B. Conversion Factor Update

Section 1833(t)(3)(C)(ii) of the Act requires the Secretary to update the conversion factor used to determine the payment rates under the OPPS on an annual basis by applying the OPD fee schedule increase factor. For purposes of section 1833(t)(3)(C)(iv) of the Act, subject to sections 1833(t)(17) and 1833(t)(3)(F) of the Act, the OPD fee schedule increase factor is equal to the hospital inpatient market basket percentage increase applicable to hospital discharges under section 1886(b)(3)(B)(iii) of the Act. As stated in the CY 2018 OPPS/ASC proposed rule, in the FY 2018 IPPS/LTCH PPS proposed rule (82 FR 19931), consistent with current law, based on IHS Global, Inc.'s fourth quarter 2016 forecast of the FY 2018 market basket increase, the proposed FY 2018 IPPS market basket update was 2.9 percent. However, sections 1833(t)(3)(F) and 1833(t)(3)(G)(v) of the Act, as added by section 3401(i) of the Patient Protection and Affordable Care Act of 2010 (Pub. L. 111–148) and as amended by section 10319(g) of that law and further amended by section 1105(e) of the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152), provide adjustments to the OPD fee schedule increase factor for CY 2018.

Specifically, section 1833(t)(3)(F)(i) of the Act requires that, for 2012 and subsequent years, the OPD fee schedule increase factor under subparagraph (C)(iv) be reduced 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 defines the productivity adjustment as equal to the 10-year moving average of changes in annual economy-wide, private nonfarm business multifactor productivity (MFP) (as projected by the Secretary for the 10-year period ending with the applicable fiscal year, year, cost reporting period, or other annual period) (the “MFP adjustment”). In the FY 2012 IPPS/LTCH PPS final rule (76 FR 51689 through 51692), we finalized our methodology for calculating and applying the MFP adjustment, and then

revised this methodology as discussed in the FY 2016 IPPS/LTCH PPS final rule (80 FR 49509). In the FY 2018 IPPS/LTCH PPS proposed rule (82 FR 19931 through 19932), the proposed MFP adjustment for FY 2018 was 0.4 percentage point.

In the CY 2018 OPPS/ASC proposed rule, we proposed that if more recent data became subsequently available after the publication of the proposed rule (for example, a more recent estimate of the market basket increase and the MFP adjustment), we would use such updated data, if appropriate, to determine the CY 2018 market basket update and the MFP adjustment, which are components in calculating the OPD fee schedule increase factor under sections 1833(t)(3)(C)(iv) and 1833(t)(3)(F) of the Act, in this CY 2018 OPPS/ASC final rule with comment period. Consistent with that proposal, and the FY 2018 IPPS/LTCH PPS final rule (82 FR 38177), we applied the final FY 2018 market basket percentage increase (2.7 percent) and the final FY 2018 MFP adjustment (0.6 percent) to the OPD fee schedule increase factor for the CY 2018 OPPS.

In addition, section 1833(t)(3)(F)(ii) of the Act requires that, for each of years 2010 through 2019, the OPD fee schedule increase factor under section 1833(t)(3)(C)(iv) of the Act be reduced by the adjustment described in section 1833(t)(3)(G) of the Act. For CY 2018, section 1833(t)(3)(G)(v) of the Act provides a 0.75 percentage point reduction to the OPD fee schedule increase factor under section 1833(t)(3)(C)(iv) of the Act. Therefore, in accordance with sections 1833(t)(3)(F)(ii) and 1833(t)(3)(G)(v) of the Act, in the CY 2018 OPPS/ASC proposed rule, we proposed to apply a 0.75 percentage point reduction to the OPD fee schedule increase factor for CY 2018.

We note that section 1833(t)(3)(F) of the Act provides that application of this subparagraph may result in the OPD fee schedule increase factor under section 1833(t)(3)(C)(iv) of the Act being less than 0.0 percent for a year, and may result in OPPS payment rates being less than rates for the preceding year. As described in further detail below, we are applying an OPD fee schedule increase factor of 1.35 percent for the CY 2018 OPPS (which is 2.7 percent, the final estimate of the hospital inpatient market basket percentage increase, less the final 0.6 percentage point MFP adjustment, and less the 0.75 percentage point additional adjustment).

Hospitals that fail to meet the Hospital OQR Program reporting requirements are subject to an

additional reduction of 2.0 percentage points from the OPD fee schedule increase factor adjustment to the conversion factor that would be used to calculate the OPPS payment rates for their services, as required by section 1833(t)(17) of the Act. For further discussion of the Hospital OQR Program, we refer readers to section XIII. of this final rule with comment period.

In the CY 2018 OPPS/ASC proposed rule, we proposed to amend 42 CFR 419.32(b)(1)(iv)(B) by adding a new paragraph (9) to reflect the requirement in section 1833(t)(3)(F)(i) of the Act that, for CY 2018, we reduce the OPD fee schedule increase factor by the MFP adjustment as determined by CMS, and to reflect the requirement in section 1833(t)(3)(G)(v) of the Act, as required by section 1833(t)(3)(F)(ii) of the Act, that we reduce the OPD fee schedule increase factor by an additional 0.75 percentage point for CY 2018.

We did not receive any public comments on our proposal. Therefore, we are implementing our proposal without modification.

To set the OPPS conversion factor for the CY 2018 OPPS/ASC proposed rule, we proposed to increase the CY 2017 conversion factor of \$75.001 by 1.75 percent (82 FR 33589). In accordance with section 1833(t)(9)(B) of the Act, we proposed further to adjust the conversion factor for CY 2018 to ensure that any revisions made to the wage index and rural adjustment were made on a budget neutral basis. We proposed to calculate an overall budget neutrality factor of 0.9999 for wage index changes by comparing proposed total estimated payments from our simulation model using the proposed FY 2018 IPPS wage indexes to those payments using the FY 2017 IPPS wage indexes, as adopted on a calendar year basis for the OPPS.

For the CY 2018 OPPS/ASC proposed rule, we proposed to maintain the current rural adjustment policy, as discussed in section II.E. of this final rule with comment period. Therefore, the proposed budget neutrality factor for the rural adjustment was 1.0000.

For the CY 2018 OPPS/ASC proposed rule, we proposed to continue previously established policies for implementing the cancer hospital payment adjustment described in section 1833(t)(18) of the Act, as discussed in section II.F. of this final rule with comment period. We proposed to calculate a CY 2018 budget neutrality adjustment factor for the cancer hospital payment adjustment by comparing estimated total CY 2018 payments under section 1833(t) of the Act, including the proposed CY 2018 cancer hospital

payment adjustment, to estimated CY 2018 total payments using the CY 2017 final cancer hospital payment adjustment as required under section 1833(t)(18)(B) of the Act. The CY 2018 proposed estimated payments applying the proposed CY 2018 cancer hospital payment adjustment were less than estimated payments applying the CY 2017 final cancer hospital payment adjustment. Therefore, we proposed to apply a budget neutrality adjustment factor of 1.0003 to the conversion factor for the cancer hospital payment adjustment. In accordance with section 16002(b) of the 21st Century Cures Act, we stated in the proposed rule that we are applying a budget neutrality factor calculated as if the proposed cancer hospital adjustment target payment-to-cost ratio was 0.90, not the 0.89 target payment-to-cost ratio we are applying as stated in section II.F. of the proposed rule.

For the CY 2018 OPPS/ASC proposed rule, we estimated that proposed pass-through spending for drugs, biologicals, and devices for CY 2018 would equal approximately \$26.2 million, which represented 0.04 percent of total projected CY 2018 OPPS spending. Therefore, the proposed conversion factor would be adjusted by the difference between the 0.26 percent estimate of pass-through spending for CY 2017 and the 0.04 percent estimate of proposed pass-through spending for CY 2018, resulting in a proposed adjustment for CY 2018 of 0.22 percent. Proposed estimated payments for outliers would remain at 1.0 percent of total OPPS payments for CY 2018. We estimated for the proposed rule that outlier payments would be 1.04 percent of total OPPS payments in CY 2017; the 1.0 percent for proposed outlier payments in CY 2018 would constitute a 0.04 percent decrease in payment in CY 2018 relative to CY 2017.

For the CY 2018 OPPS/ASC proposed rule, we also proposed that hospitals that fail to meet the reporting requirements of the Hospital OQR Program would continue to be subject to a further reduction of 2.0 percentage points to the OPD fee schedule increase factor. For hospitals that fail to meet the requirements of the Hospital OQR Program, we proposed to make all other adjustments discussed above, but use a reduced OPD fee schedule update factor of -0.25 percent (that is, the proposed OPD fee schedule increase factor of 1.75 percent further reduced by 2.0 percentage points). This would result in a proposed reduced conversion factor for CY 2018 of \$74.953 for hospitals that fail to meet the Hospital OQR Program requirements (a difference of -1.530 in

the conversion factor relative to hospitals that met the requirements).

In summary, for CY 2018, we proposed to amend § 419.32(b)(1)(iv)(B) by adding a new paragraph (9) to reflect the reductions to the OPD fee schedule increase factor that are required for CY 2018 to satisfy the statutory requirements of sections 1833(t)(3)(F) and (t)(3)(G)(v) of the Act. We proposed to use a reduced conversion factor of \$74.953 in the calculation of payments for hospitals that fail to meet the Hospital OQR Program requirements (a difference of -1.530 in the conversion factor relative to hospitals that met the requirements).

For CY 2018, we proposed to use a conversion factor of \$76.483 in the calculation of the national unadjusted payment rates for those items and services for which payment rates are calculated using geometric mean costs; that is, the proposed OPD fee schedule increase factor of 1.75 percent for CY 2018, the required proposed wage index budget neutrality adjustment of approximately 0.9999, the proposed cancer hospital payment adjustment of 1.0003, and the proposed adjustment of 0.22 percentage point of projected OPPS spending for the difference in the pass-through spending and outlier payments that resulted in a proposed conversion factor for CY 2018 of \$76.483.

We invited public comments on these proposals. However, we did not receive any public comments. Therefore, we are finalizing these proposals without modification, as discussed below.

For CY 2018, we proposed to continue previously established policies for implementing the cancer hospital payment adjustment described in section 1833(t)(18) of the Act, as discussed in section II.F. of this final rule with comment period. Based on the updated claims data for this final rule with comment period used in calculating the cancer hospital payment adjustment in section II.F. of this final rule with comment period, the target PCR for the cancer hospital payment adjustment, which was 0.91 for CY 2017, is 0.88 for CY 2018. Because we budget neutralize using the target PCR ratio prior to implementation of section 16002 (b) of the 21st Century Cures Act, we are applying a budget neutrality adjustment factor of 1.0008 to the conversion factor for the cancer hospital payment adjustment for CY 2018.

In the CY 2018 OPSS/ASC proposed rule (82 FR 33712), we estimated a 1.4 percent adjustment to nondrug OPSS payment rates as a result of the proposed payment adjustment to separately payable nonpass-through drugs purchased under the 340B

Program. As part of that proposed policy, we noted that our adjustment in the final rule could potentially change as a result of changes such as updated data, modifications to the estimate methodology, and other factors. Applying the final payment policy for drugs purchased under the 340B Program, as described in section V.B.7. of this final rule with comment period, results in an estimated reduction of approximately \$1.6 billion in separately paid OPSS drug payments. To ensure budget neutrality under the OPSS after applying this alternative payment methodology for drugs purchased under the 340B Program, we applied an offset of approximately \$1.6 billion into the OPSS conversion factor, which results in a final adjustment of 1.0319 to the OPSS conversion factor.

As a result of these finalized policies, the OPD fee schedule increase factor for the CY 2018 OPSS is 1.35 percent (which is 2.7 percent, the estimate of the hospital inpatient market basket percentage increase, less the 0.6 percentage point MFP adjustment, and less the 0.75 percentage point additional adjustment). For CY 2018, we are using a conversion factor of \$78.636 in the calculation of the national unadjusted payment rates for those items and services for which payment rates are calculated using geometric mean costs; that is, the OPD fee schedule increase factor of 1.35 percent for CY 2018, the required wage index budget neutrality adjustment of approximately 0.9997, the cancer hospital payment adjustment of 1.0008, the adjustment for drugs purchased under the 340B Program of 1.0319, and the adjustment of 0.2 percentage point of projected OPSS spending for the difference in the pass-through spending and outlier payments that result in a conversion factor for CY 2018 of \$78.636.

C. Wage Index Changes

Section 1833(t)(2)(D) of the Act requires the Secretary to determine a wage adjustment factor to adjust the portion of payment and coinsurance attributable to labor-related costs for relative differences in labor and labor-related costs across geographic regions in a budget neutral manner (codified at 42 CFR 419.43(a)). This portion of the OPSS payment rate is called the OPSS labor-related share. Budget neutrality is discussed in section II.B. of this final rule with comment period.

The OPSS labor-related share is 60 percent of the national OPSS payment. This labor-related share is based on a regression analysis that determined that, for all hospitals, approximately 60 percent of the costs of services paid

under the OPSS were attributable to wage costs. We confirmed that this labor-related share for outpatient services is appropriate during our regression analysis for the payment adjustment for rural hospitals in the CY 2006 OPSS final rule with comment period (70 FR 68553). In the CY 2018 OPSS/ASC proposed rule (82 FR 33590), we proposed to continue this policy for the CY 2018 OPSS. We refer readers to section II.H. of this final rule with comment period for a description and an example of how the wage index for a particular hospital is used to determine payment for the hospital. We did not receive any public comments on this proposal. Therefore, for the reasons discussed above and in the CY 2018 OPSS/ASC proposed rule (82 FR 33590), we are finalizing our proposal to continue this policy as discussed above for the CY 2018 OPSS without modification.

As discussed in the claims accounting narrative included with the supporting documentation for this final rule with comment period (which is available via the Internet on the CMS Web site), for estimating APC costs, we standardize 60 percent of estimated claims costs for geographic area wage variation using the same FY 2018 pre-reclassified wage index that the IPPS uses to standardize costs. This standardization process removes the effects of differences in area wage levels from the determination of a national unadjusted OPSS payment rate and copayment amount.

Under 42 CFR 419.41(c)(1) and 419.43(c) (published in the OPSS April 7, 2000 final rule with comment period (65 FR 18495 and 18545)), the OPSS adopted the final fiscal year IPPS post-reclassified wage index as the calendar year wage index for adjusting the OPSS standard payment amounts for labor market differences. Therefore, the wage index that applies to a particular acute care, short-stay hospital under the IPPS also applies to that hospital under the OPSS. As initially explained in the September 8, 1998 OPSS proposed rule (63 FR 47576), we believe that using the IPPS wage index as the source of an adjustment factor for the OPSS is reasonable and logical, given the inseparable, subordinate status of the HOPD within the hospital overall. In accordance with section 1886(d)(3)(E) of the Act, the IPPS wage index is updated annually.

The Affordable Care Act contained several provisions affecting the wage index. These provisions were discussed in the CY 2012 OPSS/ASC final rule with comment period (76 FR 74191). Section 10324 of the Affordable Care Act added section 1886(d)(3)(E)(iii)(II)

to the Act, which defines a frontier State and amended section 1833(t) of the Act to add paragraph (19), which requires a frontier State wage index floor of 1.00 in certain cases, and states that the frontier State floor shall not be applied in a budget neutral manner. We codified these requirements at § 419.43(c)(2) and (3) of our regulations. For the CY 2018 OPPS, we proposed to implement this provision in the same manner as we have since CY 2011 (82 FR 33591). Under this policy, the frontier State hospitals would receive a wage index of 1.00 if the otherwise applicable wage index (including reclassification, the rural floor, and rural floor budget neutrality) is less than 1.00 (as discussed below and in the CY 2018 OPPS/ASC proposed rule (82 FR 33591 through 33592)), we proposed not to extend the imputed floor under the OPPS for CY 2018 and subsequent years, consistent with our proposal in the FY 2018 IPPS/LTCH PPS proposed rule (81 FR 19904 through 19905) not to extend the imputed floor under the IPPS for FY 2018 and subsequent fiscal years). Because the HOPD receives a wage index based on the geographic location of the specific inpatient hospital with which it is associated, we stated that the frontier State wage index adjustment applicable for the inpatient hospital also would apply for any associated HOPD. In the proposed rule (82 FR 33591), we referred readers to the FY 2011 through FY 2017 IPPS/LTCH PPS final rules for discussions regarding this provision, including our methodology for identifying which areas meet the definition of “frontier States” as provided for in section 1886(d)(3)(E)(iii)(II) of the Act. We invited public comments on this proposal.

We did not receive any public comments on this proposal. Therefore, for the reasons discussed above and in the CY 2018 OPPS/ASC proposed rule (82 FR 33591), we are finalizing our proposal to implement the frontier State floor under the OPPS in the same manner as we have since CY 2011. We note that, after we made our proposal in the FY 2018 IPPS/LTCH PPS proposed rule not to extend the imputed floor under the IPPS for FY 2018 and subsequent fiscal years (82 FR 19904 through 19905), and our proposal in the CY 2018 OPPS/ASC proposed rule not to extend the imputed floor under the OPPS for CY 2018 and subsequent years (82 FR 33592), we decided in the FY 2018 IPPS/LTCH PPS final rule not to finalize our proposal to discontinue the imputed floor under the IPPS (82 FR 38138 through 38142). As discussed

below, consistent with the FY 2018 IPPS/LTCH PPS final rule, we are not finalizing our proposal to discontinue application of the imputed floor under the OPPS. This means that the applicable wage index, which can be superseded by the frontier State wage index if the applicable criteria are met, could also be affected by the imputed floor. We discuss our policy on the extension of the imputed floor under the IPPS as finalized in the FY 2018 IPPS/LTCH PPS final rule (82 FR 38142), and under the OPPS as finalized in this rule, in more detail later in this section.

In addition to the changes required by the Affordable Care Act, we note that the FY 2018 IPPS wage indexes continue to reflect a number of adjustments implemented over the past few years, including, but not limited to, reclassification of hospitals to different geographic areas, the rural floor provisions, an adjustment for occupational mix, and an adjustment to the wage index based on commuting patterns of employees (the out-migration adjustment). In the CY 2018 OPPS/ASC proposed rule, we referred readers to the FY 2018 IPPS/LTCH PPS proposed rule (82 FR 19898 through 19915) for a detailed discussion of all proposed changes to the FY 2018 IPPS wage indexes. We note that, in the FY 2018 IPPS/LTCH PPS proposed rule (82 FR 19905), we proposed not to apply the imputed floor to the IPPS wage index computations for FY 2018 and subsequent fiscal years. Consistent with this, we proposed in the CY 2018 OPPS/ASC proposed rule (82 FR 33592) not to extend the imputed floor policy under the OPPS beyond December 31, 2017 (the date the imputed floor policy is set to expire under the OPPS). However, in the FY 2018 IPPS/LTCH PPS final rule, we did not finalize our proposal to discontinue the imputed floor under the IPPS, and instead decided to temporarily extend the imputed floor for an additional year through FY 2018, while we continue to assess the effects of this policy and whether to continue or discontinue the imputed floor for the long term. As discussed below, consistent with the FY 2018 IPPS/LTCH PPS final rule, we are not finalizing our proposal to discontinue application of the imputed floor under the OPPS, but are instead continuing the imputed floor policy under the OPPS for an additional year, through December 31, 2018. We refer readers to the FY 2018 IPPS/LTCH PPS proposed and final rules (82 FR 19898 through 19915 and 82 FR 38129 through 38157, respectively) for a detailed discussion of all proposed and final changes to the FY 2018 IPPS wage

indexes (including our proposed and final policy regarding the imputed floor for FY 2018 and subsequent fiscal years). In addition, we refer readers to the CY 2005 OPPS final rule with comment period (69 FR 65842 through 65844) and subsequent OPPS rules for a detailed discussion of the history of these wage index adjustments as applied under the OPPS.

Summarized below are comments we received regarding the application of the rural and imputed floor policies under the OPPS, along with our responses.

Comment: One commenter opposed applying budget neutrality for the rural floor under the OPPS on a national basis. The commenter believed applying budget neutrality on a national basis disadvantages hospitals in most States while benefiting hospitals in a few States that have taken advantage of the system where a rural hospital has a wage index higher than most or all urban hospitals in a State. The commenter stated that rural floor budget neutrality currently requires all wage indexes for hospitals throughout the nation to be reduced. However, hospitals in those States that have higher wage indexes because of the rural floor are not substantially affected by the wage index reductions. Therefore, the commenter supported calculating rural floor budget neutrality under the OPPS for each individual State.

Response: We appreciate this comment. We acknowledge that the application of the wage index and applicable wage index adjustments to OPPS payment rates may create distributional payment variations, especially within a budget neutral system. However, we continue to believe it is reasonable and appropriate to continue the current policy of applying budget neutrality for the rural floor under the OPPS on a national basis, consistent with the IPPS. We believe that hospital inpatient and outpatient departments are subject to the same labor cost environment, and therefore, the wage index and any applicable wage index adjustments (including the rural floor and rural floor budget neutrality) should be applied in the same manner under the IPPS and OPPS. Furthermore, we believe that applying the rural floor and rural floor budget neutrality in the same manner under the IPPS and OPPS is reasonable and logical, given the inseparable, subordinate status of the HOPD within the hospital overall. In addition, we believe the application of different wage indexes and wage index adjustments under the IPPS and OPPS would add a level of administrative complexity that is overly burdensome and unnecessary.

Therefore, we are continuing the current policy of applying budget neutrality for the rural floor under the OPPS on a national basis, consistent with the IPPS.

Comment: One commenter supported the proposal to not apply the imputed floor to the IPPS wage index computations for FY 2018 and subsequent fiscal years when calculating the hospital wage indexes for the OPPS.

Response: In the FY 2018 IPPS/LTCH PPS proposed rule (82 FR 19905), we proposed not to apply the imputed floor to the IPPS wage index computations for FY 2018 and subsequent fiscal years. Consistent with this proposal, we proposed in the CY 2018 OPPS/ASC proposed rule (82 FR 33592) not to extend the imputed floor policy under the OPPS beyond December 31, 2017 (the date the imputed floor policy is set to expire under the OPPS). As discussed in the FY 2018 IPPS/LTCH PPS final rule (82 FR 38138 through 38142), after consideration of the many comments we received both in support of and against our proposal to discontinue the imputed floor under the IPPS, we decided to temporarily extend the imputed floor for an additional year under the IPPS through FY 2018, while we continue to assess the effects of this policy and whether to continue or discontinue the imputed floor for the long term. Therefore, in the FY 2018 IPPS/LTCH PPS final rule, we extended the imputed floor policy under both the original methodology and the alternative methodology for an additional year, through September 30, 2018. We refer readers to the FY 2018 IPPS/LTCH PPS final rule (82 FR 38138 through 38142) for a detailed discussion of our final policy and rationale regarding application of the imputed floor under the IPPS for FY 2018. Given the inseparable, subordinate status of the HOPD within the hospital overall, we believe that using the IPPS wage index and wage index adjustments, including the imputed floor, as the source of an adjustment factor for the OPPS is reasonable and logical. Furthermore, as we previously stated, we believe that hospital inpatient and outpatient departments are subject to the same labor cost environment and, therefore, the wage index and any applicable wage index adjustments (including the imputed floor) should be applied in the same manner under the IPPS and OPPS. In addition, as discussed above, we believe the application of different wage index adjustments under the IPPS and OPPS would add a level of administrative complexity that is overly burdensome and unnecessary. Thus, as discussed further below, consistent with

the FY 2018 IPPS/LTCH PPS final rule, we are not finalizing our proposal to discontinue application of the imputed floor under the OPPS, and instead are temporarily extending the imputed floor policy under the OPPS for an additional year.

After consideration of the public comments we received and for the reasons discussed above, consistent with the FY 2018 IPPS/LTCH PPS final rule, we have decided to extend the imputed floor policy under the OPPS for an additional year, through December 31, 2018, while we continue to assess the effects of this policy and whether to continue or discontinue the imputed floor for the long term. Therefore, we are not finalizing our proposal to discontinue the imputed floor policy under the OPPS. We continue to believe that using the final fiscal year IPPS post-reclassified wage index, inclusive of any adjustments (including the imputed floor), as the wage index for the OPPS to determine the wage adjustments for both the OPPS payment rate and the copayment standardized amount is reasonable and logical, given the inseparable, subordinate status of the HOPD within the hospital overall.

As discussed in the FY 2015 IPPS/LTCH PPS final rule (79 FR 49951 through 49963), the FY 2016 IPPS/LTCH PPS final rule (80 FR 49488 through 49489 and 49494 through 49496), and the FY 2017 IPPS/LTCH PPS final rule (81 FR 56913), the Office of Management and Budget (OMB) issued revisions to the labor market area delineations on February 28, 2013 (based on 2010 Decennial Census data), that included a number of significant changes such as new Core Based Statistical Areas (CBSAs), urban counties that became rural, rural counties that became urban, and existing CBSAs that were split apart (OMB Bulletin 13–01). This bulletin can be found at: <https://obama.whitehouse.archives.gov/sites/default/files/omb/bulletins/2013/b13-01.pdf>. In the FY 2015 IPPS/LTCH PPS final rule (79 FR 49950 through 49985), we adopted the use of the OMB labor market area delineations contained in OMB Bulletin No. 13–01, effective October 1, 2014. In the FY 2017 IPPS/LTCH PPS final rule (81 FR 56913), we adopted revisions to statistical areas contained in OMB Bulletin No. 15–01, issued on July 15, 2015, which provided updates to and superseded OMB Bulletin No. 13–01 that was issued on February 28, 2013. We believe that it is important for the OPPS to use the latest labor market area delineations available as soon as is reasonably possible in order to maintain a more accurate and

up-to-date payment system that reflects the reality of population shifts and labor market conditions. Therefore, for purposes of the OPPS, in the CY 2017 OPPS/ASC final rule with comment period (81 FR 79598), we adopted the revisions to the OMB statistical area delineations contained in OMB Bulletin No. 15–01, effective January 1, 2017, beginning with the CY 2017 OPPS wage indexes.

CBSAs are made up of one or more constituent counties. Each CBSA and constituent county has its own unique identifying codes. The FY 2018 IPPS/LTCH PPS proposed rule (82 FR 19898 through 19899) and final rule (82 FR 38130) discuss the two different lists of codes to identify counties: Social Security Administration (SSA) codes and Federal Information Processing Standard (FIPS) codes. Historically, CMS has listed and used SSA and FIPS county codes to identify and crosswalk counties to CBSA codes for purposes of the IPPS and OPPS wage indexes. However, the SSA county codes are no longer being maintained and updated, although the FIPS codes continue to be maintained by the U.S. Census Bureau. The Census Bureau's most current statistical area information is derived from ongoing census data received since 2010; the most recent data are from 2015. In the FY 2018 IPPS/LTCH PPS proposed rule (81 FR 19898), for purposes of crosswalking counties to CBSAs for the IPPS wage index, we proposed to discontinue the use of the SSA county codes and begin using only the FIPS county codes. (We note that we finalized the proposal to discontinue use of SSA county codes and begin using only the FIPS county codes for purposes of crosswalking counties to CBSAs in the FY 2018 IPPS/LTCH PPS final rule (82 FR 38130)). Similarly, for the purposes of crosswalking counties to CBSAs for the OPPS wage index, in the CY 2018 OPPS/ASC proposed rule (82 FR 33591), we proposed to discontinue the use of SSA county codes and begin using only the FIPS county codes. We invited public comments on this proposal. We did not receive any public comments on this proposal. Thus, for the reasons discussed above and in the CY 2018 OPPS/ASC proposed rule (82 FR 33591), we are finalizing, without modification, our proposal to discontinue the use of SSA county codes and begin using only the FIPS county codes for the purposes of crosswalking counties to CBSAs for the OPPS wage index.

The Census Bureau maintains a complete list of changes to counties or county equivalent entities on the Web site at: <https://www.census.gov/geo/>

reference/county-changes.html. In our proposed transition to using only FIPS codes for counties for the IPPS wage index, in the FY 2018 IPPS/LTCH PPS proposed rule (82 FR 19899), we proposed to update the FIPS codes used for crosswalking counties to CBSAs for the IPPS wage index effective October 1, 2017, to incorporate changes to the counties or county equivalent entities included in the Census Bureau's most recent list. We proposed to include these updates to calculate the area wage indexes in a manner that is generally consistent with the CBSA-based methodologies finalized in the FY 2005 IPPS final rule and the FY 2015 IPPS/LTCH PPS final rule. Based on information included in the Census Bureau's Web site, since 2010, the Census Bureau has made the following updates to the FIPS codes for counties or county equivalent entities:

- Petersburg Borough, AK (FIPS State County Code 02–195), CBSA 02, was created from part of former Petersburg Census Area (02–195) and part of Hoonah-Angoon Census Area (02–105). The CBSA code remains 02.
- The name of La Salle Parish, LA (FIPS State County Code 22–059), CBSA 14, is now LaSalle Parish, LA (FIPS State County Code 22–059). The CBSA code remains as 14.
- The name of Shannon County, SD (FIPS State County Code 46–113), CBSA 43, is now Oglala Lakota County, SD (FIPS State County Code 46–102). The CBSA code remains as 43.

In the FY 2018 IPPS/LTCH PPS final rule (82 FR 38130), for the IPPS, we finalized our proposal to implement these FIPS code updates, effective October 1, 2017, beginning with the FY 2018 wage indexes. We note that while the county update changes listed earlier changed the county names, the CBSAs to which these counties map did not change from the prior counties. Therefore, there is no impact or change to hospitals in these counties; they continue to be considered rural for the IPPS wage index under these changes. Consistent with the FY 2018 IPPS/LTCH PPS proposed rule, in the CY 2018 OPPS/ASC proposed rule (82 FR 33592), we proposed to implement these revisions for purposes of the OPPS, effective January 1, 2018, beginning with the CY 2018 OPPS wage indexes. We stated that we believe it is important to use the latest counties or county equivalent entities in order to properly crosswalk hospitals from a county to a CBSA for purposes of the OPPS wage index. In addition, we stated we believe that using the latest FIPS codes will allow us to maintain a more accurate and up-to-date payment system that

reflects the reality of population shifts and labor market conditions. We invited public comments on this proposal.

We did not receive any public comments on this proposal. Therefore, for the reasons discussed above and in the CY 2018 OPPS/ASC proposed rule (82 FR 33591 through 33592), we are finalizing our proposal, without modification, to implement the FIPS code updates described above, effective January 1, 2018, beginning with the CY 2018 OPPS wage indexes. Tables 2 and 3 associated with the FY 2018 IPPS/LTCH PPS final rule and the County to CBSA Crosswalk File and Urban CBSAs and Constituent Counties for Acute Care Hospitals File posted on the CMS Web site reflect these county changes.

In the CY 2018 OPPS/ASC proposed rule (82 FR 33592), we proposed to use the FY 2018 hospital IPPS post-reclassified wage index for urban and rural areas as the wage index for the OPPS to determine the wage adjustments for both the OPPS payment rate and the copayment standardized amount for CY 2018. Therefore, we stated in the proposed rule that any adjustments for the FY 2018 IPPS post-reclassified wage index would be reflected in the final CY 2018 OPPS wage index. (We refer readers to the FY 2018 IPPS/LTCH PPS proposed rule (82 FR 19898 through 19915) and final rule (82 FR 38129 through 38157), and the proposed and final FY 2018 hospital wage index files posted on the CMS Web site.) We invited public comments on this proposal. As discussed above, we received public comments regarding the application of the rural and imputed floors under the OPPS. We refer readers to our earlier discussion of these comments and our responses. After consideration of these comments, for the reasons discussed above and in the CY 2018 OPPS/ASC proposed rule (82 FR 33592), we are finalizing this proposal without modification. As stated earlier, we continue to believe that using the final fiscal year IPPS post-reclassified wage index, inclusive of any adjustments, as the wage index for the OPPS to determine the wage adjustments for both the OPPS payment rate and the copayment standardized amount is reasonable and logical, given the inseparable, subordinate status of the HOPD within the hospital overall.

Hospitals that are paid under the OPPS, but not under the IPPS, do not have an assigned hospital wage index under the IPPS. Therefore, for non-IPPS hospitals paid under the OPPS, it is our longstanding policy to assign the wage index that would be applicable if the hospital were paid under the IPPS, based on its geographic location and any

applicable wage index adjustments. In the CY 2018 OPPS/ASC proposed rule, we proposed to continue this policy for CY 2018, and included a brief summary of the major proposed FY 2018 IPPS wage index policies and adjustments that we proposed to apply to these hospitals under the OPPS for CY 2018. These proposals are summarized below. We invited public comments on these proposals.

It has been our longstanding policy to allow non-IPPS hospitals paid under the OPPS to qualify for the out-migration adjustment if they are located in a section 505 out-migration county (section 505 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA)). Applying this adjustment is consistent with our policy of adopting IPPS wage index policies for hospitals paid under the OPPS. We note that, because non-IPPS hospitals cannot reclassify, they are eligible for the out-migration wage adjustment if they are located in a section 505 out-migration county. This is the same out-migration adjustment policy that applies if the hospital were paid under the IPPS. For CY 2018, we proposed to continue our policy of allowing non-IPPS hospitals paid under the OPPS to qualify for the out-migration adjustment if they are located in a section 505 out-migration county (section 505 of the MMA). We did not receive any public comments on this proposal. Therefore, for the reasons discussed above and in the CY 2018 OPPS/ASC proposed rule (82 FR 33592), we are finalizing this proposal without modification.

As stated earlier, in the FY 2015 IPPS/LTCH PPS final rule, we adopted the OMB labor market area delineations issued by OMB in OMB Bulletin No. 13–01 on February 28, 2013, based on standards published on June 28, 2010 (75 FR 37246 through 37252) and the 2010 Census data to delineate labor market areas for purposes of the IPPS wage index. For IPPS wage index purposes, for hospitals that were located in urban CBSAs in FY 2014 but were designated as rural under these revised OMB labor market area delineations, we generally assigned them the urban wage index value of the CBSA in which they were physically located for FY 2014 for a period of 3 fiscal years (79 FR 49957 through 49960). To be consistent, we applied the same policy to hospitals paid under the OPPS but not under the IPPS so that such hospitals will maintain the wage index of the CBSA in which they were physically located for FY 2014 for 3 calendar years (until December 31, 2017). Because this 3-year transition will end at the end of CY

2017, it will no longer be applied in CY 2018.

In addition, under the IPPS, the imputed floor policy was set to expire effective October 1, 2017. However, as discussed above and in the FY 2018 IPPS/LTCH PPS final rule (82 FR 38138 through 38142), we did not finalize our proposal not to extend the imputed floor policy under the IPPS for FY 2018 and subsequent fiscal years (82 FR 38132), and instead decided to extend the imputed floor policy for one additional year, through FY 2018. For purposes of the CY 2018 OPPS, we proposed not to extend the imputed floor policy beyond December 31, 2017. However, consistent with the FY 2018 IPPS/LTCH PPS final rule, as discussed above, we are extending the imputed floor policy under the OPPS for one additional year, through December 31, 2018. Therefore, for CY 2018, for hospitals paid under the OPPS but not under the IPPS, the imputed floor policy will continue to apply through December 31, 2018.

For CMHCs, for CY 2018, we proposed to continue to calculate the wage index by using the post-reclassification IPPS wage index based on the CBSA where the CMHC is located. As with OPPS hospitals and for the same reasons, for CMHCs previously located in urban CBSAs that were designated as rural under the revised OMB labor market area delineations in OMB Bulletin No. 13-01, we finalized a policy to maintain the urban wage index value of the CBSA in which they were physically located for CY 2014 for 3 calendar years (until December 31, 2017). Because this 3-year transition will end at the end of CY 2017, it will not be applied in CY 2018. Furthermore, in the CY 2018 OPPS/ASC proposed rule (82 FR 33592), we proposed that the wage index that applies to CMHCs would include the rural floor adjustment, but not the imputed floor adjustment, given that we had proposed not to extend the imputed floor policy under the OPPS beyond December 31, 2017 (the expiration date for the imputed floor under the OPPS). We also proposed that the wage index that applies to CMHCs would not include

the out-migration adjustment because that adjustment only applies to hospitals. We did not receive any public comments regarding these proposals, and are finalizing these proposals with the following modification. Because, as discussed above, we are extending the application of the imputed floor under the OPPS for an additional year, through December 31, 2018, the wage index that applies to CMHCs will continue to include the imputed floor adjustment through December 31, 2018.

Table 2 associated with the FY 2018 IPPS/LTCH PPS final rule (available via the Internet on the CMS Web site at: <http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/AcuteInpatientPPS/index.html>) identifies counties eligible for the out-migration adjustment and IPPS hospitals that will receive the adjustment for FY 2018. We are including the out-migration adjustment information from Table 2 associated with the FY 2018 IPPS/LTCH PPS final rule as Addendum L to this final rule with comment period with the addition of non-IPPS hospitals that will receive the section 505 out-migration adjustment under the CY 2018 OPPS. Addendum L is available via the Internet on the CMS Web site. We refer readers to the CMS Web site for the OPPS at: <http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/HospitalOutpatientPPS/index.html>. At this link, readers will find a link to the final FY 2018 IPPS wage index tables and Addendum L.

D. Statewide Average Default CCRs

In addition to using CCRs to estimate costs from charges on claims for ratesetting, CMS uses overall hospital-specific CCRs calculated from the hospital's most recent cost report to determine outlier payments, payments for pass-through devices, and monthly interim transitional corridor payments under the OPPS during the PPS year. MACs cannot calculate a CCR for some hospitals because there is no cost report available. For these hospitals, CMS uses the statewide average default CCRs to determine the payments mentioned

earlier until a hospital's MAC is able to calculate the hospital's actual CCR from its most recently submitted Medicare cost report. These hospitals include, but are not limited to, hospitals that are new, hospitals that have not accepted assignment of an existing hospital's provider agreement, and hospitals that have not yet submitted a cost report. CMS also uses the statewide average default CCRs to determine payments for hospitals that appear to have a biased CCR (that is, the CCR falls outside the predetermined ceiling threshold for a valid CCR) or for hospitals in which the most recent cost report reflects an all-inclusive rate status (Medicare Claims Processing Manual (Pub. 100-04), Chapter 4, Section 10.11).

In the CY 2018 OPPS/ASC proposed rule (82 FR 33593), we proposed to update the default ratios for CY 2018 using the most recent cost report data. We discussed our policy for using default CCRs, including setting the ceiling threshold for a valid CCR, in the CY 2009 OPPS/ASC final rule with comment period (73 FR 68594 through 68599) in the context of our adoption of an outlier reconciliation policy for cost reports beginning on or after January 1, 2009. For detail on our process for calculating the statewide average CCRs, we referred readers to the CY 2018 OPPS proposed rule Claims Accounting Narrative that is posted on the CMS Web site. Table 10 published in the proposed rule (82 FR 33593 through 33594) listed the proposed statewide average default CCRs for OPPS services furnished on or after January 1, 2018, based on proposed rule data.

We did not receive any public comments on our proposal to use statewide average default CCRs if a MAC cannot calculate a CCR for a hospital and to use these CCRs to adjust charges to costs on claims data for setting the final CY 2018 OPPS relative payment weights. Therefore, we are finalizing our proposal without modification.

Table 9 below lists the statewide average default CCRs for OPPS services furnished on or after January 1, 2018, based on final rule data.

TABLE 9—CY 2018 STATEWIDE AVERAGE CCRS

State	Urban/rural	CY 2018 default CCR	Previous default CCR (CY 2017 OPPS final rule)
ALASKA	RURAL	0.659	0.449
ALASKA	URBAN	0.218	0.237
ALABAMA	RURAL	0.190	0.196
ALABAMA	URBAN	0.155	0.158
ARKANSAS	RURAL	0.186	0.196

TABLE 9—CY 2018 STATEWIDE AVERAGE CCRs—Continued

State	Urban/rural	CY 2018 default CCR	Previous default CCR (CY 2017 OPPS final rule)
ARKANSAS	URBAN	0.200	0.205
ARIZONA	RURAL	0.232	0.238
ARIZONA	URBAN	0.160	0.176
CALIFORNIA	RURAL	0.181	0.179
CALIFORNIA	URBAN	0.193	0.188
COLORADO	RURAL	0.346	0.354
COLORADO	URBAN	0.204	0.208
CONNECTICUT	RURAL	0.324	0.402
CONNECTICUT	URBAN	0.249	0.253
DISTRICT OF COLUMBIA	URBAN	0.279	0.286
DELAWARE	URBAN	0.295	0.288
FLORIDA	RURAL	0.158	0.169
FLORIDA	URBAN	0.138	0.143
GEORGIA	RURAL	0.222	0.230
GEORGIA	URBAN	0.198	0.196
HAWAII	RURAL	0.332	0.338
HAWAII	URBAN	0.322	0.319
IOWA	RURAL	0.296	0.291
IOWA	URBAN	0.254	0.252
IDAHO	RURAL	0.339	0.341
IDAHO	URBAN	0.369	0.401
ILLINOIS	RURAL	0.214	0.241
ILLINOIS	URBAN	0.208	0.209
INDIANA	RURAL	0.299	0.272
INDIANA	URBAN	0.213	0.218
KANSAS	RURAL	0.264	0.269
KANSAS	URBAN	0.199	0.194
KENTUCKY	RURAL	0.184	0.194
KENTUCKY	URBAN	0.187	0.189
LOUISIANA	RURAL	0.212	0.217
LOUISIANA	URBAN	0.195	0.201
MASSACHUSETTS	RURAL	0.322	0.316
MASSACHUSETTS	URBAN	0.348	0.345
MAINE	RURAL	0.419	0.425
MAINE	URBAN	0.422	0.413
MARYLAND	RURAL	0.258	0.264
MARYLAND	URBAN	0.227	0.229
MICHIGAN	RURAL	0.302	0.295
MICHIGAN	URBAN	0.318	0.324
MINNESOTA	RURAL	0.379	0.398
MINNESOTA	URBAN	0.302	0.319
MISSOURI	RURAL	0.220	0.222
MISSOURI	URBAN	0.240	0.261
MISSISSIPPI	RURAL	0.213	0.224
MISSISSIPPI	URBAN	0.160	0.167
MONTANA	RURAL	0.486	0.450
MONTANA	URBAN	0.350	0.368
NORTH CAROLINA	RURAL	0.206	0.216
NORTH CAROLINA	URBAN	0.212	0.223
NORTH DAKOTA	RURAL	0.366	0.411
NORTH DAKOTA	URBAN	0.369	0.334
NEBRASKA	RURAL	0.313	0.294
NEBRASKA	URBAN	0.233	0.238
NEW HAMPSHIRE	RURAL	0.307	0.320
NEW HAMPSHIRE	URBAN	0.255	0.279
NEW JERSEY	URBAN	0.200	0.195
NEW MEXICO	RURAL	0.224	0.225
NEW MEXICO	URBAN	0.284	0.280
NEVADA	RURAL	0.175	0.196
NEVADA	URBAN	0.114	0.123
NEW YORK	RURAL	0.299	0.309
NEW YORK	URBAN	0.303	0.292
OHIO	RURAL	0.280	0.292
OHIO	URBAN	0.203	0.207
OKLAHOMA	RURAL	0.215	0.231
OKLAHOMA	URBAN	0.169	0.180
OREGON	RURAL	0.290	0.280
OREGON	URBAN	0.336	0.344

TABLE 9—CY 2018 STATEWIDE AVERAGE CCRs—Continued

State	Urban/rural	CY 2018 default CCR	Previous default CCR (CY 2017 OPSS final rule)
PENNSYLVANIA	RURAL	0.267	0.274
PENNSYLVANIA	URBAN	0.173	0.179
PUERTO RICO	URBAN	0.577	0.527
RHODE ISLAND	URBAN	0.276	0.291
SOUTH CAROLINA	RURAL	0.170	0.185
SOUTH CAROLINA	URBAN	0.191	0.190
SOUTH DAKOTA	RURAL	0.391	0.383
SOUTH DAKOTA	URBAN	0.242	0.229
TENNESSEE	RURAL	0.173	0.181
TENNESSEE	URBAN	0.174	0.180
TEXAS	RURAL	0.205	0.214
TEXAS	URBAN	0.168	0.177
UTAH	RURAL	0.391	0.349
UTAH	URBAN	0.304	0.315
VIRGINIA	RURAL	0.177	0.191
VIRGINIA	URBAN	0.215	0.226
VERMONT	RURAL	0.393	0.426
VERMONT	URBAN	0.378	0.340
WASHINGTON	RURAL	0.256	0.271
WASHINGTON	URBAN	0.323	0.294
WISCONSIN	RURAL	0.348	0.354
WISCONSIN	URBAN	0.308	0.290
WEST VIRGINIA	RURAL	0.253	0.266
WEST VIRGINIA	URBAN	0.297	0.285
WYOMING	RURAL	0.407	0.429
WYOMING	URBAN	0.327	0.311

E. Adjustment for Rural Sole Community Hospitals (SCHs) and Essential Access Community Hospitals (EACHs) Under Section 1833(t)(13)(B) of the Act for CY 2018

In the CY 2006 OPSS final rule with comment period (70 FR 68556), we finalized a payment increase for rural sole community hospitals (SCHs) of 7.1 percent for all services and procedures paid under the OPSS, excluding drugs, biologicals, brachytherapy sources, and devices paid under the pass-through payment policy in accordance with section 1833(t)(13)(B) of the Act, as added by section 411 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) (Pub. L. 108–173). Section 1833(t)(13) of the Act provided the Secretary the authority to make an adjustment to OPSS payments for rural hospitals, effective January 1, 2006, if justified by a study of the difference in costs by APC between hospitals in rural areas and hospitals in urban areas. Our analysis showed a difference in costs for rural SCHs. Therefore, for the CY 2006 OPSS, we finalized a payment adjustment for rural SCHs of 7.1 percent for all services and procedures paid under the OPSS, excluding separately payable drugs and biologicals, brachytherapy sources, and devices paid under the pass-through

payment policy, in accordance with section 1833(t)(13)(B) of the Act.

In the CY 2007 OPSS/ASC final rule with comment period (71 FR 68010 and 68227), for purposes of receiving this rural adjustment, we revised § 419.43(g) of the regulations to clarify that essential access community hospitals (EACHs) also are eligible to receive the rural SCH adjustment, assuming these entities otherwise meet the rural adjustment criteria. Currently, two hospitals are classified as EACHs, and as of CY 1998, under section 4201(c) of Public Law 105–33, a hospital can no longer become newly classified as an EACH.

This adjustment for rural SCHs is budget neutral and applied before calculating outlier payments and copayments. We stated in the CY 2006 OPSS final rule with comment period (70 FR 68560) that we would not reestablish the adjustment amount on an annual basis, but we may review the adjustment in the future and, if appropriate, would revise the adjustment. We provided the same 7.1 percent adjustment to rural SCHs, including EACHs, again in CYs 2008 through 2017. Further, in the CY 2009 OPSS/ASC final rule with comment period (73 FR 68590), we updated the regulations at § 419.43(g)(4) to specify, in general terms, that items paid at

charges adjusted to costs by application of a hospital-specific CCR are excluded from the 7.1 percent payment adjustment.

In the CY 2018 OPSS/ASC proposed rule (82 FR 33594 through 33595), for the CY 2018 OPSS, we proposed to continue our policy of a 7.1 percent payment adjustment that is done in a budget neutral manner for rural SCHs, including EACHs, for all services and procedures paid under the OPSS, excluding separately payable drugs and biologicals, devices paid under the pass-through payment policy, and items paid at charges reduced to costs.

Comment: Commenters supported the proposed payment adjustment for rural SCHs and EACHs, and stated that this adjustment would support access to care in rural areas and provide additional resources for rural SCHs and EACHs.

Response: We appreciate the commenters' support.

After consideration of the public comments we received, we are finalizing the proposal for CY 2017 to continue our policy of a 7.1 percent payment adjustment that is done in a budget neutral manner for rural SCHs, including EACHs, for all services and procedures paid under the OPSS, excluding separately payable drugs and biologicals, devices paid under the pass-through payment policy, and items paid at charges reduced to costs.

F. Payment Adjustment for Certain Cancer Hospitals for CY 2018

1. Background

Since the inception of the OPSS, which was authorized by the Balanced Budget Act of 1997 (BBA) (Pub. L. 105–33), Medicare has paid the 11 hospitals that meet the criteria for cancer hospitals identified in section 1886(d)(1)(B)(v) of the Act under the OPSS for covered outpatient hospital services. These cancer hospitals are exempted from payment under the IPPS. With the Medicare, Medicaid and SCHIP Balanced Budget Refinement Act of 1999 (Pub. L. 106–113), Congress established section 1833(t)(7) of the Act, “Transitional Adjustment to Limit Decline in Payment,” to determine OPSS payments to cancer and children’s hospitals based on their pre-BBA payment amount (often referred to as “held harmless”).

As required under section 1833(t)(7)(D)(ii) of the Act, a cancer hospital receives the full amount of the difference between payments for covered outpatient services under the OPSS and a “pre-BBA amount.” That is, cancer hospitals are permanently held harmless to their “pre-BBA amount,” and they receive transitional outpatient payments (TOPs) or hold harmless payments to ensure that they do not receive a payment that is lower in amount under the OPSS than the payment amount they would have received before implementation of the OPSS, as set forth in section 1833(t)(7)(F) of the Act. The “pre-BBA amount” is the product of the hospital’s reasonable costs for covered outpatient services occurring in the current year and the base payment-to-cost ratio (PCR) for the hospital defined in section 1833(t)(7)(F)(ii) of the Act. The “pre-BBA amount” and the determination of the base PCR are defined at 42 CFR 419.70(f). TOPs are calculated on Worksheet E, Part B, of the Hospital Cost Report or the Hospital Health Care Complex Cost Report (Form CMS–2552–96 or Form CMS–2552–10, respectively) as applicable each year. Section 1833(t)(7)(I) of the Act exempts TOPs from budget neutrality calculations.

Section 3138 of the Affordable Care Act amended section 1833(t) of the Act by adding a new paragraph (18), which instructs the Secretary to conduct a study to determine if, under the OPSS, outpatient costs incurred by cancer hospitals described in section 1886(d)(1)(B)(v) of the Act with respect to APC groups exceed outpatient costs incurred by other hospitals furnishing services under section 1833(t) of the Act, as determined appropriate by the

Secretary. Section 1833(t)(18)(A) of the Act requires the Secretary to take into consideration the cost of drugs and biologicals incurred by cancer hospitals and other hospitals. Section 1833(t)(18)(B) of the Act provides that, if the Secretary determines that cancer hospitals’ costs are higher than those of other hospitals, the Secretary shall provide an appropriate adjustment under section 1833(t)(2)(E) of the Act to reflect these higher costs. In 2011, after conducting the study required by section 1833(t)(18)(A) of the Act, we determined that outpatient costs incurred by the 11 specified cancer hospitals were greater than the costs incurred by other OPSS hospitals. For a complete discussion regarding the cancer hospital cost study, we refer readers to the CY 2012 OPSS/ASC final rule with comment period (76 FR 74200 through 74201).

Based on these findings, we finalized a policy to provide a payment adjustment to the 11 specified cancer hospitals that reflects their higher outpatient costs as discussed in the CY 2012 OPSS/ASC final rule with comment period (76 FR 74202 through 74206). Specifically, we adopted a policy to provide additional payments to the cancer hospitals so that each cancer hospital’s final PCR for services provided in a given calendar year is equal to the weighted average PCR (which we refer to as the “target PCR”) for other hospitals paid under the OPSS. The target PCR is set in advance of the calendar year and is calculated using the most recently submitted or settled cost report data that are available at the time of final rulemaking for the calendar year. The amount of the payment adjustment is made on an aggregate basis at cost report settlement. We note that the changes made by section 1833(t)(18) of the Act do not affect the existing statutory provisions that provide for TOPs for cancer hospitals. The TOPs are assessed as usual after all payments, including the cancer hospital payment adjustment, have been made for a cost reporting period. For CYs 2012 and 2013, the target PCR for purposes of the cancer hospital payment adjustment was 0.91. For CY 2014, the target PCR for purposes of the cancer hospital payment adjustment was 0.89. For CY 2015, the target PCR was 0.90. For CY 2016, the target PCR was 0.92, as discussed in the CY 2016 OPSS/ASC final rule with comment period (80 FR 70362 through 70363). For CY 2017, the target PCR was 0.91, as discussed in the CY 2017 OPSS/ASC final rule with comment period (81 FR 79603 through 79604).

2. Proposed and Finalized Policy for CY 2018

Section 16002(b) of the 21st Century Cures Act (Pub. L. 114–255) amended section 1833(t)(18) of the Act by adding subparagraph (C), which requires that in applying 42 CFR 419.43(i), that is, the payment adjustment for certain cancer hospitals, for services furnished on or after January 1, 2018, the target PCR adjustment be reduced by 1.0 percentage point less than what would otherwise apply. Section 16002(b) also provides that, in addition to the percentage reduction, the Secretary may consider making an additional percentage point reduction to the target PCR that takes into account payment rates for applicable items and services described under section 1833(t)(21)(C) of the Act for hospitals that are not cancer hospitals described under section 1886(d)(1)(B)(v) of the Act. Further, in making any budget neutrality adjustment under section 1833(t) of the Act, the Secretary shall not take into account the reduced expenditures that result from application of section 1833(t)(18)(C) of the Act. In the CY 2018 OPSS/ASC proposed rule (82 FR 33595), for CY 2018, we proposed to provide additional payments to the 11 specified cancer hospitals so that each cancer hospital’s final PCR is equal to the weighted average PCR (or “target PCR”) for the other OPSS hospitals using the most recent submitted or settled cost report data that were available at the time of the development of the proposed rule, reduced by 1.0 percentage point to comply with section 16002(b) of the 21st Century Cures Act. We did not propose an additional reduction beyond the 1.0 percentage point reduction required by section 16002(b) for CY 2018. To calculate the proposed CY 2018 target PCR, we used the same extract of cost report data from HCRIS, as discussed in section II.A. of the proposed rule, used to estimate costs for the CY 2018 OPSS. Using these cost report data, we included data from Worksheet E, Part B, for each hospital, using data from each hospital’s most recent cost report, whether as submitted or settled.

We then limited the dataset to the hospitals with CY 2016 claims data that we used to model the impact of the proposed CY 2018 APC relative payment weights (3,701 hospitals) because it is appropriate to use the same set of hospitals that we are using to calibrate the modeled CY 2018 OPSS. The cost report data for the hospitals in this dataset were from cost report periods with fiscal year ends ranging

from 2013 to 2016. We then removed the cost report data of the 49 hospitals located in Puerto Rico from our dataset because we do not believe that their cost structure reflects the costs of most hospitals paid under the OPSS and, therefore, their inclusion may bias the calculation of hospital-weighted statistics. We also removed the cost report data of 16 hospitals because these hospitals had cost report data that were not complete (missing aggregate OPSS payments, missing aggregate cost data, or missing both), so that all cost reports in the study would have both the payment and cost data necessary to calculate a PCR for each hospital, leading to a proposed analytic file of 3,636 hospitals with cost report data.

Using this smaller dataset of cost report data, we estimated that, on average, the OPSS payments to other hospitals furnishing services under the OPSS were approximately 90 percent of reasonable cost (weighted average PCR of 0.90). Therefore, after applying the 1.0 percentage point reduction as required by section 16002(b) of the 21st Century Cures Act, we proposed that the payment amount associated with the cancer hospital payment adjustment to be determined at cost report settlement would be the additional payment needed to result in a proposed target PCR equal to 0.89 for each cancer hospital.

Table 11 of the proposed rule indicated the proposed estimated percentage increase in OPSS payments to each cancer hospital for CY 2018 due to the cancer hospital payment adjustment policy. We stated in the

proposed rule that the actual amount of the CY 2018 cancer hospital payment adjustment for each cancer hospital will be determined at cost report settlement and will depend on each hospital's CY 2018 payments and costs. We noted that the requirements contained in section 1833(t)(18) of the Act do not affect the existing statutory provisions that provide for TOPs for cancer hospitals. The TOPs will be assessed as usual after all payments, including the cancer hospital payment adjustment, have been made for a cost reporting period.

Comment: Several commenters supported the proposed cancer hospital payment adjustment for CY 2018.

Response: We appreciate the commenters' support.

After consideration of the public comments we received, we are finalizing our cancer hospital payment adjustment methodology as proposed. For this final rule with comment period, we are using the most recent cost report data through June 30, 2017 to update the adjustment. This update yields a target PCR of 0.88. We limited the dataset to the hospitals with CY 2016 claims data that we used to model the impact of the CY 2018 APC relative payment weights (3,724 hospitals) because it is appropriate to use the same set of hospitals that we are using to calibrate the modeled CY 2018 OPSS. The cost report data for the hospitals in this dataset were from cost report periods with fiscal year ends ranging from 2012 to 2017. We then removed the cost report data of the 49 hospitals located in Puerto Rico from our dataset because we do not believe that their cost structure

reflects the costs of most hospitals paid under the OPSS and, therefore, their inclusion may bias the calculation of hospital-weighted statistics. We also removed the cost report data of 14 hospitals because these hospitals had cost report data that were not complete (missing aggregate OPSS payments, missing aggregate cost data, or missing both), so that all cost reports in the study would have both the payment and cost data necessary to calculate a PCR for each hospital, leading to an analytic file of 3,661 hospitals with cost report data.

Using this smaller dataset of cost report data, we estimated a target PCR of 0.89. Therefore, after applying the 1.0 percentage point reduction as required by section 16002(b) of the 21st Century Cures Act, we are finalizing that the payment amount associated with the cancer hospital payment adjustment to be determined at cost report settlement will be the additional payment needed to result in a PCR equal to 0.88 for each cancer hospital. Table 10 below indicates the estimated percentage increase in OPSS payments to each cancer hospital for CY 2018 due to the cancer hospital payment adjustment policy. We note that the requirements contained in section 1833(t)(18) of the Act do not affect the existing statutory provisions that provide for TOPs for cancer hospitals. The TOPs will be assessed as usual after all payments, including the cancer hospital payment adjustment, have been made for a cost reporting period.

TABLE 10—ESTIMATED CY 2018 HOSPITAL-SPECIFIC PAYMENT ADJUSTMENT FOR CANCER HOSPITALS TO BE PROVIDED AT COST REPORT SETTLEMENT

Provider No.	Hospital name	Estimated percentage increase in OPSS payments for CY 2018 due to payment adjustment
050146	City of Hope Comprehensive Cancer Center	31.5
050660	USC Norris Cancer Hospital	16.4
100079	Sylvester Comprehensive Cancer Center	22.9
100271	H. Lee Moffitt Cancer Center & Research Institute	21.7
220162	Dana-Farber Cancer Institute	44.2
330154	Memorial Sloan-Kettering Cancer Center	46.9
330354	Roswell Park Cancer Institute	20.0
360242	James Cancer Hospital & Solove Research Institute	27.5
390196	Fox Chase Cancer Center	7.6
450076	M.D. Anderson Cancer Center	74.9
500138	Seattle Cancer Care Alliance	52.2

G. Hospital Outpatient Outlier Payments

1. Background

The OPSS provides outlier payments to hospitals to help mitigate the financial risk associated with high-cost and complex procedures, where a very costly service could present a hospital with significant financial loss. As explained in the CY 2015 OPSS/ASC final rule with comment period (79 FR 66832 through 66834), we set our projected target for aggregate outlier payments at 1.0 percent of the estimated aggregate total payments under the OPSS for the prospective year. Outlier payments are provided on a service-by-service basis when the cost of a service exceeds the APC payment amount multiplier threshold (the APC payment amount multiplied by a certain amount) as well as the APC payment amount plus a fixed-dollar amount threshold (the APC payment plus a certain amount of dollars). In CY 2017, the outlier threshold was met when the hospital's cost of furnishing a service exceeded 1.75 times (the multiplier threshold) the APC payment amount and exceeded the APC payment amount plus \$3,825 (the fixed-dollar amount threshold) (81 FR 79604 through 79606). If the cost of a service exceeds both the multiplier threshold and the fixed-dollar threshold, the outlier payment is calculated as 50 percent of the amount by which the cost of furnishing the service exceeds 1.75 times the APC payment amount. Beginning with CY 2009 payments, outlier payments are subject to a reconciliation process similar to the IPPS outlier reconciliation process for cost reports, as discussed in the CY 2009 OPSS/ASC final rule with comment period (73 FR 68594 through 68599).

It has been our policy to report the actual amount of outlier payments as a percent of total spending in the claims being used to model the OPSS. Our estimate of total outlier payments as a percent of total CY 2016 OPSS payments, using CY 2016 claims available for this proposed rule, is approximately 1.0 percent of the total aggregated OPSS payments. Therefore, for CY 2016, we estimate that we paid the outlier target of 1.0 percent of total aggregated OPSS payments.

As stated in the proposed rule, using CY 2016 claims data and CY 2017 payment rates, we estimated that the aggregate outlier payments for CY 2017 would be approximately 1.0 percent of the total CY 2017 OPSS payments. Using an updated claims dataset and OPSS ancillary CCRs, we estimate that we paid approximately 1.11 percent of

the total CY 2017 OPSS payments, in OPSS outliers. We provided estimated CY 2018 outlier payments for hospitals and CMHCs with claims included in the claims data that we used to model impacts in the Hospital-Specific Impacts—Provider-Specific Data file on the CMS Web site at: <https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/HospitalOutpatientPPS/index.html>.

2. Outlier Calculation for CY 2018

In the CY 2018 OPSS/ASC proposed rule (82 FR 33596), for CY 2018, we proposed to continue our policy of estimating outlier payments to be 1.0 percent of the estimated aggregate total payments under the OPSS. We proposed that a portion of that 1.0 percent, an amount equal to less than 0.01 percent of outlier payments (or 0.0001 percent of total OPSS payments) would be allocated to CMHCs for PHP outlier payments. This is the amount of estimated outlier payments that would result from the proposed CMHC outlier threshold as a proportion of total estimated OPSS outlier payments. As discussed in section VIII.C. of the proposed rule, we proposed to continue our longstanding policy that if a CMHC's cost for partial hospitalization services, paid under APC 5853 (Partial Hospitalization for CMHCs), exceeds 3.40 times the payment rate for proposed APC 5853, the outlier payment would be calculated as 50 percent of the amount by which the cost exceeds 3.40 times the proposed APC 5853 payment rate. For further discussion of CMHC outlier payments, we refer readers to section VIII.D. of the proposed rule.

To ensure that the estimated CY 2018 aggregate outlier payments would equal 1.0 percent of estimated aggregate total payments under the OPSS, we proposed that the hospital outlier threshold be set so that outlier payments would be triggered when a hospital's cost of furnishing a service exceeds 1.75 times the APC payment amount and exceeds the APC payment amount plus \$4,325.

We calculated the proposed fixed-dollar threshold of \$4,325 using the standard methodology most recently used for CY 2017 (81 FR 79604 through 79605). For purposes of estimating outlier payments for the proposed rule, we used the hospital-specific overall ancillary CCRs available in the April 2017 update to the Outpatient Provider-Specific File (OPSF). The OPSF contains provider-specific data, such as the most current CCRs, which are maintained by the MACs and used by the OPSS Pricer to pay claims. The

claims that we use to model each OPSS update lag by 2 years.

In order to estimate the CY 2018 hospital outlier payments for the proposed rule, we inflated the charges on the CY 2016 claims using the same inflation factor of 1.104055 that we used to estimate the IPPS fixed-dollar outlier threshold for the FY 2018 IPPS/LTCH PPS proposed rule (82 FR 20173). We used an inflation factor of 1.05074 to estimate CY 2017 charges from the CY 2016 charges reported on CY 2016 claims. The methodology for determining this charge inflation factor is discussed in the FY 2017 IPPS/LTCH PPS final rule (81 FR 57286). As we stated in the CY 2005 OPSS final rule with comment period (69 FR 65845), we believe that the use of these charge inflation factors are appropriate for the OPSS because, with the exception of the inpatient routine service cost centers, hospitals use the same ancillary and outpatient cost centers to capture costs and charges for inpatient and outpatient services.

As noted in the CY 2007 OPSS/ASC final rule with comment period (71 FR 68011), we are concerned that we could systematically overestimate the OPSS hospital outlier threshold if we did not apply a CCR inflation adjustment factor. Therefore, we proposed to apply the same CCR inflation adjustment factor that we proposed to apply for the FY 2018 IPPS outlier calculation to the CCRs used to simulate the proposed CY 2018 OPSS outlier payments to determine the fixed-dollar threshold. Specifically, for CY 2018, we proposed to apply an adjustment factor of 0.979187 to the CCRs that were in the April 2017 OPSF to trend them forward from CY 2017 to CY 2018. The methodology for calculating this proposed adjustment was discussed in the FY 2018 IPPS/LTCH PPS proposed rule (82 FR 20173).

To model hospital outlier payments for the proposed rule, we applied the overall CCRs from the April 2017 OPSF after adjustment (using the proposed CCR inflation adjustment factor of 0.979187 to approximate CY 2018 CCRs) to charges on CY 2016 claims that were adjusted (using the proposed charge inflation factor of 1.104055 to approximate CY 2018 charges). We simulated aggregated CY 2018 hospital outlier payments using these costs for several different fixed-dollar thresholds, holding the 1.75 multiplier threshold constant and assuming that outlier payments would continue to be made at 50 percent of the amount by which the cost of furnishing the service would exceed 1.75 times the APC payment amount, until the total outlier payments

equaled 1.0 percent of aggregated estimated total CY 2018 OPSS payments. We estimated that a proposed fixed-dollar threshold of \$4,325, combined with the proposed multiplier threshold of 1.75 times the APC payment rate, would allocate 1.0 percent of aggregated total OPSS payments to outlier payments. For CMHCs, we proposed that, if a CMHC's cost for partial hospitalization services, paid under APC 5853, exceeds 3.40 times the payment rate for APC 5853, the outlier payment would be calculated as 50 percent of the amount by which the cost exceeds 3.40 times the APC 5853 payment rate.

Section 1833(t)(17)(A) of the Act, which applies to hospitals as defined under section 1886(d)(1)(B) of the Act, requires that hospitals that fail to report data required for the quality measures selected by the Secretary, in the form and manner required by the Secretary under section 1833(t)(17)(B) of the Act, incur a 2.0 percentage point reduction to their OPD fee schedule increase factor; that is, the annual payment update factor. The application of a reduced OPD fee schedule increase factor results in reduced national unadjusted payment rates that will apply to certain outpatient items and services furnished by hospitals that are required to report outpatient quality data and that fail to meet the Hospital OQR Program requirements. For hospitals that fail to meet the Hospital OQR Program requirements, we proposed to continue the policy that we implemented in CY 2010 that the hospitals' costs will be compared to the reduced payments for purposes of outlier eligibility and payment calculation. For more information on the Hospital OQR Program, we referred readers to section XIII. of the proposed rule.

We did not receive any public comments on our hospital outpatient outlier payment methodology. Therefore, we are finalizing our proposal to continue our policy of estimating outlier payments to be 1.0 percent of the estimated aggregate total payments under the OPSS and to use our established methodology to set the OPSS outlier fixed-dollar loss threshold for CY 2018.

3. Final Outlier Calculation

Consistent with historical practice, we used updated data for this final rule with comment period for outlier calculations. For CY 2018, we are applying the overall CCRs from the July 2017 OPSF file after adjustment (using the CCR inflation adjustment factor of 0.9856 to approximate CY 2018 CCRs) to

charges on CY 2016 claims that were adjusted using a charge inflation factor of 1.0936 to approximate CY 2018 charges. These are the same CCR adjustment and charge inflation factors that were used to set the IPPS fixed-dollar thresholds for the FY 2018 IPPS/LTCH PPS final rule (82 FR 38527). We simulated aggregated CY 2018 hospital outlier payments using these costs for several different fixed-dollar thresholds, holding the 1.75 multiple threshold constant and assuming that outlier payments will continue to be made at 50 percent of the amount by which the cost of furnishing the service would exceed 1.75 times the APC payment amount, until the total outlier payment equaled 1.0 percent of aggregated estimated total CY 2018 OPSS payments. We estimate that a fixed-dollar threshold of \$4,150, combined with the multiple threshold of 1.75 times the APC payment rate, will allocate 1.0 percent of aggregated total OPSS payments to outlier payments. We note that the difference in our calculation of the final fixed-dollar threshold of \$4,150 and the proposed fixed-dollar threshold of \$4,350 is largely attributed to finalized proposals related to reducing payments for drugs purchased under the 340B drug program for CY 2018, as discussed in section V.B.7. of this final rule with comment period.

For CMHCs, if a CMHC's cost for partial hospitalization services, paid under APC 5853, exceeds 3.40 times the payment rate, the outlier payment will be calculated as 50 percent of the amount by which the cost exceeds 3.40 times APC 5853.

H. Calculation of an Adjusted Medicare Payment From the National Unadjusted Medicare Payment

The basic methodology for determining prospective payment rates for HOPD services under the OPSS is set forth in existing regulations at 42 CFR part 419, subparts C and D. For this CY 2018 OPSS/ASC final rule with comment period, the payment rate for most services and procedures for which payment is made under the OPSS is the product of the conversion factor calculated in accordance with section II.B. of this final rule with comment period and the relative payment weight determined under section II.A. of this final rule with comment period. Therefore, the national unadjusted payment rate for most APCs contained in Addendum A to this final rule with comment period (which is available via the Internet on the CMS Web site) and for most HCPCS codes to which separate payment under the OPSS has been assigned in Addendum B to this final

rule with comment period (which is available via the Internet on the CMS Web site) was calculated by multiplying the CY 2018 scaled weight for the APC by the CY 2018 conversion factor. We note that this is the same methodology proposed in the CY 2018 OPSS/ASC proposed rule (82 FR 33598), on which we did not receive any public comments.

We note that section 1833(t)(17) of the Act, which applies to hospitals as defined under section 1886(d)(1)(B) of the Act, requires that hospitals that fail to submit data required to be submitted on quality measures selected by the Secretary, in the form and manner and at a time specified by the Secretary, incur a reduction of 2.0 percentage points to their OPD fee schedule increase factor, that is, the annual payment update factor. The application of a reduced OPD fee schedule increase factor results in reduced national unadjusted payment rates that apply to certain outpatient items and services provided by hospitals that are required to report outpatient quality data and that fail to meet the Hospital OQR Program (formerly referred to as the Hospital Outpatient Quality Data Reporting Program (HOP QDRP)) requirements. For further discussion of the payment reduction for hospitals that fail to meet the requirements of the Hospital OQR Program, we refer readers to section XIII. of this final rule with comment period.

We demonstrate below the steps on how to determine the APC payments that will be made in a calendar year under the OPSS to a hospital that fulfills the Hospital OQR Program requirements and to a hospital that fails to meet the Hospital OQR Program requirements for a service that has any of the following status indicator assignments: "J1", "J2", "P", "Q1", "Q2", "Q3", "Q4", "R", "S", "T", "U", or "V" (as defined in Addendum D1 to this final rule with comment period, which is available via the Internet on the CMS Web site), in a circumstance in which the multiple procedure discount does not apply, the procedure is not bilateral, and conditionally packaged services (status indicator of "Q1" and "Q2") qualify for separate payment. We note that, although blood and blood products with status indicator "R" and brachytherapy sources with status indicator "U" are not subject to wage adjustment, they are subject to reduced payments when a hospital fails to meet the Hospital OQR Program requirements.

Individual providers interested in calculating the payment amount that they will receive for a specific service from the national unadjusted payment

rates presented in Addenda A and B to this final rule with comment period (which are available via the Internet on the CMS Web site) should follow the formulas presented in the following steps. For purposes of the payment calculations below, we refer to the national unadjusted payment rate for hospitals that meet the requirements of the Hospital OQR Program as the “full” national unadjusted payment rate. We refer to the national unadjusted payment rate for hospitals that fail to meet the requirements of the Hospital OQR Program as the “reduced” national unadjusted payment rate. The reduced national unadjusted payment rate is calculated by multiplying the reporting ratio of 0.980 times the “full” national unadjusted payment rate. The national unadjusted payment rate used in the calculations below is either the full national unadjusted payment rate or the reduced national unadjusted payment rate, depending on whether the hospital met its Hospital OQR Program requirements in order to receive the full CY 2018 OPSS fee schedule increase factor.

Step 1. Calculate 60 percent (the labor-related portion) of the national unadjusted payment rate. Since the initial implementation of the OPSS, we have used 60 percent to represent our estimate of that portion of costs attributable, on average, to labor. We refer readers to the April 7, 2000 OPSS final rule with comment period (65 FR 18496 through 18497) for a detailed discussion of how we derived this percentage. During our regression analysis for the payment adjustment for rural hospitals in the CY 2006 OPSS final rule with comment period (70 FR 68553), we confirmed that this labor-related share for hospital outpatient services is appropriate.

The formula below is a mathematical representation of Step 1 and identifies the labor-related portion of a specific payment rate for a specific service.

X is the labor-related portion of the national unadjusted payment rate.
 $X = .60 * (\text{national unadjusted payment rate}).$

Step 2. Determine the wage index area in which the hospital is located and identify the wage index level that applies to the specific hospital. We note that, under the CY 2018 OPSS policy for continuing to use the OMB labor market area delineations based on the 2010 Decennial Census data for the wage indexes used under the IPPS, a hold harmless policy for the wage index may apply, as discussed in section II.C. of this final rule with comment period. The wage index values assigned to each

area reflect the geographic statistical areas (which are based upon OMB standards) to which hospitals are assigned for FY 2018 under the IPPS, reclassifications through the Metropolitan Geographic Classification Review Board (MGCRB), section 1886(d)(8)(B) “Lugar” hospitals, reclassifications under section 1886(d)(8)(E) of the Act, as defined in § 412.103 of the regulations, and hospitals designated as urban under section 601(g) of Public Law 98–21. For further discussion of the changes to the FY 2018 IPPS wage indexes, as applied to the CY 2018 OPSS, we refer readers to section II.C. of this final rule with comment period. We are continuing to apply a wage index floor of 1.00 to frontier States, in accordance with section 10324 of the Affordable Care Act of 2010.

Step 3. Adjust the wage index of hospitals located in certain qualifying counties that have a relatively high percentage of hospital employees who reside in the county, but who work in a different county with a higher wage index, in accordance with section 505 of Public Law 108–173. Addendum L to this final rule with comment period (which is available via the Internet on the CMS Web site) contains the qualifying counties and the associated wage index increase developed for the FY 2018 IPPS, which are listed in Table 2 in the FY 2018 IPPS/LTCH PPS final rule available via the Internet on the CMS Web site at: <http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/AcuteInpatientPPS/index.html>. (Click on the link on the left side of the screen titled “FY 2018 IPPS Final Rule Home Page” and select “FY 2018 Final Rule Tables.”) This step is to be followed only if the hospital is not reclassified or redesignated under section 1886(d)(8) or section 1886(d)(10) of the Act.

Step 4. Multiply the applicable wage index determined under Steps 2 and 3 by the amount determined under Step 1 that represents the labor-related portion of the national unadjusted payment rate.

The formula below is a mathematical representation of Step 4 and adjusts the labor-related portion of the national unadjusted payment rate for the specific service by the wage index.

X_a is the labor-related portion of the national unadjusted payment rate (wage adjusted).
 $X_a = .60 * (\text{national unadjusted payment rate}) * \text{applicable wage index}.$

Step 5. Calculate 40 percent (the nonlabor-related portion) of the national unadjusted payment rate and add that amount to the resulting product of Step

4. The result is the wage index adjusted payment rate for the relevant wage index area.

The formula below is a mathematical representation of Step 5 and calculates the remaining portion of the national payment rate, the amount not attributable to labor, and the adjusted payment for the specific service.

Y is the nonlabor-related portion of the national unadjusted payment rate.
 $Y = .40 * (\text{national unadjusted payment rate}).$

Adjusted Medicare Payment = $Y + X_a$.

Step 6. If a provider is an SCH, as set forth in the regulations at § 412.92, or an EACH, which is considered to be an SCH under section 1886(d)(5)(D)(iii)(III) of the Act, and located in a rural area, as defined in § 412.64(b), or is treated as being located in a rural area under § 412.103, multiply the wage index adjusted payment rate by 1.071 to calculate the total payment.

The formula below is a mathematical representation of Step 6 and applies the rural adjustment for rural SCHs.

Adjusted Medicare Payment (SCH or EACH) = Adjusted Medicare Payment * 1.071.

We are providing examples below of the calculation of both the full and reduced national unadjusted payment rates that will apply to certain outpatient items and services performed by hospitals that meet and that fail to meet the Hospital OQR Program requirements, using the steps outlined above. For purposes of this example, we used a provider that is located in Brooklyn, New York that is assigned to CBSA 35614. This provider bills one service that is assigned to APC 5071 (Level 1 Excision/Biopsy/Incision and Drainage). The CY 2018 full national unadjusted payment rate for APC 5071 is approximately \$572.81. The reduced national unadjusted payment rate for APC 5071 for a hospital that fails to meet the Hospital OQR Program requirements is approximately \$561.35. This reduced rate is calculated by multiplying the reporting ratio of 0.980 by the full unadjusted payment rate for APC 5071.

The FY 2018 wage index for a provider located in CBSA 35614 in New York is 1.2876. The labor-related portion of the full national unadjusted payment is approximately \$442.53 (.60 * \$572.81 * 1.2876). The labor-related portion of the reduced national unadjusted payment is approximately \$433.68 (.60 * \$561.35 * 1.2876). The nonlabor-related portion of the full national unadjusted payment is approximately \$229.12 (.40 * \$572.81). The nonlabor-related portion of the

reduced national unadjusted payment is approximately \$224.54 (.40 * \$561.35). The sum of the labor-related and nonlabor-related portions of the full national adjusted payment is approximately \$671.65 (\$442.53 + \$229.12). The sum of the portions of the reduced national adjusted payment is approximately \$658.22 (\$433.68 + \$224.54).

I. Beneficiary Copayments

1. Background

Section 1833(t)(3)(B) of the Act requires the Secretary to set rules for determining the unadjusted copayment amounts to be paid by beneficiaries for covered OPD services. Section 1833(t)(8)(C)(ii) of the Act specifies that the Secretary must reduce the national unadjusted copayment amount for a covered OPD service (or group of such services) furnished in a year in a manner so that the effective copayment rate (determined on a national unadjusted basis) for that service in the year does not exceed a specified percentage. As specified in section 1833(t)(8)(C)(ii)(V) of the Act, the effective copayment rate for a covered OPD service paid under the OPSS in CY 2006, and in calendar years thereafter, shall not exceed 40 percent of the APC payment rate.

Section 1833(t)(3)(B)(ii) of the Act provides that, for a covered OPD service (or group of such services) furnished in a year, the national unadjusted copayment amount cannot be less than 20 percent of the OPD fee schedule amount. However, section 1833(t)(8)(C)(i) of the Act limits the amount of beneficiary copayment that may be collected for a procedure performed in a year to the amount of the inpatient hospital deductible for that year.

Section 4104 of the Affordable Care Act eliminated the Medicare Part B coinsurance for preventive services furnished on and after January 1, 2011, that meet certain requirements, including flexible sigmoidoscopies and screening colonoscopies, and waived the Part B deductible for screening colonoscopies that become diagnostic during the procedure. Our discussion of the changes made by the Affordable Care Act with regard to copayments for preventive services furnished on and after January 1, 2011, may be found in section XII.B. of the CY 2011 OPSS/ASC final rule with comment period (75 FR 72013).

2. OPSS Copayment Policy

In the CY 2018 OPSS/ASC proposed rule (82 FR 33599), for CY 2018, we

proposed to determine copayment amounts for new and revised APCs using the same methodology that we implemented beginning in CY 2004. (We refer readers to the November 7, 2003 OPSS final rule with comment period (68 FR 63458).) In addition, we proposed to use the same standard rounding principles that we have historically used in instances where the application of our standard copayment methodology would result in a copayment amount that is less than 20 percent and cannot be rounded, under standard rounding principles, to 20 percent. (We refer readers to the CY 2008 OPSS/ASC final rule with comment period (72 FR 66687) in which we discuss our rationale for applying these rounding principles.) The proposed national unadjusted copayment amounts for services payable under the OPSS that would be effective January 1, 2018 were included in Addenda A and B to the proposed rule (which are available via the Internet on the CMS Web site).

We did not receive any public comments on the proposed copayment amounts for new and revised APCs using the same methodology we implemented beginning in CY 2004 or the standard rounding principles we apply to our copayment amounts. Therefore, we are finalizing our proposed copayment policies, without modification.

As discussed in section XIII.E. of this final rule with comment period, for CY 2018, the Medicare beneficiary's minimum unadjusted copayment and national unadjusted copayment for a service to which a reduced national unadjusted payment rate applies will equal the product of the reporting ratio and the national unadjusted copayment, or the product of the reporting ratio and the minimum unadjusted copayment, respectively, for the service.

We note that OPSS copayments may increase or decrease each year based on changes in the calculated APC payment rates due to updated cost report and claims data, and any changes to the OPSS cost modeling process. However, as described in the CY 2004 OPSS final rule with comment period, the development of the copayment methodology generally moves beneficiary copayments closer to 20 percent of OPSS APC payments (68 FR 63458 through 63459).

In the CY 2004 OPSS final rule with comment period (68 FR 63459), we adopted a new methodology to calculate unadjusted copayment amounts in situations including reorganizing APCs, and we finalized the following rules to

determine copayment amounts in CY 2004 and subsequent years.

- When an APC group consists solely of HCPCS codes that were not paid under the OPSS the prior year because they were packaged or excluded or are new codes, the unadjusted copayment amount would be 20 percent of the APC payment rate.

- If a new APC that did not exist during the prior year is created and consists of HCPCS codes previously assigned to other APCs, the copayment amount is calculated as the product of the APC payment rate and the lowest coinsurance percentage of the codes comprising the new APC.

- If no codes are added to or removed from an APC and, after recalibration of its relative payment weight, the new payment rate is equal to or *greater than* the prior year's rate, the copayment amount remains constant (unless the resulting coinsurance percentage is less than 20 percent).

- If no codes are added to or removed from an APC and, after recalibration of its relative payment weight, the new payment rate is *less than* the prior year's rate, the copayment amount is calculated as the product of the new payment rate and the prior year's coinsurance percentage.

- If HCPCS codes are added to or deleted from an APC and, after recalibrating its relative payment weight, holding its unadjusted copayment amount constant results in a decrease in the coinsurance percentage for the reconfigured APC, the copayment amount would not change (unless retaining the copayment amount would result in a coinsurance rate less than 20 percent).

- If HCPCS codes are added to an APC and, after recalibrating its relative payment weight, holding its unadjusted copayment amount constant results in an increase in the coinsurance percentage for the reconfigured APC, the copayment amount would be calculated as the product of the payment rate of the reconfigured APC and the lowest coinsurance percentage of the codes being added to the reconfigured APC.

We noted in the CY 2004 OPSS final rule with comment period that we would seek to lower the copayment percentage for a service in an APC from the prior year if the copayment percentage was greater than 20 percent. We noted that this principle was consistent with section 1833(t)(8)(C)(ii) of the Act, which accelerates the reduction in the national unadjusted coinsurance rate so that beneficiary liability will eventually equal 20 percent of the OPSS payment rate for all OPSS services to which a copayment

applies, and with section 1833(t)(3)(B) of the Act, which achieves a 20-percent copayment percentage when fully phased in and gives the Secretary the authority to set rules for determining copayment amounts for new services. We further noted that the use of this methodology would, in general, reduce the beneficiary coinsurance rate and copayment amount for APCs for which the payment rate changes as the result of the reconfiguration of APCs and/or recalibration of relative payment weights (68 FR 63459).

3. Calculation of an Adjusted Copayment Amount for an APC Group

As we stated in the CY 2018 OPPTS/ASC proposed rule (82 FR 33600), individuals interested in calculating the national copayment liability for a Medicare beneficiary for a given service provided by a hospital that met or failed to meet its Hospital OQR Program requirements should follow the formulas presented in the following steps.

Step 1. Calculate the beneficiary payment percentage for the APC by dividing the APC's national unadjusted copayment by its payment rate. For example, using APC 5071, \$114.57 is approximately 20 percent of the full national unadjusted payment rate of \$572.81. For APCs with only a minimum unadjusted copayment in Addenda A and B to this final rule with comment period rule (which are available via the Internet on the CMS Web site), the beneficiary payment percentage is 20 percent.

The formula below is a mathematical representation of Step 1 and calculates the national copayment as a percentage of national payment for a given service. *B* is the beneficiary payment percentage. *B* = National unadjusted copayment for APC/national unadjusted payment rate for APC.

Step 2. Calculate the appropriate wage-adjusted payment rate for the APC for the provider in question, as indicated in Steps 2 through 4 under section II.H. of this final rule with comment period. Calculate the rural adjustment for eligible providers as indicated in Step 6 under section II.H. of this final rule with comment period.

Step 3. Multiply the percentage calculated in Step 1 by the payment rate calculated in Step 2. The result is the

wage-adjusted copayment amount for the APC.

The formula below is a mathematical representation of Step 3 and applies the beneficiary payment percentage to the adjusted payment rate for a service calculated under section II.H. of this final rule with comment period, with and without the rural adjustment, to calculate the adjusted beneficiary copayment for a given service.

Wage-adjusted copayment amount for the APC = Adjusted Medicare Payment * *B*.

Wage-adjusted copayment amount for the APC (SCH or EACH) = (Adjusted Medicare Payment * 1.071) * *B*.

Step 4. For a hospital that failed to meet its Hospital OQR Program requirements, multiply the copayment calculated in Step 3 by the reporting ratio of 0.980.

The unadjusted copayments for services payable under the OPPTS that will be effective January 1, 2018, are shown in Addenda A and B to this final rule with comment period (which are available via the Internet on the CMS Web site). We note that the national unadjusted payment rates and copayment rates shown in Addenda A and B to this final rule with comment period reflect the CY 2018 OPD fee schedule increase factor discussed in section II.B. of this final rule with comment period.

In addition, as noted earlier, section 1833(t)(8)(C)(i) of the Act limits the amount of beneficiary copayment that may be collected for a procedure performed in a year to the amount of the inpatient hospital deductible for that year.

III. OPPTS Ambulatory Payment Classification (APC) Group Policies

A. OPPTS Treatment of New CPT and Level II HCPCS Codes

CPT and Level II HCPCS codes are used to report procedures, services, items, and supplies under the hospital OPPTS. Specifically, CMS recognizes the following codes on OPPTS claims:

- Category I CPT codes, which describe surgical procedures and medical services;
- Category III CPT codes, which describe new and emerging

technologies, services, and procedures; and

- Level II HCPCS codes, which are used primarily to identify products, supplies, temporary procedures, and services not described by CPT codes.

CPT codes are established by the American Medical Association (AMA) and the Level II HCPCS codes are established by the CMS HCPCS Workgroup. These codes are updated and changed throughout the year. CPT and HCPCS code changes that affect the OPPTS are published both through the annual rulemaking cycle and through the OPPTS quarterly update Change Requests (CRs). CMS releases new Level II HCPCS codes to the public or recognizes the release of new CPT codes by the AMA and makes these codes effective (that is, the codes can be reported on Medicare claims) outside of the formal rulemaking process via OPPTS quarterly update CRs. Based on our review, we assign the new CPT and Level II HCPCS codes to interim status indicators (SIs) and APCs. These interim assignments are finalized in the OPPTS/ASC final rules. This quarterly process offers hospitals access to codes that may more accurately describe items or services furnished and provides payment or more accurate payment for these items or services in a timelier manner than if we waited for the annual rulemaking process. We solicit public comments on these new codes and finalize our proposals related to these codes through our annual rulemaking process.

We note that, under the OPPTS, the APC assignment determines the payment rate for an item, procedure, or service. Those items, procedures, or services not paid separately under the hospital OPPTS are assigned to appropriate status indicators. Certain payment status indicators provide separate payment, while other payment status indicators do not. Section XI. of this final rule with comment period discusses the various status indicators used under the OPPTS.

As we did in the CY 2018 OPPTS/ASC proposed rule, in Table 11 below, we summarize our current process for updating codes through our OPPTS quarterly update CRs, seeking public comments, and finalizing the treatment of these new codes under the OPPTS.

TABLE 11—COMMENT TIMEFRAME FOR NEW OR REVISED HCPCS CODES

OPPTS quarterly update CR	Type of code	Effective date	Comments sought	When finalized
April 1, 2017	Level II HCPCS Codes	April 1, 2017	CY 2018 OPPTS/ASC proposed rule.	CY 2018 OPPTS/ASC final rule with comment period.

TABLE 11—COMMENT TIMEFRAME FOR NEW OR REVISED HCPCS CODES—Continued

OPPS quarterly update CR	Type of code	Effective date	Comments sought	When finalized
July 1, 2017	Level II HCPCS Codes	July 1, 2017	CY 2018 OPPS/ASC proposed rule.	CY 2018 OPPS/ASC final rule with comment period.
	Category I (certain vaccine codes) and III CPT codes.	July 1, 2017	CY 2018 OPPS/ASC proposed rule.	CY 2018 OPPS/ASC final rule with comment period.
October 1, 2017	Level II HCPCS Codes	October 1, 2017	CY 2018 OPPS/ASC final rule with comment period.	CY 2019 OPPS/ASC final rule with comment period.
January 1, 2018	Level II HCPCS Codes	January 1, 2018	CY 2018 OPPS/ASC final rule with comment period.	CY 2019 OPPS/ASC final rule with comment period.
	Category I and III CPT Codes.	January 1, 2018	CY 2018 OPPS/ASC proposed rule.	CY 2018 OPPS/ASC final rule with comment period.

1. Treatment of New HCPCS Codes That Were Effective April 1, 2017 for Which We Solicited Public Comments in the CY 2018 OPPS/ASC Proposed Rule

Through the April 2017 OPPS quarterly update CR (Transmittal 3728, Change Request 10005, dated March 3, 2017), we made effective five new Level II HCPCS codes for separate payment

under the OPPS. In the CY 2018 OPPS/ASC proposed rule (82 FR 33601), we solicited public comments on the proposed APC and status indicator assignments for these Level II HCPCS codes, which were displayed in Table 13 of the proposed rule and are now listed in Table 12 of this final rule with comment period. Specifically, we solicited public comments on HCPCS

codes C9484, C9485, C9486, C9487, and C9488. We note that HCPCS code C9487 was deleted on June 30, 2017, and replaced with HCPCS code Q9989, effective July 1, 2017. We indicated that the proposed payment rates for these codes were included in Addendum B to the proposed rule (which is available via the Internet on the CMS Web site).

TABLE 12—NEW LEVEL II HCPCS CODES EFFECTIVE APRIL 1, 2017

CY 2017 HCPCS code	CY 2018 HCPCS code	CY 2018 long descriptor	Final CY 2018 SI	Final CY 2018 APC
C9484	J1428	Injection, eteplirsen, 10 mg	G	9484
C9485	J9285	Injection, olaratumab, 10 mg	G	9485
C9486	J1627	Injection, granisetron, extended-release, 0.1 mg	G	9486
C9487 *	J3358	Ustekinumab, for intravenous injection, 1 mg	G	9487
C9488	C9488	Injection, conivaptan hydrochloride, 1 mg	G	9488

* HCPCS code C9487, which was effective April 1, 2017, was deleted June 30, 2017 and replaced with HCPCS code Q9989 (Ustekinumab, for intravenous injection, 1 mg) effective July 1, 2017.

We did not receive any public comments on the proposed APC and status indicator assignments for the new Level II HCPCS codes implemented in April 2017. Therefore, we are finalizing the proposed APC and status indicator assignments for these codes, as indicated in Table 12 above. We note that several of the HCPCS C-codes have been replaced with HCPCS J-codes effective January 1, 2018. Their replacement codes are listed in Table 12 above. The final payment rates for these codes can be found in Addendum B to this final rule with comment period (which is available via the Internet on the CMS Web site). In addition, the status indicator meanings can be found in Addendum A to this final rule with comment period (which is available via the Internet on the CMS Web site).

2. Treatment of New HCPCS Codes That Were Effective July 1, 2017 for Which We Solicited Public Comments in the CY 2018 OPPS/ASC Proposed Rule

As discussed in the CY 2018 OPPS/ASC proposed rule (82 FR 33602), through the July 2017 OPPS quarterly update CR (Transmittal 3783, Change Request 10122, dated May 26, 2017), we made 10 new Category III CPT codes and 13 Level II HCPCS codes effective July 1, 2017, and assigned them to appropriate interim OPPS status indicators and APCs. In the CY 2018 OPPS/ASC proposed rule, we solicited public comments on the proposed APC and status indicator assignments for CY 2018 for the CPT and Level II HCPCS codes implemented on July 1, 2017, all of which were displayed in Table 14 of the proposed rule, and are now listed in Table 13 of this final rule with comment period. We note that three of the new HCPCS codes effective July 1, 2017

replaced four existing HCPCS codes. Specifically, HCPCS code Q9986 replaced HCPCS code J1725 (Injection, hydroxyprogesterone caproate, 1 mg), HCPCS codes Q9987 and Q9988 replaced HCPCS code P9072 (Platelets, pheresis, pathogen reduced or rapid bacterial tested, each unit), and HCPCS code Q9989 replaced HCPCS code C9487 (Ustekinumab, for intravenous injection, 1 mg). With the establishment of HCPCS codes Q9986, Q9987, and Q9988, we made their predecessor HCPCS codes J1725 and P9072 inactive for reporting and revised the status indicators for both codes to “E1” (Not Payable by Medicare) effective July 1, 2017. In addition, because HCPCS code Q9989 describes the same drug as HCPCS code C9487, in the CY 2018 OPPS/ASC proposed rule, we proposed to continue the drug’s pass-through payment status and to assign HCPCS code Q9989 to the same APC and status indicator as its predecessor HCPCS code

C9487, as shown in Table 14 of the proposed rule. The proposed payment rates and status indicators for these codes, where applicable, were included in Addendum B to the proposed rule (which is available via the Internet on the CMS Web site).

We did not receive any public comments on the proposed APC and status indicator assignments for the new

Category III CPT codes and Level II HCPCS codes implemented in July 2017. Therefore, we are finalizing the proposed APC and status indicator assignments for these codes, as indicated in Table 13 below. We note that several of the HCPCS C and Q-codes have been replaced with HCPCS J-codes effective January 1, 2018. Their replacement codes are listed in Table 13

below. The final payment rates for these codes can be found in Addendum B to this final rule with comment period (which is available via the Internet on the CMS Web site). In addition, the status indicator meanings can be found in Addendum A to this final rule with comment period (which is available via the Internet on the CMS Web site).

TABLE 13—NEW CATEGORY III CPT AND LEVEL II HCPCS CODES EFFECTIVE JULY 1, 2017

CY 2017 HCPCS code	CY 2018 HCPCS code	CY 2018 long descriptor	Final CY 2018 SI	Final CY 2018 APC
C9489	J2326	Injection, nusinersen, 0.1 mg	G	9489
C9490	J0565	Injection, bezlotoxumab, 10 mg	G	9490
C9745	C9745	Nasal endoscopy, surgical; balloon dilation of eustachian tube	J1	5165
C9746	C9746	Transperineal implantation of permanent adjustable balloon continence device, with cystourethroscopy, when performed and/or fluoroscopy, when performed.	J1	5377
C9747	C9747	Ablation of prostate, transrectal, high intensity focused ultrasound (HIFU), including imaging guidance.	J1	5376
K0553	K0553	Supply allowance for therapeutic continuous glucose monitor (CGM), includes all supplies and accessories, 1 month supply = 1 Unit Of Service.	Y	N/A
K0554	K0554	Receiver (monitor), dedicated, for use with therapeutic glucose continuous monitor system.	Y	N/A
Q9984	J7296	Levonorgestrel-releasing intrauterine contraceptive system (Kyleena), 19.5 mg.	E1	N/A
Q9985	J1729	Injection, hydroxyprogesterone caproate, not otherwise specified, 10 mg	N	N/A
Q9986	J1726	Injection, hydroxyprogesterone caproate (Makena), 10 mg	K	9074
Q9987	P9100	Pathogen(s) test for platelets	S	1493
Q9988	P9073	Platelets, pheresis, pathogen reduced, each unit	R	9536
Q9989	J3358	Ustekinumab, for intravenous injection, 1 mg	G	9487
0469T	0469T	Retinal polarization scan, ocular screening with on-site automated results, bilateral.	E1	N/A
0470T	0470T	Optical coherence tomography (OCT) for microstructural and morphological imaging of skin, image acquisition, interpretation, and report; first lesion.	M	N/A
0471T	0471T	Optical coherence tomography (OCT) for microstructural and morphological imaging of skin, image acquisition, interpretation, and report; each additional lesion (List separately in addition to code for primary procedure).	N	N/A
0472T	0472T	Device evaluation, interrogation, and initial programming of intra-ocular retinal electrode array (eg, retinal prosthesis), in person, with iterative adjustment of the implantable device to test functionality, select optimal permanent programmed values with analysis, including visual training, with review and report by a qualified health care professional.	Q1	5743
0473T	0473T	Device evaluation and interrogation of intra-ocular retinal electrode array (eg, retinal prosthesis), in person, including reprogramming and visual training, when performed, with review and report by a qualified health care professional.	Q1	5742
0474T	0474T	Insertion of anterior segment aqueous drainage device, with creation of intraocular reservoir, internal approach, into the supraciliary space.	J1	5492
0475T	0475T	Recording of fetal magnetic cardiac signal using at least 3 channels; patient recording and storage, data scanning with signal extraction, technical analysis and result, as well as supervision, review, and interpretation of report by a physician or other qualified health care professional.	M	N/A
0476T	0476T	Recording of fetal magnetic cardiac signal using at least 3 channels; patient recording, data scanning, with raw electronic signal transfer of data and storage.	Q1	5734
0477T	0477T	Recording of fetal magnetic cardiac signal using at least 3 channels; signal extraction, technical analysis, and result.	Q1	5734
0478T	0478T	Recording of fetal magnetic cardiac signal using at least 3 channels; review, interpretation, report by physician or other qualified health care professional.	M	N/A

3. Process for New Level II HCPCS Codes That Became Effective October 1, 2017 and New Level II HCPCS Codes That Will Be Effective January 1, 2018 for Which We Are Soliciting Public Comments in This CY 2018 OPPS/ASC Final Rule With Comment Period

As has been our practice in the past, we incorporate those new Level II HCPCS codes that are effective October 1 and January 1 in the final rule with comment period, thereby updating the OPPS for the following calendar year, as displayed in Table 11 of this final rule with comment period. These codes are released to the public through the October and January OPPS quarterly update CRs and via the CMS HCPCS Web site (for Level II HCPCS codes). For CY 2018, these codes are flagged with comment indicator “NI” in Addendum B to this OPPS/ASC final rule with comment period to indicate that we are assigning them an interim payment status which is subject to public comment. Specifically, the status indicators and the APC assignments for codes flagged with comment indicator “NI” are open to public comment in this final rule with comment period, and we will respond to these public comments in the OPPS/ASC final rule with comment period for the next year’s OPPS/ASC update. In the CY 2018 OPPS/ASC proposed rule (82 FR 33603), we proposed to continue this process for CY 2018. Specifically, for CY 2018, we proposed to include in Addendum B to the CY 2018 OPPS/ASC final rule with comment period the following new HCPCS codes:

- New Level II HCPCS codes effective October 1, 2017, that would be incorporated in the October 2017 OPPS quarterly update CR; and
- New Level II HCPCS codes effective January 1, 2018, that would be incorporated in the January 2018 OPPS quarterly update CR.

As stated above, the October 1, 2017 and January 1, 2018 codes are flagged with comment indicator “NI” in Addendum B to this CY 2018 OPPS/ASC final rule with comment period to indicate that we have assigned these codes an interim OPPS payment status for CY 2018. We are inviting public comments on the interim status indicator and APC assignments for these codes, if applicable, that will be finalized in the CY 2019 OPPS/ASC final rule with comment period.

4. Treatment of New and Revised Category I and III CPT Codes That Will Be Effective January 1, 2018 for Which We Solicited Public Comments in the CY 2018 OPPS/ASC Proposed Rule

In the CY 2015 OPPS/ASC final rule with comment period (79 FR 66841 through 66844), we finalized a revised process of assigning APC and status indicators for new and revised Category I and III CPT codes that would be effective January 1. Specifically, for the new/revised CPT codes that we receive in a timely manner from the AMA’s CPT Editorial Panel, we finalized our proposal to include the codes that would be effective January 1 in the OPPS/ASC proposed rules, along with proposed APC and status indicator assignments for them, and to finalize the APC and status indicator assignments in the OPPS/ASC final rules beginning with the CY 2016 OPPS update. For those new/revised CPT codes that were received too late for inclusion in the OPPS/ASC proposed rule, we finalized our proposal to establish and use HCPCS G-codes that mirror the predecessor CPT codes and retain the current APC and status indicator assignments for a year until we can propose APC and status indicator assignments in the following year’s rulemaking cycle. We note that even if we find that we need to create HCPCS G-codes in place of certain CPT codes for the MPFS proposed rule, we do not anticipate that these HCPCS G-codes will always be necessary for OPPS purposes. We will make every effort to include proposed APC and status indicator assignments for all new and revised CPT codes that the AMA makes publicly available in time for us to include them in the proposed rule, and to avoid the resort to HCPCS G-codes and the resulting delay in utilization of the most current CPT codes. Also, we finalized our proposal to make interim APC and status indicator assignments for CPT codes that are not available in time for the proposed rule and that describe wholly new services (such as new technologies or new surgical procedures), solicit public comments, and finalize the specific APC and status indicator assignments for those codes in the following year’s final rule.

For the CY 2018 OPPS update, we received the CY 2018 CPT codes from AMA in time for inclusion in the CY 2018 OPPS/ASC proposed rule. The new, revised, and deleted CY 2018 Category I and III CPT codes were included in Addendum B to the CY 2018 OPPS/ASC proposed rule (which is available via the Internet on the CMS Web site). We noted in the proposed

rule that the new and revised codes are assigned to new comment indicator “NP” to indicate that the code is new for the next calendar year or the code is an existing code with substantial revision to its code descriptor in the next calendar year as compared to the current calendar year with a proposed APC assignment, and that comments will be accepted on the proposed APC assignment and status indicator.

Further, in the CY 2018 OPPS/ASC proposed rule, we reminded readers that the CPT code descriptors that appear in Addendum B are short descriptors and do not fully describe the complete procedure, service, or item described by the CPT code. Therefore, we included the 5-digit placeholder codes and their long descriptors for the new and revised CY 2018 CPT codes in Addendum O to the proposed rule (which is available via the Internet on the CMS Web site) so that the public could adequately comment on our proposed APCs and status indicator assignments. We indicated that the 5-digit placeholder codes were included in Addendum O, specifically under the column labeled “CY 2018 OPPS/ASC Proposed Rule 5-Digit AMA Placeholder Code,” to the proposed rule. We stated that the final CPT code numbers will be included in the CY 2018 OPPS/ASC final rule with comment period. We noted that not every code listed in Addendum O is subject to comment. For the new and revised Category I and III CPT codes, we requested comments on only those codes that are assigned to comment indicator “NP”. We indicated that public comments would not be accepted for new Category I CPT laboratory codes that were not assigned to the “NP” comment indicator in Addendum O to the proposed rule. We stated that comments to these codes must be submitted at the Clinical Laboratory Fee Schedule (CLFS) Public Meeting, which was scheduled on July 31–August 1, 2017.

In summary, we solicited public comments on the proposed APC and status indicator assignments for the new and revised Category I and III CPT codes that will be effective January 1, 2018. The CPT codes were listed in Addendum B to the proposed rule with short descriptors only. We listed them again in Addendum O to the proposed rule with long descriptors. We also proposed to finalize the status indicator and APC assignments for these codes (with their final CPT code numbers) in the CY 2018 OPPS/ASC final rule with comment period.

Commenters addressed several of the new CPT codes that were assigned to comment indicator “NP” in Addendum

B to the CY 2018 OPSS/ASC proposed rule. We have responded to those public comments in sections II.A.2.b. (Comprehensive APCs), III.D. (OPSS APC-Specific Policies), V. (OPSS Payment Changes for Drugs, Biologicals, and Radiopharmaceuticals), and XII. (Updates to the ASC Payment System) of this CY 2018 OPSS/ASC final rule with comment period.

The final status indicators, APC assignments, and payment rates for the new CPT codes that are effective January 1, 2018 can be found in Addendum B to this final rule with comment period (which is available via the Internet on the CMS Web site). In addition, the status indicator meanings can be found in Addendum A to this final rule with comment period (which is available via the Internet on the CMS Web site).

B. OPSS Changes—Variations Within APCs

1. Background

Section 1833(t)(2)(A) of the Act requires the Secretary to develop a classification system for covered hospital outpatient department services. Section 1833(t)(2)(B) of the Act provides that the Secretary may establish groups of covered OPD services within this classification system, so that services classified within each group are comparable clinically and with respect to the use of resources. In accordance with these provisions, we developed a grouping classification system, referred to as Ambulatory Payment Classifications (APCs), as set forth in § 419.31 of the regulations. We use Level I and Level II HCPCS codes to identify and group the services within each APC. The APCs are organized such that each group is homogeneous both clinically and in terms of resource use. Using this classification system, we have established distinct groups of similar services. We also have developed separate APC groups for certain medical devices, drugs, biologicals, therapeutic radiopharmaceuticals, and brachytherapy devices that are not packaged into the payment for the procedure.

We have packaged into the payment for each procedure or service within an APC group the costs associated with those items and services that are typically ancillary and supportive to a primary diagnostic or therapeutic modality and, in those cases, are an integral part of the primary service they support. Therefore, we do not make separate payment for these packaged items or services. In general, packaged

items and services include, but are not limited to, the items and services listed in § 419.2(b) of the regulations. A further discussion of packaged services is included in section II.A.3. of this final rule with comment period.

Under the OPSS, we generally pay for covered hospital outpatient services on a rate-per-service basis, where the service may be reported with one or more HCPCS codes. Payment varies according to the APC group to which the independent service or combination of services is assigned. In the CY 2018 OPSS/ASC proposed rule (82 FR 33604), for CY 2018, we proposed that each APC relative payment weight represents the hospital cost of the services included in that APC, relative to the hospital cost of the services included in APC 5012 (Clinic Visits and Related Services). The APC relative payment weights are scaled to APC 5012 because it is the hospital clinic visit APC and clinic visits are among the most frequently furnished services in the hospital outpatient setting.

2. Application of the 2 Times Rule

Section 1833(t)(9)(A) of the Act requires the Secretary to review, not less often than annually, and revise the APC groups, the relative payment weights, and the wage and other adjustments described in paragraph (2) to take into account changes in medical practice, changes in technology, the addition of new services, new cost data, and other relevant information and factors. Section 1833(t)(9)(A) of the Act also requires the Secretary to consult with an expert outside advisory panel composed of an appropriate selection of representatives of providers to review (and advise the Secretary concerning) the clinical integrity of the APC groups and the relative payment weights. We note that the HOP Panel recommendations for specific services for the CY 2018 OPSS and our responses to them are discussed in the relevant specific sections throughout this final rule with comment period.

In addition, section 1833(t)(2) of the Act provides that, subject to certain exceptions, the items and services within an APC group cannot be considered comparable with respect to the use of resources if the highest cost for an item or service in the group is more than 2 times greater than the lowest cost for an item or service within the same group (referred to as the “2 times rule”). The statute authorizes the Secretary to make exceptions to the 2 times rule in unusual cases, such as low-volume items and services (but the Secretary may not make such an exception in the case of a drug or

biological that has been designated as an orphan drug under section 526 of the Federal Food, Drug, and Cosmetic Act).

Therefore, in accordance with section 1833(t)(2) of the Act and § 419.31 of the regulations, we annually review the items and services within an APC group to determine if there are any APC violations of the 2 times rule and whether there are any appropriate revisions to APC assignments that may be necessary or exceptions to be made. In determining the APCs with a 2 times rule violation, we consider only those HCPCS codes that are significant based on the number of claims. We note that, for purposes of identifying significant procedure codes for examination under the 2 times rule, we consider procedure codes that have more than 1,000 single major claims or procedure codes that have both greater than 99 single major claims and contribute at least 2 percent of the single major claims used to establish the APC cost to be significant (75 FR 71832). This longstanding definition of when a procedure code is significant for purposes of the 2 times rule was selected because we believe that a subset of 1,000 claims (or less than 1,000 claims) is negligible within the set of approximately 100 million single procedure or single session claims we use for establishing costs. Similarly, a procedure code for which there are fewer than 99 single claims and which comprises less than 2 percent of the single major claims within an APC will have a negligible impact on the APC cost. In the CY 2018 OPSS/ASC proposed rule (81 FR 33604 through 33605), we proposed to make exceptions to this limit on the variation of costs within each APC group in unusual cases, such as low-volume items and services.

For the CY 2018 OPSS update, we identified the APCs with violations of the 2 times rule, and we proposed changes to the procedure codes assigned to these APCs in Addendum B to the CY 2018 OPSS/ASC proposed rule. We noted that Addendum B did not appear in the printed version of the **Federal Register** as part of the CY 2018 OPSS/ASC proposed rule. Rather, it was published and made available via the Internet on the CMS Web site at: <http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/HospitalOutpatientPPS/index.html>. In these cases, to eliminate a violation of the 2 times rule or to improve clinical and resource homogeneity, in the CY 2018 OPSS/ASC proposed rule (81 FR 33604 through 33605), we proposed to reassign these procedure codes to new APCs that contain services that are similar with regard to both their clinical and

resource characteristics. In many cases, the proposed procedure code reassignments and associated APC reconfigurations for CY 2018 included in the proposed rule are related to changes in costs of services that were observed in the CY 2016 claims data newly available for CY 2018 ratesetting. We also proposed changes to the status indicators for some procedure codes that were not specifically and separately discussed in the proposed rule. In these cases, we proposed to change the status indicators for these procedure codes because we believe that another status indicator would more accurately describe their payment status from an OPPS perspective based on the policies that we proposed for CY 2018. Addendum B to the CY 2018 OPPS/ASC proposed rule identified with the comment indicator "CH" those procedure codes for which we proposed a change to the APC assignment or status indicator, or both, that were initially assigned in the July 1, 2017 OPPS Addendum B update (available via the Internet on the CMS Web site at: <https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/HospitalOutpatientPPS/Addendum-A-and-Addendum-B-Updates.html>). Addendum B to this final rule with comment period (available via the Internet on the CMS Web site) identifies with the "CH" comment indicator the final CY 2018 changes compared to the HCPCS codes' status as reflected in the October 2017 Addendum B update.

3. APC Exceptions to the 2 Times Rule

Taking into account the APC changes that we proposed for CY 2018, we reviewed all of the APCs to determine which APCs would not meet the requirements of the 2 times rule. We used the following criteria to evaluate whether to propose exceptions to the 2 times rule for affected APCs:

- Resource homogeneity;
- Clinical homogeneity;
- Hospital outpatient setting utilization;
- Frequency of service (volume); and
- Opportunity for upcoding and code fragments.

Based on the CY 2016 claims data available for the CY 2018 proposed rule, we found 12 APCs with violations of the 2 times rule. We applied the criteria as described above to identify the APCs for which we proposed to make exceptions under the 2 times rule for CY 2018, and found that all of the 12 APCs we identified met the criteria for an exception to the 2 times rule based on the CY 2016 claims data available for the proposed rule. We did not include in that determination those APCs where

a 2 times rule violation was not a relevant concept, such as APC 5401 (Dialysis), which only has two HCPCS codes assigned to it that have similar geometric mean costs and do not create a 2 times rule violation. Therefore, we have only identified those APCs, including those with criteria-based costs, such as device-dependent CPT/HCPCS codes, with 2 times rule violations.

We note that, for cases in which a recommendation by the HOP Panel appears to result in or allow a violation of the 2 times rule, we may accept the HOP Panel's recommendation because those recommendations are based on explicit consideration (that is, a review of the latest OPPS claims data and group discussion of the issue) of resource use, clinical homogeneity, site of service, and the quality of the claims data used to determine the APC payment rates.

Table 16 of the proposed rule listed the 12 APCs for which we proposed to make exceptions under the 2 times rule for CY 2018 based on the criteria cited above and claims data submitted between January 1, 2016, and December 31, 2016, that were processed on or before December 31, 2016. We indicated that, for the final rule with comment period, we intended to use claims data for dates of service between January 1, 2016, and December 31, 2016, that were processed on or before June 30, 2017, and updated CCRs, if available.

Based on the updated final rule CY 2016 claims data used for this CY 2018 final rule with comment period, we were able to remedy 6 APC violations out of the 12 APCs that appeared in Table 16 of the CY 2018 OPPS/ASC proposed rule. Specifically, we found that the following 6 APCs no longer met the criteria for exception to the 2 times rule in this final rule with comment period:

- APC 5161 (Level 1 ENT Procedures);
- APC 5311 (Level 1 Lower GI Procedures);
- APC 5461 (Level 1 Neurostimulator and Related Procedures);
- APC 5573 (Level 3 Imaging with Contrast);
- APC 5611 (Level 1 Therapeutic Radiation Treatment Preparation); and
- APC 5735 (Level 5 Minor Procedures).

Secondly, based on our analysis of the final rule claims data, we found a total of 11 APCs with violations of the 2 times rule. Of these 11 total APCs, 6 were identified in the proposed rule and 5 are newly identified APCs. Specifically, we found the following 6 APCs from the proposed rule continued

to have violations of the 2 times rule for this final rule with comment period:

- APC 5112 (Level 2 Musculoskeletal Procedures);
- APC 5521 (Level 1 Imaging without Contrast);
- APC 5691 (Level 1 Drug Administration);
- APC 5731 (Level 1 Minor Procedures);
- APC 5771 (Cardiac Rehabilitation); and
- APC 5823 (Level 3 Health and Behavior Services).

In addition, we found that the following 5 additional APCs violated the 2 times rule using the final rule with comment period claims data:

- APC 5522 (Level 2 Imaging without Contrast);
- APC 5524 (Level 4 Imaging without Contrast);
- APC 5571 (Level 1 Imaging with Contrast);
- APC 5721 (Level 1 Diagnostic Tests and Related Services); and
- APC 5732 (Level 2 Minor Procedures).

Comment: Some commenters requested that CMS not adopt the exception to C-APCs, including C-APC 5112 (Level 2 Musculoskeletal Procedures), because they believed it would result in lowering the payments for the procedures assigned to C-APCs. According to the commenters, because C-APCs involve complex combinations of items and services where appropriate valuation is critical, CMS should not adopt exceptions that have the result of lowering the overall payment rate for associated procedures. Instead, as one commenter suggested, CMS should establish additional APC levels to avoid any exceptions to the 2 times rule.

Response: We do not agree that we should establish a new APC for every group that violates the 2 times rule. We believe that excepting certain APCs from the 2 times rule is necessary, especially for procedures assigned to the same APC based on clinical homogeneity. As we have seen throughout the years since the implementation of the OPPS on August 1, 2000, APCs excepted in one year are usually resolved the following year based on our analysis of the latest claims data used for ratesetting. For example, we listed C-APC 5165 (Level 5 ENT Procedures) in Table 19 of the CY 2016 OPPS/ASC final rule with comment period (80 FR 70374) as one of the APCs that violated the 2 times rule for CY 2016. However, this same APC no longer appeared in Table 9 of the CY 2017 OPPS/ASC final rule with comment period (81 FR 79614) as excepted from the 2 times rule. We

believe that the anomalies seen in one year but not the next year for a given APC are the result of more accurate coding and charge master identification by HOPDs.

After considering the public comments we received on APC assignments and our analysis of the CY 2016 costs from hospital claims and cost report data available for this CY 2018 final rule with comment period, we are finalizing our proposals with some modifications. Specifically, we are finalizing our proposal to except 6 of the 12 proposed APCs from the 2 times rule for CY 2018 (APCs 5112, 5521, 5691, 5731, 5771, and 5823), and also excepting 5 additional APCs (APCs 5522, 5524, 5571, 5721, and 5732). As noted above, we were able to remedy the other 6 of the proposed rule 2 time violations in this final rule with comment period.

Table 14 below lists the 11 APCs that we are excepting from the 2 times rule for CY 2018 based on the criteria described earlier and a review of updated claims data for dates of service between January 1, 2016 and December 31, 2016, that were processed on or before June 30, 2017, and updated CCRs, if available. We note that, for cases in which a recommendation by the HOP Panel appears to result in or allow a violation of the 2 times rule, we generally accept the HOP Panel's recommendation because those recommendations are based on explicit consideration of resource use, clinical homogeneity, site of service, and the quality of the claims data used to determine the APC payment rates. The geometric mean costs for hospital outpatient services for these and all other APCs that were used in the development of this final rule with comment period can be found on the CMS Web site at: <http://www.cms.gov>.

TABLE 14—APC EXCEPTIONS TO THE 2 TIMES RULE FOR CY 2018

APC	CY 2018 APC title
5112	Level 2 Musculoskeletal Procedures.
5521	Level 1 Imaging without Contrast.
5522	Level 2 Imaging without Contrast.
5524	Level 4 Imaging without Contrast.
5571	Level 1 Imaging with Contrast.
5691	Level 1 Drug Administration.
5721	Level 1 Diagnostic Tests and Related Services
5731	Level 1 Minor Procedures.
5732	Level 2 Minor Procedures.
5771	Cardiac Rehabilitation.
5823	Level 3 Health and Behavior Services.

C. New Technology APCs

1. Background

In the November 30, 2001 final rule (66 FR 59903), we finalized changes to the time period in which a service can be eligible for payment under a New Technology APC. Beginning in CY 2002, we retain services within New Technology APC groups until we gather sufficient claims data to enable us to assign the service to an appropriate clinical APC. This policy allows us to move a service from a New Technology APC in less than 2 years if sufficient data are available. It also allows us to retain a service in a New Technology APC for more than 2 years if sufficient data upon which to base a decision for reassignment have not been collected.

For CY 2017, there are 51 New Technology APC levels, ranging from the lowest cost band assigned to APC 1491 (New Technology—Level 1A (\$0–\$10)) through the highest cost band assigned to APC 1906 (New Technology—Level 51 (\$140,001–\$160,000)). In the CY 2004 OPSS final rule with comment period (68 FR 63416), we restructured the New Technology APCs to make the cost intervals more consistent across payment levels and refined the cost bands for these APCs to retain two parallel sets of New Technology APCs, one set with a status indicator of “S” (Significant Procedures, Not Discounted when Multiple. Paid under OPSS; separate APC payment) and the other set with a status indicator of “T” (Significant Procedure, Multiple Reduction Applies. Paid under OPSS; separate APC payment). These current New Technology APC configurations allow us to price new technology services more appropriately and consistently.

We note that the cost bands for the New Technology APCs, specifically, APCs 1491 through 1599 and 1901 through 1906, vary with increments ranging from \$10 to \$19,999. These cost bands identify the APCs to which new technology procedures and services with estimated service costs that fall within those cost bands are assigned under the OPSS. Payment for each APC is made at the mid-point of the APC's assigned cost band. For example, payment for New Technology APC 1507 (New Technology—Level 7 (\$501–\$600)) is made at \$550.50.

Every year, we receive several requests for higher payment amounts under the New Technology APCs for specific procedures paid under the OPSS because they require the use of expensive equipment. As we did in the CY 2018 OPSS/ASC proposed rule, we

are taking this opportunity to reiterate our response, in general, to the issue of hospitals' capital expenditures as they relate to the OPSS and Medicare, as specified in the CY 2016 OPSS/ASC final rule with comment period (80 FR 70374).

Under the OPSS, one of our goals is to make payments that are appropriate for the services that are necessary for the treatment of Medicare beneficiaries. The OPSS, like other Medicare payment systems, is budget neutral and increases are limited to the annual hospital inpatient market basket increase. We believe that our payment rates generally reflect the costs that are associated with providing care to Medicare beneficiaries. Furthermore, we believe that our payment rates are adequate to ensure access to services (80 FR 70374).

For many emerging technologies, there is a transitional period during which utilization may be low, often because providers are first learning about the techniques and their clinical utility. Quite often, parties request that Medicare make higher payment amounts under the New Technology APCs for new procedures in that transitional phase. These requests, and their accompanying estimates for expected total patient utilization, often reflect very low rates of patient use of expensive equipment, resulting in high per use costs for which requesters believe Medicare should make full payment. Medicare does not, and we believe should not, assume responsibility for more than its share of the costs of procedures based on projected utilization for Medicare beneficiaries and does not set its payment rates based on initial projections of low utilization for services that require expensive capital equipment. For the OPSS, we rely on hospitals to make informed business decisions regarding the acquisition of high-cost capital equipment, taking into consideration their knowledge about their entire patient base (Medicare beneficiaries included) and an understanding of Medicare's and other payers' payment policies. (We refer readers to the CY 2013 OPSS/ASC final rule with comment period (77 FR 68314) for further discussion regarding this payment policy.)

We note that, in a budget neutral environment, payments may not fully cover hospitals' costs in a particular circumstance, including those for the purchase and maintenance of capital equipment. We rely on hospitals to make their decisions regarding the acquisition of high-cost equipment with the understanding that the Medicare program must be careful to establish its

initial payment rates, including those made through New Technology APCs, for new services that lack hospital claims data based on realistic utilization projections for all such services delivered in cost-efficient hospital outpatient settings. As the OPSS acquires claims data regarding hospital costs associated with new procedures, we regularly examine the claims data and any available new information regarding the clinical aspects of new procedures to confirm that our OPSS payments remain appropriate for procedures as they transition into

mainstream medical practice (77 FR 68314).

2. Revised and Additional New Technology APC Groups

As stated earlier, for CY 2017, there are currently 51 levels of New Technology APCs. To improve our ability to have payments for services over \$100,000 more closely match the cost of the service, in the CY 2018 OPSS/ASC proposed rule (82 FR 33606), for CY 2018, we proposed to narrow the increments for New Technology APCs 1901–1906 from \$19,999 cost bands to \$14,999 cost bands. We also proposed to add New Technology APCs 1907 and

1908 (New Technology Level 52 (\$145,001–\$160,000), which would allow for an appropriate payment of retinal prosthesis implantation procedures, which is discussed later in this section. Table 17 of the proposed rule included the complete list of the proposed modified and additional New Technology APC groups for CY 2018.

We did not receive any public comments on our proposal. Therefore, we are finalizing the proposal, without modification. Table 15 below includes the complete list of the final modified and additional New Technology APC groups for CY 2018.

TABLE 15—CY 2018 ADDITIONAL NEW TECHNOLOGY APC GROUPS

CY 2018 APC	CY 2018 APC title	CY 2018 SI	Updated or new APC
1901	New Technology—Level 49 (\$100,001–\$115,000)	S	Updated.
1902	New Technology—Level 49 (\$100,001–\$115,000)	T	Updated.
1903	New Technology—Level 50 (\$115,001–\$130,000)	S	Updated.
1904	New Technology—Level 50 (\$115,001–\$130,000)	T	Updated.
1905	New Technology—Level 51 (\$130,001–\$145,000)	S	Updated.
1906	New Technology—Level 51 (\$130,001–\$145,000)	T	Updated.
1907	New Technology—Level 52 (\$145,001–\$160,000)	S	New.
1908	New Technology—Level 52 (\$145,001–\$160,000)	T	New.

The final payment rates for New Technology APCs 1901 through 1908 are included in Addendum A to this final rule with comment period (which is available via the Internet on the CMS Web site).

3. Procedures Assigned to New Technology APC Groups for CY 2018

As we explained in the CY 2002 OPSS final rule with comment period (66 FR 59902), we generally retain a procedure in the New Technology APC to which it is initially assigned until we have obtained sufficient claims data to justify reassignment of the procedure to a clinically appropriate APC.

In addition, in cases where we find that our initial New Technology APC assignment was based on inaccurate or inadequate information (although it was the best information available at the time), where we obtain new information that was not available at the time of our initial New Technology APC assignment, or where the New Technology APCs are restructured, we may, based on more recent resource utilization information (including claims data) or the availability of refined New Technology APC cost bands, reassign the procedure or service to a different New Technology APC that more appropriately reflects its cost (66 FR 59903).

Consistent with our current policy, for CY 2018, in the CY 2018 OPSS/ASC proposed rule (82 FR 33606), we

proposed to retain services within New Technology APC groups until we obtain sufficient claims data to justify reassignment of the service to a clinically appropriate APC. The flexibility associated with this policy allows us to reassign a service from a New Technology APC in less than 2 years if sufficient claims data are available. It also allows us to retain a service in a New Technology APC for more than 2 years if sufficient claims data upon which to base a decision for reassignment have not been obtained (66 FR 59902).

a. Magnetic Resonance-Guided Focused Ultrasound Surgery (MRgFUS) (APCs 1537, 5114, and 5414)

As discussed in the CY 2018 OPSS/ASC proposed rule (82 FR 33607), currently, there are four CPT/HCPCS codes that describe magnetic resonance image guided high intensity focused ultrasound (MRgFUS) procedures, three of which we proposed to continue to assign to standard APCs and one of which we proposed to continue to assign to a New Technology APC for CY 2018. These codes include CPT codes 0071T, 0072T, and 0398T, and HCPCS code C9734. CPT codes 0071T and 0072T are used for the treatment of uterine fibroids, CPT code 0398T is used for the treatment of essential tremor, and HCPCS code C9734 is used

for pain palliation for metastatic bone cancer.

As shown in Table 18 of the proposed rule, and as listed in Addendum B of the CY 2018 OPSS/ASC proposed rule, we proposed to continue to assign CPT codes 0071T and 0072T to APC 5414 (Level 4 Gynecologic Procedures), with a proposed payment rate of approximately \$2,189 for CY 2018. We also proposed to continue to assign the APC to status indicator “J1” (Hospital Part B services paid through a comprehensive APC) to indicate that all covered Part B services on the claim are packaged with the payment for the primary “J1” service for the claim, except for services assigned to OPSS status indicator “F”, “G”, “H”, “L”, and “U”; ambulance services; diagnostic and screening mammography; all preventive services; and certain Part B inpatient services. In addition, we proposed to continue to assign HCPCS code C9734 (Focused ultrasound ablation/therapeutic intervention, other than uterine leiomyomata, with magnetic resonance (mr) guidance) to APC 5114 (Level 4 Musculoskeletal Procedures), with a proposed payment rate of approximately \$5,385 for CY 2018. We also proposed to continue to assign HCPCS code C9734 to status indicator “J1”.

Further, we proposed to continue to assign CPT code 0398T to APC 1537 (New Technology—Level 37 (\$9,501–

\$10,000)), with a proposed payment rate of \$9,750.50 for CY 2018. At the time the proposed rule was developed, there was only one claim for CPT code 0398T with a geometric mean cost of \$27,516. We referred readers to Addendum B to the proposed rule for the proposed payment rates for all codes reportable under the OPPIs. Addendum B is available via the Internet on the CMS Web site.

Comment: Several commenters stated that the proposed payment rate for CPT code 0398T is too low and recommended that CPT code 0398T be assigned to either New Technology APC 1578 (New Technology—Level 41 (\$25,001–\$30,000)) or APC 5464 (Level 4 Neurostimulator and Related Procedures), which have payment rates closer to the reported cost of the procedure of \$27,500 based on the one claim available at the time of the development of the proposed rule. Commenters also noted that the resources required for the procedure described by CPT code 0398T are substantially more than the resources required for the procedure described by CPT code C9734, which had been used by CMS to attempt to model the cost of the procedure described by CPT code 0398T.

Response: We appreciate the concerns of the commenters and, for the reasons set forth below, agree that the proposed payment rate for CPT code 0398T may be too low and the procedure should be reassigned to a different APC. The proposed payment rate for CPT code 0398T was based on the payment rate for HCPCS code C9734 because the

MRgFUS equipment used in the performance of the procedure described by CPT code 0398T is very similar to the MRgFUS equipment used in the performance of the procedure described by HCPCS code C9734. Both machines are made by the same manufacturer (81 FR 79642). However, based on information from the manufacturer, resources involved for the procedure described by CPT code 0398T appear to be higher than those involved for the procedure described by HCPCS code C9734. In addition, we still have concerns that the costs reported from the one claim for the procedure described by CPT code 0398T may not accurately reflect the geometric mean costs of the procedure. However, the geometric mean cost of \$29,254 for the one claim means the cost of CPT code 0398T is substantially higher than the proposed payment rate of \$9,750.50. We note that, for CY 2017, the manufacturer indicated that an appropriate payment for the procedure described by CPT code 0398T would be approximately \$18,000 and that either a New Technology APC paying that amount or assignment to clinical APC 5463 (Level 3 Neurostimulator and Related Procedures) would be appropriate. Based on the presence of only one claim along with the reported costs associated with the procedure described by CPT code 0398T presented to us last year by the manufacturer, we believe that it is appropriate to assign the procedure described by CPT code 0398T to APC 1576 (New Technology—Level 39 (\$15,001–\$20,000)), with a payment rate of \$17,500.50 for CY 2018. The

continued New Technology APC assignment will allow time to collect more claims data before assigning CPT code 0398T to a clinical APC.

Comment: One commenter supported the proposal to assign CPT code C9734 to APC 5114.

Response: We appreciate the commenter’s support.

In summary, after consideration of the public comments we received, we are modifying our proposal for the APC assignment of CPT code 0398T. Instead of continuing to assign this code to New Technology APC 1537 (New Technology—Level 37 (\$9,501–\$10,000)), with a payment rate of \$9,750.50, for CY 2018, we are reassigning CPT code 0398T to New Technology APC 1576 (New Technology—Level 39 (\$15,001–\$20,000)), with a payment rate of \$17,500.50. In addition, we are finalizing our proposal, without modification, to reassign HCPCS code C9734 to APC 5114. We did not receive any public comments related to our proposal for CPT codes 0071T and 0072T. Therefore, we are finalizing our proposal to continue to assign these CPT codes to APC 5414 without modification. Table 16 below lists the final CY 2018 status indicator and APC assignments for the magnetic resonance image guided high intensity focused ultrasound (MRgFUS) procedures. We refer readers to Addendum B of this final rule with comment period for the final payment rates for all codes reportable under the OPPIs. Addendum B is available via the Internet on the CMS Web site.

TABLE 16—CY 2018 STATUS INDICATOR (SI) AND APC ASSIGNMENT FOR THE MAGNETIC RESONANCE IMAGE GUIDED HIGH INTENSITY FOCUSED ULTRASOUND (MRgFUS) PROCEDURES

CPT/HCPCS code	Long descriptor	CY 2017 OPPIs SI	CY 2017 OPPIs APC	CY 2017 OPPIs payment rate	CY 2018 OPPIs SI	CY 2018 OPPIs APC	CY 2018 OPPIs payment rate
0071T	Focused ultrasound ablation of uterine leiomyomata, including mr guidance; total leiomyomata volume less than 200 cc of tissue.	J1	5414	\$2,084.59	J1	5414	Refer to OPPIs Addendum B.
0072T	Focused ultrasound ablation of uterine leiomyomata, including mr guidance; total leiomyomata volume greater or equal to 200 cc of tissue.	J1	5414	2,084.59	J1	5414	Refer to OPPIs Addendum B.
0398T	Magnetic resonance image guided high intensity focused ultrasound (mrgfus), stereotactic ablation lesion, intracranial for movement disorder including stereotactic navigation and frame placement when performed.	S	1537	9,750.50	S	1576	Refer to OPPIs Addendum B.

TABLE 16—CY 2018 STATUS INDICATOR (SI) AND APC ASSIGNMENT FOR THE MAGNETIC RESONANCE IMAGE GUIDED HIGH INTENSITY FOCUSED ULTRASOUND (MRgFUS) PROCEDURES—Continued

CPT/HCPCS code	Long descriptor	CY 2017 OPPTS SI	CY 2017 OPPTS APC	CY 2017 OPPTS payment rate	CY 2018 OPPTS SI	CY 2018 OPPTS APC	CY 2018 OPPTS payment rate
C9734	Focused ultrasound ablation/therapeutic intervention, other than uterine leiomyomata, with magnetic resonance (mr) guidance.	J1	5114	5,219.36	J1	5114	Refer to OPPTS Addendum B.

c. Retinal Prosthesis Implant Procedure

CPT code 0100T (Placement of a subconjunctival retinal prosthesis receiver and pulse generator, and implantation of intra-ocular retinal electrode array, with vitrectomy) describes the implantation of a retinal prosthesis, specifically, a procedure involving the use of the Argus® II Retinal Prosthesis System. This first retinal prosthesis was approved by the FDA in 2013 for adult patients diagnosed with advanced retinitis pigmentosa. Pass-through payment status was granted for the Argus® II device under HCPCS code C1841 (Retinal prosthesis, includes all internal and external components) beginning October 1, 2013, and this status expired on December 31, 2015. We note that after pass-through payment status expires for a medical device, the payment for the device is packaged into the payment for the associated surgical procedure. Consequently, for CY 2016, the device described by HCPCS code C1841 was assigned to OPPTS status indicator “N” to indicate that payment for the device is packaged and included in the payment rate for the surgical procedure described by CPT code 0100T. For CY 2016, CPT code 0100T was assigned to New Technology APC 1599 with a payment rate of \$95,000, which was the highest paying New Technology APC for that year. This payment includes both the surgical procedure (CPT code 0100T) and the use of the Argus® II device (HCPCS code C1841). However, stakeholders (including the device manufacturer and hospitals) believed that the CY 2016 payment rate for the procedure involving the Argus® II System was insufficient to cover the hospital cost of performing the procedure, which includes the cost of the retinal prosthesis with a retail price of approximately \$145,000.

For CY 2017, analysis of the CY 2015 OPPTS claims data used for the CY 2017 final rule with comment period showed 9 single claims (out of 13 total claims) for CPT code 0100T, with a geometric

mean cost of approximately \$142,003 based on claims submitted between January 1, 2015, through December 31, 2015, and processed through June 30, 2016. Based on the CY 2015 OPPTS claims data available for the final rule with comment period and our understanding of the Argus® II procedure, we reassigned CPT code 0100T from New Technology APC 1599 to New Technology APC 1906, with a final payment rate of \$150,000.50 for CY 2017. We noted that this payment rate included the cost of both the surgical procedure (CPT code 0100T) and the retinal prosthesis device (HCPCS code C1841).

As discussed in the CY 2018 OPPTS/ASC proposed rule (82 FR 33607 through 33608), for the CY 2018 update, analysis of the CY 2016 OPPTS claims data used for the CY 2018 proposed rule showed 3 single claims (out of 3 total claims) for CPT code 0100T, with a geometric mean cost of approximately \$116,239 based on the claims submitted between January 1, 2016 through December 31, 2016, and processed through December 31, 2016. We stated in the proposed rule that, for the CY 2018 OPPTS/ASC final rule with comment period, the final payment rate would be based on claims submitted between January 1, 2016 and December 31, 2016, and processed through June 30, 2017.

In the proposed rule, based on the CY 2016 OPPTS claims data available, which showed a geometric mean cost of approximately \$116,239, we proposed to reassign the Argus® II procedure to a New Technology APC with a payment band that covers the geometric mean cost of the procedure. Therefore, we proposed to reassign CPT code 0100T to APC 1904 (New Technology—Level 50 (\$115,001–\$130,000)), with a proposed payment of \$122,500.50 for CY 2018. We invited public comments on this proposal.

Comment: One commenter, the manufacturer, opposed the proposal to reassign CPT code 0100T to APC 1904, with a proposed payment of

\$122,500.50 for CY 2018. Instead, the commenter requested that CMS reassign CPT code 0100T to a New Technology APC that would establish a payment rate near the CY 2017 payment rate of \$150,000.50. The commenter stated that the estimated cost of the service generated from 3 claims reported in CY 2016 is much lower than the actual cost of the procedure. The commenter believed the lower cost of the procedure described by CPT code 0100T is a result of CMS’ decision to set the payment rate of the procedure at \$95,000 for CY 2016 based on 2 claims, for which the submitting hospital stated the charges reported were mistakenly low. The commenter asserted that the lower payment rate forced the manufacturer of the Argus® II to provide a substantial discount for the device, which is reflected in the lower reported cost for the Argus® II procedure in CY 2016. This commenter and a second commenter were concerned with the high level of variation in payment for a low volume service like the Argus® II procedure from year to year. The commenters requested payment of approximately \$150,000 for CPT code 0100T in CY 2018 to break the cycle of extremely volatile year-to-year shifts of the payment for the procedure described by this CPT code and noted its expectation that claims for CY 2017 (which would be used for the CY 2019 rulemaking) would reflect a significantly higher average cost than those for CY 2016.

Response: We understand the concerns of the commenters. The reported cost of the Argus® II procedure based on the updated CY 2016 hospital outpatient claims data, which include additional claims received after issuance of the CY 2018 proposed rule and finalized as of June 30, 2017, is approximately \$94,455, which is more than \$55,000 less than the payment rate for the procedure in CY 2017. We note that the costs of the Argus® II procedure are extraordinarily high compared to many other procedures paid under the OPPTS. In addition, the number of claims

submitted has, to date, been very low and has not exceeded 10 claims. We believe it is important to mitigate significant payment differences, especially shifts of several tens of thousands of dollars, while also basing payment rates on available costs information and claims data. In CY 2016, the payment rate for the Argus® II procedure was \$95,000.50. The payment rate increased to \$150,000.50 in CY 2017. For CY 2018, we proposed a payment rate of \$122,500.50 based on the most recent claims data available at the time of the development of the proposed rule. However, if we were to assign the payment rate based on updated final rule claims data, the payment rate would decrease, to \$95,000.50 for CY 2018, a decrease of \$55,000 relative to CY 2017. We are concerned that these large changes in payment could potentially create an access to care issue for the Argus® II procedure. While we believe that the proposed payment rate of \$122,500.50 is a significant decrease, we believe that it would be appropriate to finalize the proposed rate to mitigate a much sharper decline in payment from one year to the next (as well as from the proposed rule to the final rule).

In accordance with section 1833(t)(2)(B) of the Act, we must establish that services classified within each APC are comparable clinically and with respect to the use of resources. Accordingly, we are using our equitable adjustment authority under section 1833(t)(2)(E) of the Act, which states that the Secretary shall establish, in a budget neutral manner, other adjustments as determined to be necessary to ensure equitable payments, to maintain the proposed rate for this procedure, despite the lower geometric mean costs available in the claims data used for this final rule with comment period. As stated earlier, we believe that

this situation is unique, given the high cost and very limited number of claims for the procedure. Therefore, for CY 2018, we are reassigning the Argus® II procedure to APC 1904 (New Technology—Level 50 (\$115,001–\$130,000)). This APC assignment will establish a payment rate for the Argus® II procedure of \$122,500.50, which is the arithmetic mean of the payment rates for the service for CY 2016 and CY 2017. As we do each year, we acquire claims data regarding hospital costs associated with new procedures. We regularly examine the claims data and any available new information regarding the clinical aspects of new procedures to confirm that our OPPI payments remain appropriate for procedures like the Argus® II procedure as they transition into mainstream medical practice (77 FR 68314).

After consideration of the public comments we received, we are finalizing our proposal to reassign CPT code 0100T to APC 1904 through use of our equitable adjustment authority. We are reassigning CPT code 0100T from APC 1906 (New Technology—Level 51 (\$140,001–\$160,000)), which has a final payment rate of \$150,000.50 for CY 2017, to APC 1904 (New Technology—Level 50 \$115,001–\$130,000)), which has a final payment rate of \$122,500.50 for CY 2018. We note this payment includes both the surgical procedure (CPT code 0100T) and the use of the Argus® II device (HCPCS code C1841).

d. Pathogen Test for Platelets

As stated in the CY 2018 OPPI/ASC proposed rule (82 FR 33608), the CMS HCPCS Workgroup established HCPCS code Q9987 (Pathogen(s) test for platelets), effective July 1, 2017. HCPCS code Q9987 will be used to report any test used to identify bacterial or other pathogen contamination in blood platelets. Currently, there is one test

approved by the FDA that is described by HCPCS code Q9987. The test is a rapid bacterial test, and the manufacturer estimates the cost of the test to be between \$26 and \$35. HCPCS code Q9987 was established after concerns from blood and blood product stakeholders that the previous CPT code used to describe pathogen tests for platelets, CPT code P9072 (Platelets, pheresis, pathogen reduced or rapid bacterial tested, each unit), inappropriately described rapid bacterial testing by combining the test with the pathogen reduction of platelets. CPT code P9072 is inactive effective on July 1, 2017.

In the CY 2018 OPPI/ASC proposed rule, we sought more information on the actual costs of pathogen tests for platelets before assigning HCPCS code Q9987 to a clinical APC. Effective July 1, 2017, HCPCS code Q9987 is assigned to New Technology APC 1493 (New Technology—Level 1C (\$21–\$30)), with a payment rate of \$25.50. We proposed to continue to assign HCPCS code Q9987 to New Technology APC 1493, with a proposed payment rate of \$25.50, until such time as claims data are available to support the assignment to a clinical APC. We invited public comments on this proposal.

Comment: Two commenters supported the proposal to continue to provide separate payment for HCPCS code Q9987.

Response: We appreciate the commenters' support.

After consideration of the public comments we received, we are finalizing our proposal to continue separate payment for HCPCS code Q9987 for CY 2018, with a modification that HCPCS code Q9987 will be replaced by HCPCS code P9100 (Pathogen(s) test for platelets). Table 17 below contains more information on the coding change.

TABLE 17—REPLACEMENT CODE FOR HCPCS CODE Q9987 AS OF JANUARY 1, 2018

CY 2017 HCPCS code	CY 2018 HCPCS code	CY 2018 long descriptor	Final CY 2018 SI	Final CY 2018 APC
Q9987	P9100	Pathogen(s) test for platelets	S	1493

e. Fractional Flow Reserve Derived From Computed Tomography (FFR_{CT})

For CY 2018, the AMA CPT Editorial Panel established four new CPT codes for fractional flow reserve derived from computed tomography (FFR_{CT}). Table 18 below lists the new CPT codes along with their complete descriptors. These codes were listed in Addendum B and Addendum O to the CY 2018 OPPI/ASC

proposed rule (which is available via the Internet on the CMS Web site). Addendum B included the proposed status indicator assignments for the new codes and their assignment to comment indicator “NP” (New code for the next calendar year or existing code with substantial revision to its code descriptor in the next calendar year as compared to current calendar year,

proposed APC assignment; comments will be accepted on the proposed APC assignment for the new code). Addendum O included the proposed/placeholder CY 2018 CPT codes and the long descriptors.

We note that the CPT code descriptors that appeared in Addendum B were short descriptors and did not fully describe the complete procedure,

service, or item identified for the CPT codes. Therefore, we included the 5-digit placeholder codes and their long descriptors in Addendum O to the proposed rule, specifically under the column labeled “CY 2018 OPPS/ASC Proposed Rule 5-Digit AMA Placeholder Code,” so that the public could adequately comment on our proposed APC and status indicator assignments. We also indicated that the final CPT

code numbers would be included in this CY 2018 OPPS/ASC final rule with comment period. The final CPT code numbers, along with their corresponding 5-digit placeholder codes, can be found in Table 19 below. As displayed in Table 18 and in Addendum B of the CY 2018 OPPS/ASC proposed rule, we proposed to assign CPT codes 0501T and 0504T to status indicator “M” (Not paid under OPPS;

Items and Services Not Billable to the MAC) to indicate that these services are not paid under the OPPS, and to assign CPT codes 0502T and 0503T to status indicator “N” (packaged) to indicate that the payment for these services is packaged into the primary service or procedure that is reported with the codes.

TABLE 18—PROPOSED CY 2018 STATUS INDICATOR (SI) ASSIGNMENT FOR THE NEW FFR_{CT} CPT CODES EFFECTIVE JANUARY 1, 2018

CPT code	CY 2018 OPPS/ASC proposed rule placeholder code	Long descriptor	Proposed CY 2018 OPPS SI	Proposed CY 2018 OPPS APC	Proposed CY 2018 OPPS payment
0501T	02X4T	Non-invasive estimated coronary fractional flow reserve (FFR) derived from coronary computed tomography angiography data using computation fluid dynamics physiologic simulation software analysis of functional data to assess the severity of coronary artery disease; data preparation and transmission, analysis of fluid dynamics and simulated maximal coronary hyperemia, generation of estimated FFR model, with anatomical data review in comparison with estimated FFR model to reconcile discordant data, interpretation and report.	M	N/A	N/A
0502T	02X5T	Non-invasive estimated coronary fractional flow reserve (FFR) derived from coronary computed tomography angiography data using computation fluid dynamics physiologic simulation software analysis of functional data to assess the severity of coronary artery disease; data preparation and transmission.	N	N/A	N/A
0503T	02X6T	Non-invasive estimated coronary fractional flow reserve (FFR) derived from coronary computed tomography angiography data using computation fluid dynamics physiologic simulation software analysis of functional data to assess the severity of coronary artery disease; analysis of fluid dynamics and simulated maximal coronary hyperemia, and generation of estimated FFR model.	N	N/A	N/A
0504T	02X7T	Non-invasive estimated coronary fractional flow reserve (FFR) derived from coronary computed tomography angiography data using computation fluid dynamics physiologic simulation software analysis of functional data to assess the severity of coronary artery disease; anatomical data review in comparison with estimated FFR model to reconcile discordant data, interpretation and report.	M	N/A	N/A

According to the FDA, FFR_{CT} uses post-processing software to create “a mathematically derived quantity, computed from simulated pressure, velocity and blood flow information obtained from a 3D computer model generated from static coronary CT images.”¹ FFR_{CT} is performed outside the outpatient hospital setting by HeartFlow, which uses proprietary software to conduct the analysis. Hospital outpatient providers use industry-leading protocols and technologies at every step to ensure protection of patient data and that the CT images are securely transferred to HeartFlow.² After FFR_{CT} is performed, a

report is generated that provides fractional flow reserve values throughout the coronary blood vessels, which allows providers to determine treatment strategies based on the findings of the report while considering the patient’s medical history, symptoms, and results of other diagnostic tests. The developer of FFR_{CT} first submitted an application for the procedure to be given a temporary procedure code and assigned to a New Technology APC in March 2016. CMS denied the developer’s application because we considered the FFR_{CT} procedure to be an image guidance, processing, supervision, or interpretation service whose payment should be packaged into the payment for the related computed tomography service, in accordance with our

regulations at 42 CFR 419.2(b)(13). The developer then filed a New Technology APC reconsideration request in March 2017 asking that CMS reverse its denial of the developer’s application to have the FFR_{CT} assigned to a New Technology APC. We reviewed the reconsideration request and denied the request for the same reason as we did in March 2016. In a New Technology APC application for HeartFlow for CY 2018, the developer of the FFR_{CT} service proposed that the service be reported with CPT code 0503T (Non-invasive estimated coronary fractional flow reserve (FFR) derived from coronary computed tomography angiography data using computation fluid dynamics physiologic simulation software analysis of functional data to assess the severity of

¹ Available at: https://www.accessdata.fda.gov/cdrh_docs/reviews/DEN130045.pdf, page 1.
² Available at: <http://www.heartflow.com/>.

coronary artery disease; analysis of fluid dynamics and simulated maximal coronary hyperemia, and generation of estimated FFR model) and requested that the service be assigned to APC 1517 (New Technology—Level 17 (\$1501–\$1600)), with a payment rate of \$1,550.50. Because both the initial New Technology APC application and the reconsideration request were denied, we did not describe the associated New Technology APC application for HeartFlow in the CY 2018 OPPS/ASC proposed rule.

Comment: Several commenters, including the developer of HeartFlow and some clinicians who have experience with it, supported having a FFR_{CT} service paid as a separate service and not packaged into the payment for the coronary computed tomography angiography. The commenters stated that FFR_{CT} is performed separately from a coronary computed tomography angiography by an independent testing company that is not affiliated with any outpatient hospital provider and is performed at locations owned by the testing company. These commenters noted that the service may be performed several days or weeks after the original coronary computed tomography angiography is performed. Also, commenters noted that several physician societies involved in cardiac care recognize FFR_{CT} as a separate service from a coronary computed tomography angiography and requested that new CPT codes 0501T, 0502T, 0503T, and 0504T be established for FFR_{CT} services, effective January 1, 2018. The commenters stated that the physician societies and the AMA determined that a coronary computed tomography angiography and a FFR_{CT} service are not connected services.

Commenters asserted that a FFR_{CT} service provides information that cannot be obtained from standard analysis of a coronary computed tomography angiography image. Several commenters stated that FFR_{CT} services can improve the quality of screening for coronary artery disease (CAD) while reducing costs. That is, the commenters stated that, unlike a coronary computed tomography angiography service, which merely produces images, the FFR_{CT} service is able to directly produce FFR_{CT} values by creating a 3-D model of the patient's coronary arteries using the previously acquired image. Moreover, the commenters contended that, because the FFR_{CT} service does not produce images, it is improper to package the costs of FFR_{CT} into the payment for the associated coronary computed tomography angiography service.

Commenters stated that, many times, a coronary computed tomography angiography indicates that a beneficiary may potentially have CAD and that without FFR_{CT}, providers will often request an invasive coronary angiogram to verify the presence of CAD. In many cases, the invasive coronary angiogram finds no occurrence of CAD. FFR_{CT} services can provide analytic services not otherwise available to determine fractional flow rates in coronary arteries using the original coronary computed tomography angiography image and show whether a beneficiary has CAD without performing a coronary procedure.

The developer also stated that hospitals incur a cost charged by HeartFlow of \$1,500 to perform the FFR_{CT} analysis, and certain other modest costs (for example, overhead for interpretation and entering results into medical record). Therefore, the commenters stated that bundling the payment for FFR_{CT} with the payment for the coronary computed tomography angiography imaging service would prevent hospitals from using FFR_{CT} because the payment rate for the bundled coronary computed tomography angiography service would be less than \$300. One commenter (the developer) requested that the service be assigned to APC 1517 (New Technology—Level 17 (\$1501–\$1600)), with a payment rate of \$1,550.50.

Some commenters, including the developer, stated that CMS did not properly interpret the regulation at 42 CFR 419.2(b)(13) in its previous decisions to deny the FFR_{CT} application and reconsideration request to receive separate payment in a New Technology APC. Specifically, the FFR_{CT} developer and other commenters stated that the FFR_{CT} service was not an image guidance service because CMS stated in prior preamble language that an image guidance service must produce images. The commenters stated that a FFR_{CT} service does not produce images, but instead produces FFR values. They stated that the FFR_{CT} service is also not an image processing service because such processing services help to compile diagnostic data to create an image, and noted that, although the FFR_{CT} service analyzes image data, it is not used to construct an anatomic image. In addition, the commenters asserted that the FFR_{CT} service is not an imaging supervision or interpretation service. The commenters believed that imaging supervision and interpretation services should be performed on the same day and at the provider location as the independent imaging service; whereas the FFR_{CT} service can be

performed days or weeks after the original coronary computed tomography angiography service is performed and is performed in a specialized location outside of hospital. In addition, the commenters stated that imaging supervision and interpretation services are for radiological services that are mostly billed with the CPT radiological code set (CPT codes 70000–79999) and the FFR_{CT} service is not a radiological service and does not involve supervision or interpretation.

Response: We appreciate the comments we have received about the FFR_{CT} service. We have reviewed our image packaging regulations under 42 CFR 419.2(b)(13). This regulation states, in relevant part, that in determining the packaged costs for hospital outpatient prospective payment rates, the prospective payment system establishes a national payment rate, standardized for geographic wage differences, that includes operating and capital-related costs that are integral, ancillary, supportive, dependent, or adjunctive to performing a procedure or furnishing a service on an outpatient basis. In general, these packaged costs may include, but are not limited to, among other items and services, image guidance, processing, supervision, and interpretation services, the payment for which are packaged or conditionally packaged into the payment for the related procedures or services.

After reviewing the public comments, we agree with the commenters that the FFR_{CT} service is not image guidance or supervision because FFR_{CT} does not produce images, does not appear to be a supportive guidance service that aids in the performance of an independent procedure, and, unlike typical supervision services, is not generally reported when the initial image is acquired. However, we are concerned that it may be image processing and/or interpretation. We discuss these concerns below.

With respect to image processing, in the CY 2008 OPPS/ASC interim and final rule with comment period, we stated that an “image processing service processes and integrates diagnostic test data that were captured during another independent procedure, usually one that is separately payable under the OPPS. The image processing service is not necessarily provided on the same date of service as the independent procedure. In fact, several of the image processing services that we proposed to package for CY 2008 do not need to be provided face-to-face with the patient in the same encounter as the independent service” (72 FR 66625). In addition, we stated that we believed it was important

to package payment for supportive dependent services that accompany independent services but that may not need to be provided face-to-face with the patient in the same encounter because the supportive services utilize data that were collected during the preceding independent services and packaging their payment encourages the most efficient use of hospital resources. We noted that we were particularly concerned with any OPSS payment policies that could encourage certain inefficient and more costly service patterns. In addition, we stated that packaging encourages hospitals to establish protocols that ensure that services are furnished only when they are medically necessary and to carefully scrutinize the services ordered by practitioners to minimize unnecessary use of hospital resources (72 FR 66625).

FFRCT services necessarily require the use of the prior coronary computed tomography angiography image; the fact that the FFRCT service is done on a different date, at a different site, and by nonhospital staff does not, in and of itself, mean that the service is separate and distinct, from the CCTA. This is especially true because it is using a prior image acquired by the hospital for the patient and is used for the same purpose to diagnose CAD.

With respect to imaging interpretation, as stated in the CY 2008 OPSS/ASC final rule with comment period (72 FR 66630), we define “imaging supervision and interpretation codes” as HCPCS codes for services that are defined as “radiological supervision and interpretation” in the radiology series, codes 70000 through 79999 of the book of AMA CPT codes, with the addition of some services in other code ranges of CPT, Category III CPT tracking codes, or Level II HCPCS codes that are clinically similar or directly crosswalk to codes defined as radiological supervision and interpretation services in the CPT radiology range. The current

CPT FFRCT codes are Category III codes, and we believe they may be clinically similar to codes in the 70000 through 79999 range of the AMA book of CPT codes.

Nonetheless, we were persuaded by the commenters that the FFRCT service is a separate and distinct service from the original coronary computed tomography angiography service and should receive separate payment. Specifically, the commenters provided additional details since the denial of the new technology reconsideration request that FFRCT is not covered by the image packaging regulations under 42 CFR 419.2(b)(13). Most of the additional detail focuses on whether FFRCT is an image processing service. In particular, the FFRCT service generates data on FFR values that can only be obtained by performing the FFRCT service. Accordingly, we now believe that the FFRCT service should not be considered to be an image processing service because the diagnostic output of the FFRCT service yields functional values (that is, FFR values), which reflect the drop in pressure across a narrowing in a coronary artery as opposed to anatomic images. The CY 2008 OPSS/ASC final rule with comment period (72 FR 66625) states that image processing covers “supportive dependent services to process and integrate diagnostic test data in the development of images, indicating that an image processing service must help develop or otherwise visually enhance an image and the FFRCT service does neither. Further, we agree that the quantitative diagnostic information about the function of the coronary arteries produced by the FFRCT service is not possible to derive from examining anatomic images of the arteries. Additionally, we agree with the commenters that the FFRCT service does not support the diagnostic output of CCTA. Notably, CPT code 0503T does not mention processing, interpretation, or supervision. Further, the FDA

clearance refers to the FFRCT service as “post-processing image analysis software . . . using graphics and text [FFRCT] to aid the clinician in the assessment of coronary artery disease.”

Therefore, we conclude, based on the information available to us at this time, that the costs of the FFRCT service, as described by CPT code 0503T, should not be a packaged service under the regulation at 42 CFR 419.2(b)(13). Accordingly, we are assigning CPT code 0503T to a New Technology APC for CY 2018. We remind hospitals that, according to the Medicare statute, this service should only be furnished when reasonable and medically necessary for the purposes of diagnosis of and treatment a Medicare beneficiary.

In summary, after consideration of the public comments we received, we are finalizing our proposal for CPT codes 0501T, 0502T, and 0504T without modification. However, for CPT code 0503T, we are finalizing our proposal with modification. Specifically, we are reassigning CPT code 0503T from packaged status (status indicator “N”) to New Technology APC 1516 (New Technology—Level 16 (\$1401–\$1500)), with a payment rate of \$1,450.50 for CY 2018. We note our belief that CPT code 0503T covers payment for the majority of hospital resources involved in the HeartFlow service, and that CPT 0502T, which reflects data preparation and transmission, will be packaged under the OPSS.

Table 19 lists the final status indicator assignments for CPT codes 0501T, 0502T, 0503T, and 0504T. We refer readers to Addendum B to this final rule with comment period for the payment rates for all codes reported under the OPSS. In addition, we refer readers to Addendum A to this final rule with comment period for the status indicator meanings for all codes reported under the OPSS. Both Addendum A and B are available via the Internet on the CMS Web site.

TABLE 19—FINAL CY 2018 STATUS INDICATOR (SI) ASSIGNMENT FOR THE NEW FFR_{CT} CPT CODES EFFECTIVE JANUARY 1, 2018

CPT code	CY 2018 OPSS/ASC proposed rule placeholder code	Long descriptor	CY 2018 OPSS SI	CY 2018 OPSS APC	CY 2018 OPSS payment
0501T	02X4T	Non-invasive estimated coronary fractional flow reserve (FFR) derived from coronary computed tomography angiography data using computation fluid dynamics physiologic simulation software analysis of functional data to assess the severity of coronary artery disease; data preparation and transmission, analysis of fluid dynamics and simulated maximal coronary hyperemia, generation of estimated FFR model, with anatomical data review in comparison with estimated FFR model to reconcile discordant data, interpretation and report.	M	N/A	N/A.
0502T	02X5T	Non-invasive estimated coronary fractional flow reserve (FFR) derived from coronary computed tomography angiography data using computation fluid dynamics physiologic simulation software analysis of functional data to assess the severity of coronary artery disease; data preparation and transmission.	N	N/A	N/A.
0503T	02X6T	Non-invasive estimated coronary fractional flow reserve (FFR) derived from coronary computed tomography angiography data using computation fluid dynamics physiologic simulation software analysis of functional data to assess the severity of coronary artery disease; analysis of fluid dynamics and simulated maximal coronary hyperemia, and generation of estimated FFR model.	S	1516	Refer to OPSS Addendum B.
0504T	02X7T	Non-invasive estimated coronary fractional flow reserve (FFR) derived from coronary computed tomography angiography data using computation fluid dynamics physiologic simulation software analysis of functional data to assess the severity of coronary artery disease; anatomical data review in comparison with estimated FFR model to reconcile discordant data, interpretation and report.	M	N/A	N/A.

D. OPSS APC-Specific Policies

1. Blood-Derived Hematopoietic Cell Harvesting

HCPCS code 38205 describes blood-derived hematopoietic progenitor cell harvesting for transplantation, per collection; allogeneic. This code represents a donor acquisition cost for an allogeneic hematopoietic stem cell transplant (HSCT). In the CY 2010 OPSS/ASC final rule with comment period (74 FR 60575), we assigned HCPCS code 38205 to status indicator “B”, which indicates that this code is not recognized by the OPSS when submitted on an outpatient hospital Part B bill (type 12x and 13x).

In CY 2017, we finalized a C-APC for HSCT (81 FR 79586 through 79587). Payment for donor acquisition services for HSCT is included in the C-APC payment for the allogeneic stem cell transplant when the transplant occurs in the hospital outpatient setting. All donor acquisition costs, including the costs for HCPCS code 38205, should be reported on the same date of service as

the transplant procedure (HCPCS code 38240 (Hematopoietic progenitor (HPC); allogeneic transplantation per donor)) in order to be appropriately packaged for payment purposes. Hospitals are instructed to identify services required to acquire stem cells from a donor for allogeneic HSCT separately in Field 42 on Form CMS-1450 (or UB-04), with revenue code 0815 when an allogeneic stem cell transplant occurs. (We refer readers to the Medicare Claims Processing Manual (Pub. 100-04), Chapter 4, Section 231.11, and Chapter 3, Section 90.3.1.)

There are other donor acquisition costs, namely those costs for the procedure described by HCPCS code 38230 (Bone marrow harvesting for transplantation; allogeneic), that are assigned to status indicator “S”. For consistency and to ensure that the donor acquisition costs are captured accurately, in the CY 2018 OPSS/ASC proposed rule (82 FR 33608), for CY 2018, we proposed to change the status indicator assignment for the procedure described by HCPCS code 38205 from

“B” to “S”, which indicates that the procedure is paid under the OPSS and receives separate payment.

The CY 2016 claims data used for the proposed rule, which included claims submitted between January 1, 2016, and December 31, 2016, and processed on or before December 31, 2016, showed a geometric mean cost of approximately \$580 for HCPCS code 38205 based on 2 single claims (out of 8 total claims). The procedure described by HCPCS code 38205 has resource and clinical similarities to procedures assigned to APC 5242 (Level 2 Blood Product Exchange and Related Services). Therefore, we proposed to assign HCPCS code 38205 to APC 5242. We invited public comments on these proposals.

Comment: Several commenters opposed the proposal to change the status indicator assignment for the procedure described by HCPCS code 38205 from “B” to “S”. The commenters stated that this procedure represents a donor acquisition cost for allogeneic hematopoietic stem cell transplants for

which Medicare does not make separate payment because hospitals may bill and receive payment only for services provided to the Medicare beneficiary who is the recipient of the stem cell transplant and whose illness is being treated with the stem cell transplant. The commenters believed that a change from status indicator “B” to “S” may indicate to providers that they can bill donors for these services and lead to potential for erroneous separate payments if this code is billed with status indicator “S”. In addition, the HOP Panel recommended that CMS retain status indicator “B” for HCPCS code 38205. The commenters also encouraged CMS to look at the entire

series of bone marrow and stem cell transplant-related CPT codes to ensure consistency in terms of coding, billing guidance, appropriate APC assignment, and payment.

Response: We appreciate the commenters’ responses. We believed that changing the status indicator assignment from “B” to “S” for HCPCS code 38205 would be consistent with other donor acquisition costs and ensure that the donor acquisition costs for allogeneic HSCT are captured accurately. However, we agree with the commenters that this change could result in erroneous billing or misinterpretations by providers.

After consideration of the public comments we received, we are not

finalizing our proposal to change the status indicator assignment for the procedure described by HCPCS code 38205 from “B” to “S” and to assign HCPCS code 38205 to APC 5242.

2. Brachytherapy Insertion Procedures (C-APCs 5341 and 5092)

a. C-APC 5341 (Abdominal/Peritoneal/Biliary and Related Procedures)

For CY 2018, as displayed in Table 20 below and in Addendum B to the CY 2018 OPPTS/ASC proposed rule, we proposed to continue to assign CPT code 55920 to C-APC 5341 (Abdominal/Peritoneal/Biliary and Related Procedures), with a proposed payment rate of \$2,788.26.

TABLE 20—PROPOSED CY 2018 STATUS INDICATOR (SI), APC ASSIGNMENT, AND PAYMENT RATE FOR CPT CODE 55920

CPT code	Long descriptor	CY 2017 OPPTS SI	CY 2017 OPPTS APC	CY 2017 OPPTS payment rate	Proposed CY 2018 OPPTS SI	Proposed CY 2018 OPPTS APC	Proposed CY 2018 OPPTS payment rate
55920	Placement of needles or catheters into pelvic organs and/or genitalia (except prostate) for subsequent interstitial radioelement application.	J1	5341	\$2,861.53	J1	5341	\$2,788.26

Comment: Commenters disagreed with the proposed APC assignment for CPT code 55920 and recommended that this code be reassigned to an APC that includes gynecologic procedures, specifically C-APC 5415 (Level 5 Gynecologic Procedures). The commenters noted that radiation therapy is an important adjuvant treatment for gynecological malignancies and the vignette for the procedure described by CPT 55920 describes a gynecological implant with a Syed-type intracavitary applicator insertion to the vagina, cervix, or female urethra. The commenters stated that the procedure described by CPT code 55920 was similar, from a clinical and resource perspective, to procedures assigned to C-APC 5415.

Response: Our analysis of the final rule updated claims data revealed a

geometric mean cost of approximately \$4,791 for CPT code 55920 based on 134 single claims (out of 135 total claims), which is comparable to the geometric mean cost of approximately \$4,109 for C-APC 5415. The geometric mean cost for C-APC 5341 is approximately \$2,909. After reviewing the procedures assigned to C-APC 5415, we agree with the commenters that CPT code 55920 would be more appropriately reassigned to C-APC 5415 based on its clinical homogeneity and resource costs.

After consideration of the public comments we received, we are finalizing our CY 2018 proposal with modification. Specifically, we are reassigning CPT code 55920 from C-APC 5341 to C-APC 5415 for CY 2018. We refer readers to Addendum B to this final rule with comment period for the final CY 2018 payment rates for all

codes reported under the OPPTS. In addition, we refer readers to Addendum A to this final rule with comment period for the status indicator meanings for all codes reported under the OPPTS for CY 2018. Both Addendum A and Addendum B are available via the Internet on the CMS Web site.

b. C-APC 5092 (Level 2 Breast/Lymphatic Surgery and Related Procedures)

For CY 2018, as displayed in Table 21 below and in Addendum B to the CY 2018 OPPTS/ASC proposed rule, we proposed to continue to assign CPT code 19298 to C-APC 5092 (Level 2 Breast/Lymphatic Surgery and Related Procedures), with a proposed payment rate of \$4,616.48.

TABLE 21—PROPOSED CY 2018 STATUS INDICATOR (SI), APC ASSIGNMENT, AND PAYMENT RATE FOR CPT CODE 19298

CPT code	Long descriptor	CY 2017 OPPS SI	CY 2017 OPPS APC	CY 2017 OPPS payment rate	Proposed CY 2018 OPPS SI	Proposed CY 2018 OPPS APC	Proposed CY 2018 OPPS payment rate
19298	Placement of radiotherapy afterloading brachytherapy catheters (multiple tube and button type) into breast for interstitial; radioelement application following (at the time of or subsequent to) partial mastectomy, includes image guidance).	J1	5092	\$4,417.60	J1	5092	\$4,616.48

Comment: Commenters disagreed with the proposed continued APC assignment for CPT code 19298 to C-APC 5092. These commenters stated that the CY 2018 proposed payment is inadequate and does not cover the costs associated with the surgical placement of the breast brachytherapy catheter or the brachytherapy treatment delivery and related planning and preparation codes included on the claim. The commenters also stated that, previously, both breast brachytherapy catheter placement codes 19296 (Breast interstitial radiation treatment, delayed (expandable) and 19298 have been assigned to the same APC as they are similar clinically and with regard to resource cost. The commenters requested that CPT code 19298 be assigned to the same C-APC as CPT code 19296 proposed for CY 2018; that is, C-APC 5093 (Level 3 Breast/Lymphatic Surgery and Related Procedures).

Response: Our analysis of the final rule updated claims data revealed a geometric mean cost of approximately \$5,944 for CPT code 19298 based on 68 single claims (out of 69 total claims). Based on our updated analysis, we believe that CPT code 19298 is appropriately assigned to C-APC 5092, which has a geometric mean cost of approximately \$4,809, rather than to C-APC 5093, which has a geometric mean cost of approximately \$7,383 as suggested by the commenters. In addition, our updated analysis showed that the geometric mean cost of

approximately \$5,944 for CPT code 19298 is within the range of the significant procedures assigned to C-APC 5092, which is between \$4,276 (for CPT code 19380) and \$6,134 (for CPT code 19340).

After consideration of the public comments we received and based on updated claims data, we are finalizing our proposal to continue to assign CPT code 19298 to C-APC 5092 for CY 2018.

3. Care Management Coding Changes Effective January 1, 2018 (APCs 5821 and 5822)

As noted in the CY 2018 MPFS proposed rule (82 FR 34079), we continue to be interested in the ongoing work of the medical community to refine the set of codes used to describe care management services, including chronic care management. In the CY 2018 OPPS/ASC proposed rule (82 FR 33603 and 33604), we proposed to adopt CPT replacement codes for CY 2018 for several of the care management services finalized last year and sought public comment on ways we might further reduce the burden on reporting providers, including through stronger alignment between CMS requirements and CPT guidance for existing and potential new codes. Table 15 of the CY 2018 OPP/ASC proposed rule detailed the proposed care management coding changes. We referred readers to Addendum B to the proposed rule (which is available via the Internet on the CMS Web site) for the proposed CY

2018 payment rates for the replacement codes.

Comment: Commenters supported CMS' proposed replacement codes for CY 2018 for several of the care management services finalized for CY 2017. One commenter recommended that the new chronic care management codes be removed from the financial settlement of accountable care organizations (ACOs). This commenter also recommended that CMS develop documentation and billing workflow to reduce administrative burden on providers billing transitional care management and chronic care management codes.

Response: We appreciate the commenters' support. We also appreciate the suggestion for reducing provider burden with respect to billing and documentation requirements for chronic care management and will consider these suggestions in future rulemaking. However, we note that ACOs are outside the scope of this final rule with comment period.

After consideration of the public comments we received, we are finalizing our proposal to adopt CPT replacement codes for CY 2018 for several of the care management services finalized last year. Table 22 below details the final care management coding changes. We refer readers to Addendum B to this final rule with comment period (which is available via the Internet on the CMS Web site) for the final CY 2018 payment rates for the replacement codes.

TABLE 22—CARE MANAGEMENT CODING CHANGES EFFECTIVE JANUARY 1, 2018

CY 2017 HCPCS code	CY 2017 HCPCS code short descriptor	CY 2017 OPPS SI	CY 2017 OPPS ASC	CY 2018 replacement CPT code	CY 2018 replacement HCPCS code short descriptor*	CY 2018 OPPS SI	CY 2018 OPPS APC
G0502	Init psych care Manag, 70min.	S	5822	99492	1st Psyc collab care mgmt.	S	5822
G0503	Subseq psych care man, 60mi.	S	5822	99493	Sbsg psyc collab care mgmt.	S	5822

TABLE 22—CARE MANAGEMENT CODING CHANGES EFFECTIVE JANUARY 1, 2018—Continued

CY 2017 HCPCS code	CY 2017 HCPCS code short descriptor	CY 2017 OPPI SI	CY 2017 OPPI ASC	CY 2018 replacement CPT code	CY 2018 replacement HCPCS code short descriptor*	CY 2018 OPPI SI	CY 2018 OPPI APC
G0504	Init/sub psych Care add 30 m.	N	N/A	99494	1st/sbsq psyc collab care	N	N/A
G0505	Cog/func assessment outpt.	S	5822	99483	Assmt & care pln pt cog imp.	S	5822
G0507	Care manage serv minimum 20.	S	5821	99484	Care mgmt. svc bhvl hlth cond.	S	5821

* The long descriptors for the final CPT codes can be found in Addendum O (New Category I and Category III CPT Codes Effective January 1, 2018) to this final rule with comment period, which is available via the Internet on the CMS Web site.

4. Cardiac Telemetry (APC 5721) 2018 OPPI/ASC proposed rule, we proposed to reassign CPT code 93229 from APC 5733 (Level 3 Minor Procedures) to APC 5734 (Level 4 Minor Procedures), with a proposed payment rate of \$94.27.

TABLE 23—PROPOSED CY 2018 STATUS INDICATOR (SI), APC ASSIGNMENT, AND PAYMENT RATE FOR CPT CODE 93229

CPT Code	Long descriptor	CY 2017 OPPI SI	CY 2017 OPPI APC	CY 2017 OPPI payment rate	Proposed CY 2018 OPPI SI	Proposed CY 2018 OPPI APC	Proposed CY 2018 OPPI payment rate
93229	External mobile cardiovascular telemetry with electrocardiographic recording, concurrent computerized real time data analysis and greater than 24 hours of accessible ecg data storage (retrievable with query) with ecg triggered and patient selected events transmitted to a remote attended surveillance center for up to 30 days; technical support for connection and patient instructions for use, attended surveillance, analysis and transmission of daily and emergent data reports as prescribed by a physician or other qualified health care professional.	S	5733	\$54.55	S	5734	\$94.27

We proposed to revise the APC assignment for CPT code 93229 based on claims data used for the CY 2018 OPPI/ASC proposed rule. We note that the proposed rule data were based on claims data submitted between January 1, 2016, and December 31, 2016, that were processed on or before December 31, 2016. Our analysis of the claims data revealed a geometric mean cost of approximately \$156 for CPT code 93229 based on 1,518 single claims (out of 3,370 total claims). Our analysis further revealed a geometric mean cost of approximately \$98 for APC 5734. Based on the geometric mean cost, we believed that it was necessary to revise the APC assignment for CPT code 93229 from APC 5733 to APC 5734 to pay appropriately for the service.

Comment: Some commenters disagreed with the proposed reassignment of CPT code 93229 to APC 5734, and instead requested a

reassignment to APC 5722 (Level 2 Diagnostic Tests and Related Services), which had a proposed payment rate of \$242.21 and which is the same APC assignment for CPT code 93229 as in CY 2016. The commenters believed that the cost data used to set the payment rate for the CY 2017 OPPI update was based on miscoding of the service because mobile outpatient telemetry is a low-volume service in the HOPD setting that is performed by a small number of hospitals. The commenters indicated that since the publication of a 2016 coding guidance in the AHA Coding Clinic for HCPCS on the proper coding of remote cardiac monitoring services, they have noticed that the top billers of this service from prior years are no longer inappropriately reporting the service. In addition, the commenters believed that APC 5734 is an inappropriate assignment both from the clinical and resource cost perspectives.

The commenters further indicated that the service is not a minor procedure, as described by the group description for APC 5734, and added that CPT code 93229 is the only code in APC 5734 with a status indicator assignment of “S” (Procedure or Service, Not Discounted When Multiple), while all the other codes in the APC are assigned to status indicator “Q1” (conditionally packaged).

Response: Although CPT code 93229 was assigned to status indicator “S” in APC 5734, it was not the only status indicator assigned to the codes in this APC. As indicated in OPPI Addendum B that was released with the CY 2018 OPPI/ASC proposed rule, three separate status indicators were assigned to the codes in APC 5734. Specifically, CPT code 93229 was assigned to status indicator “S”, CPT codes 30903 and 30905 were assigned to status indicator “T” (Procedure or Service, Discounted

When Multiple), and the remaining codes were assigned to status indicator “Q1”. We note that a specific status indicator assignment does not preclude a code’s assignment to a specific APC.

In addition, as we have stated since the implementation of the OPSS in August 2000, section 1833(t)(9) of the Act requires that we annually review all the items and services within an APC group and revise the APC structures accordingly. Included in this review is the identification of any 2 times rule violations as provided under section 1833(t)(2) of the Act and, to the extent possible, rectification of these violations. We review the most recently available OPSS claims data every year and determine whether changes to the current APC assignment are necessary. Although CPT code 93229 was assigned to APC 5722 in CY 2016, we revised the APC assignment to APC 5733 for CY 2017 based on the latest claims data available at that time. The discussion related to this APC revision can be found in the CY 2017 OPSS/ASC final rule with comment period (81 FR 79616 through 79617).

For this CY 2018 OPSS/ASC final rule with comment period, we again reviewed the claims data associated with CPT code 93229. We note that, for this final rule with comment period, we used claims data with dates of service between January 1, 2016, and December 31, 2016 that were processed on or before June 30, 2017. Our analysis revealed a geometric mean cost of approximately \$160 for CPT code 93229 based on 1,750 single claims (out of 3,869 total claims). Based on our review of the four levels of Diagnostic Tests and Related Services APCs, we believe that CPT code 93229 appropriately fits in APC 5721 (Level 1 Diagnostic Tests and Related Services), which has a geometric mean cost of approximately \$136, rather than in APC 5722, which has a geometric mean cost of approximately \$249. In addition, our review shows that the geometric mean cost of approximately \$160 for CPT code 93229 is within the range of the significant procedures in APC 5721, which is between \$60 (for CPT code 93702) and \$181 (for CPT code 94727). Consequently, we believe that a

reassignment of CPT code 93229 to APC 5721 is more appropriate.

In summary, after consideration of the public comments we received, we are finalizing our CY 2018 proposal with modification. Specifically, we are revising the assignment for CPT code 93229 to APC 5721 for CY 2018 rather than the proposed APC 5734. Consistent with our policy of reviewing APC assignments annually, we will reevaluate the cost of CPT code 93229 and its APC assignment for the CY 2019 rulemaking. Table 24 below lists the final status indicator and APC assignment for CPT code 93229 for CY 2018. We refer readers to Addendum B of this final rule with comment period for the payment rates for all codes reported under the OPSS. In addition, we refer readers to Addendum A to this final rule with comment period for the status indicator meanings for all codes reported under the OPSS. Both Addenda A and B are available via the Internet on the CMS Web site.

TABLE 24—FINAL CY 2018 STATUS INDICATOR (SI) AND APC ASSIGNMENT FOR CPT CODE 93229

CPT code	Long descriptor	CY 2017 OPSS SI	CY 2017 OPSS APC	CY 2017 OPSS payment rate	CY 2018 OPSS SI	CY 2018 OPSS APC	CY 2018 OPSS payment rate
93229	External mobile cardiovascular telemetry with electrocardiographic recording, concurrent computerized real time data analysis and greater than 24 hours of accessible ecg data storage (retrievable with query) with ecg triggered and patient selected events transmitted to a remote attended surveillance center for up to 30 days; technical support for connection and patient instructions for use, attended surveillance, analysis and transmission of daily and emergent data reports as prescribed by a physician or other qualified health care professional.	S	5733	\$54.55	S	5721	Refer to OPSS Addendum B.

5. Collagen Cross-Linking of Cornea (C-APC 5503)

For CY 2018, as noted in Addendum B to the CY 2018 OPSS/ASC proposed rule, we proposed to continue to assign CPT code 0402T (Collagen cross-linking of cornea (including removal of the corneal epithelium and intraoperative pachymetry when performed)) to APC 5502 (Level 2 Extraocular, Repair, and Plastic Eye Procedures) for CY 2018.

Comment: One commenter requested that CMS reassign CPT code 0402T from

APC 5502 to APC 5504 (Level 4 Extraocular, Repair, and Plastic Eye Procedures). The commenter recommended reassignment to APC 5504 because it believed that assignment to that APC would more accurately reflect the level of resource utilization (particularly labor time and capital equipment) involved in the corneal collagen cross-linking procedure. In addition, the commenter provided resource information on the supplies, equipment, and labor required

to perform the procedure described by CPT code 0402T. According to the commenter, the capital equipment required for the procedure costs approximately \$90,000, and disposable supplies and at least one technician or registered nurse are also required. In addition, the commenter stated that the average procedure time can last from 1.25 to 2 hours. The commenter acknowledged that there are no Medicare claims data for CPT code

0402T because it was established on January 1, 2016.

Response: We reviewed the updated CY 2016 claims data used for this final rule with comment period. Based on our review, and with consideration of the resource information provided by the commenter, in the absence of data and based on the resources and operating expenses to perform the procedure as described by the commenter, we disagree with the commenter's recommendation that CPT code 0402T should be reassigned to APC 5504, which has a geometric mean cost of approximately \$3,000 in CY 2018. In the absence of claims data, we may use other data, such as invoices, to assign a new procedure to a clinical APC. In this case, the commenter did not provide invoices, but did supply some cost information in its comment. We note that the payment rate is not designed to pay for capital equipment costs on a per claim basis. However, taking into

account the disposable costs as well as information from the commenter about the time to perform the procedure and the hospital staff involved, we are persuaded to modify our proposal. Given the resource cost and clinical congruence of CPT code 0402T with other procedures assigned to APC 5503 (approximate geometric mean cost of \$1,800), such as CPT code 65436 (Removal of corneal epithelium; with application of chelating agent, eg., EDTA), we believe that the reassignment to APC 5503 is more appropriate for CY 2018. Therefore, we are modifying our proposal, and reassigning CPT code 0402T to APC 5503 (Level 3 Extraocular, Repair, and Plastic Eye Procedures) for CY 2018. We will consider reassignment of CPT code 0402T to APC 5504 in the CY 2019 rulemaking.

6. Cryoablation Procedure for Lung Tumors (C-APC 5361)

For CY 2018, the AMA CPT Editorial Panel deleted CPT code 0340T and

replaced the code with CPT code 32994, effective January 1, 2018. We note that CPT code 0340T was effective January 1, 2014, and deleted on December 31, 2017. Table 25 below lists the complete descriptors for the deleted and replacement code. We note that the deleted and replacement code were both listed in Addendum B and Addendum O to the CY 2018 OPPI/ASC proposed rule (which are available via the Internet on the CMS Web site). Addendum B listed the proposed status indicator assignment for the replacement code and assigned it to comment indicator "NP" (New code for the next calendar year or existing code with substantial revision to its code descriptor in the next calendar year as compared to current calendar year, proposed APC assignment; comments will be accepted on the proposed APC assignment for the new code), while Addendum O listed the proposed/placeholder CY 2018 CPT codes and the long descriptors.

TABLE 25—CODING CHANGES FOR CPT CODE 32994

CPT Code	CY 2018 OPPI/ASC proposed rule placeholder code	Long descriptor
0340T .....	.....	Ablation, pulmonary tumor(s), including pleura or chest wall when involved by tumor extension, percutaneous, cryoablation, unilateral, includes imaging guidance.
32994	32X99	Ablation therapy for reduction or eradication of 1 or more pulmonary tumor(s) including pleura or chest wall when involved by tumor extension, percutaneous, including imaging guidance when performed, unilateral; cryoablation.

As noted in Table 26 below and in Addendum B to the CY 2018 OPPI/ASC proposed rule, we proposed to delete CPT code 0340T (status indicator "D") and assign its replacement code, CPT

code 32994 (placeholder code 32X99), to C-APC 5361 (Level 1 Laparoscopy and Related Services), with a proposed payment rate of \$4,340.65. As noted in Table 26, for CY 2017, CPT code 0340T

was assigned to C-APC 5361, which is the same APC assignment for CPT code 32994.

TABLE 26—PROPOSED CY 2018 STATUS INDICATOR (SI), APC ASSIGNMENT, AND PAYMENT RATE FOR CPT CODE 32994

CPT code	CY 2018 OPPI/ASC proposed rule placeholder code	Short descriptor	CY 2017 OPPI SI	CY 2017 OPPI APC	CY 2017 OPPI payment rate	Proposed CY 2018 OPPI SI	Proposed CY 2018 OPPI APC	Proposed CY 2018 OPPI payment rate
0340T .....	.....	Ablate pulm tumors + extnsn.	J1	5361	\$4,199.13	D	N/A	N/A
32994	32X99	Ablate pulm tumor perq crybl.	N/A	N/A	N/A	J1	5361	\$4,340.65

Comment: Commenters presented opposing recommendations on the proposed APC assignment for CPT code 32994. Some commenters supported the proposed APC assignment to C-APC 5361. One commenter stated that the APC assignment maintains clinical homogeneity for services within the

APC and addresses resource cost fluctuation and volatility, and suggested that CMS finalize the proposal. However, other commenters disagreed with the proposed APC assignment and recommended that CPT code 32994 be assigned to C-APC 5362 (Level 2 Laparoscopy and Related Services),

which had a proposed payment rate of \$7,213.53. One commenter understood why CMS proposed to assign CPT code 32994 to C-APC 5361, which is the same APC to which its predecessor code was assigned. However, the commenter believed that the cost of the procedure will only increase as hospitals gain

experience with it. Consequently, the commenter suggested that CMS assign the CPT code to C-APC 5362. Another commenter recommended that CMS assign CPT code 32994 to C-APC 5362 and further noted the importance of new codes to be priced correctly before they are subject to APC placement based on their actual cost data.

Response: Because CPT code 0340T is a predecessor code to CPT code 32994, we have historical claims data on which to base the payment rate for CPT code 32994. Review of our claims data for this final rule with comment period shows a geometric mean cost of approximately \$5,471 for CPT code 0340T based on 27 single claims (out of 27 total claims), which is more comparable to the geometric mean cost of approximately \$4,486 for C-APC

5361 than to the geometric mean cost of approximately \$7,591 for C-APC 5362. We do not agree that we should assign CPT code 32994 to C-APC 5362 because the geometric mean cost for this APC is significantly greater than that of CPT code 32994 (cross-walked from CPT code 0340T) as indicated in our claims data available for this final rule with comment period. In addition, if the cost of the procedure increases, this will be identified through our annual review of the claims data. Consistent with our policy of reviewing APC assignments annually, we will reevaluate the geometric mean cost of CPT code 32994 and its APC assignment in next year's rulemaking for the CY 2019 OPPS update.

In summary, after consideration of the public comments we received and our

analysis of the updated claims data for this final rule with comment period, we are finalizing our CY 2018 proposal without modification, and assigning CPT code 32994 to C-APC 5361. The final CY 2018 geometric mean cost for C-APC 5361 is approximately \$4,486. Table 27 below lists the final status indicator and APC assignment for CPT code 32994 for CY 2018. We refer readers to Addendum B to this final rule with comment period for the payment rates for all codes reported under the OPPS. In addition, we refer readers to Addendum A to this final rule with comment period for the status indicator meanings for all codes reported under the OPPS. Both Addenda A and B are available via the Internet on the CMS Web site.

TABLE 27—FINAL CY 2018 STATUS INDICATOR (SI) AND APC ASSIGNMENT FOR CPT CODE 32994

CPT code	CY 2018 OPPS/ASC proposed rule placeholder code	Short descriptor	CY 2017 OPPS SI	CY 2017 OPPS APC	CY 2017 OPPS payment rate	CY 2018 OPPS SI	CY 2018 OPPS APC	CY 2018 OPPS payment rate
0340T	N/A	Ablate pulm tumors + extnsn.	J1	5361	\$4,199.13	D	N/A	N/A.
32994	32X99	Ablate pulm tumor perq crybl.	N/A	N/A	N/A	J1	5361	Refer to OPPS Addendum B.

7. Diagnostic Bone Marrow Aspiration and Biopsy (C-APC 5072)

For CY 2018, the AMA CPT Editorial Panel revised the bone marrow and aspiration CPT codes. Specifically, the descriptors for CPT codes 38220 and 38221 were revised and new CPT codes 20939 (placeholder code 2093X) and 38222 (placeholder code 382X3) were established, effective January 1, 2018. In addition, add-on HCPCS code G0364, which was effective January 1, 2005,

will be deleted on December 31, 2017 and replaced with CPT codes 38220, 38221, and 38222, effective January 1, 2018. The deleted and replacement codes were listed in Addendum B and Addendum O to the CY 2018 OPPS/ASC proposed rule. Addendum B listed the proposed status indicator assignment for revised CPT codes 38220 and 38221 and new CPT code 38222, which was assigned to comment indicator “NP” (New code for the next calendar year or

existing code with substantial revision to its code descriptor in the next calendar year as compared to current calendar year, proposed APC assignment; comments will be accepted on the proposed APC assignment for the new code), while Addendum O listed the proposed/placeholder CY 2018 CPT codes and the long descriptors.

Table 28 below lists the complete descriptors for the bone marrow aspiration and biopsy codes.

TABLE 28—CODING CHANGES FOR THE BONE MARROW ASPIRATION AND BIOPSY CODES

HCPCS code	CY 2018 OPPS/ASC proposed rule placeholder code	Long descriptor
20939	2093X	Bone marrow aspiration for bone grafting, spine surgery only, through separate skin or fascial incision (List separately in addition to code for primary procedure).
38220	N/A	Diagnostic bone marrow; aspiration.
38221	N/A	Diagnostic bone marrow; biopsy(ies).
38222	382X3	Diagnostic bone marrow; biopsy(ies) and aspiration(s).
G0364	N/A	Bone marrow aspiration performed with bone marrow biopsy through the same incision on the same date of service.

As noted in Table 29 below and in Addendum B of the CY 2018 OPPS/ASC proposed rule, we proposed to delete HCPCS code G0364 (status indicator

“D”) and assign revised CPT codes 38220 and 38221, as well as new CPT code 38222 (placeholder code 382X3) to C-APC 5072 (Level 2 Excision/Biopsy/

Incision and Drainage), with a proposed payment rate of \$1,268.53. We note that, under the OPPS, we packaged the payment for HCPCS code G0364 (status

indicator “N”) into the primary service or procedure that is reported with the code because we considered the service to be an add-on furnished as part of a comprehensive service. In addition, we

proposed to assign CPT code 20939 (placeholder 2093X) to status indicator “N” (Packaged status) because it is an add-on code. Under Medicare regulations at 42 CFR 419.2(b)(18), add-

on codes are packaged under the OPSS. Further, we proposed to continue to assign revised CPT codes 38220 and 38221 to C-APC 5072 for CY 2018.

TABLE 29—PROPOSED CY 2018 STATUS INDICATOR (SI), APC ASSIGNMENT, AND PAYMENT RATES FOR THE BONE MARROW ASPIRATION AND BIOPSY CODES

HCPCS Code	CY 2018 OPSS/ASC proposed rule placeholder code	Short descriptor	CY 2017 OPSS SI	CY 2017 OPSS APC	CY 2017 OPSS payment rate	Proposed CY 2018 OPSS SI	Proposed CY 2018 OPSS APC	Proposed CY 2018 OPSS payment rate
20939	2093X	Bone marrow aspir bone grfg	N/A	N/A	N/A	N	N/A	N/A
38220	N/A	Dx bone marrow aspirations	J1	5072	\$1,236.62	J1	5072	\$1,268.53
38221	N/A	Dx bone marrow biopsies	J1	5072	\$1,236.62	J1	5072	\$1,268.53
38222	382X3	Dx bone marrow bx & aspir	N/A	N/A	N/A	J1	5072	\$1,268.53
G0364	N/A	Bone marrow aspirate & biopsy	N	N/A	N/A	D	N/A	N/A

Comment: One commenter disagreed with the proposed APC assignment of new CPT code 38222 to C-APC 5072 and recommended that the code be assigned to C-APC 5073 (Level 3 Excision/Biopsy/Incision and Drainage), which had a proposed payment rate of \$2,222.47. This commenter further noted the importance of new codes being priced correctly before they are subject to APC assignment based on their actual cost data.

Response: As displayed in Table 29, we proposed to make no change to the APC assignments for CPT codes 38220 and 38221. Specifically, we proposed to continue to assign both codes to C-APC 5072 for CY 2018 based on claims data used for the CY 2018 OPSS/ASC proposed rule. We note that the proposed rule data was based on claims data submitted between January 1, 2016, and December 31, 2016, that were processed on or before December 31, 2016. For CPT code 38220, our examination of the claims data revealed a geometric mean cost of approximately \$1,645 based on 5,361 single claims (out of 5,431 total claims). For CPT code 38221, our claims data showed a geometric mean cost of approximately \$1,615 based on 53,789 single claims (out of 54,335 total claims). We believe that the geometric mean costs of approximately \$1,645 for CPT code 38220 and \$1,615 for CPT code 38221 are comparable to the geometric mean

cost of approximately \$1,319 for C-APC 5072. Consequently, we proposed to maintain both codes in C-APC 5072 for CY 2018. We note that we had no claims data for HCPCS code G0364 because this is an add-on code whose payment is packaged into the primary service that is reported with the code.

For this final rule with comment period, we again analyzed updated claims data associated with the four codes. We note that, for this final rule with comment period, we used claims data with dates of service between January 1, 2016, and December 31, 2016, that were processed on or before June 30, 2017. Our review of the final rule claims data revealed a similar pattern for both codes. For CPT code 38220, we found a geometric mean cost of approximately \$1,787 based on 5,908 single claims (out of 5,993 total claims), and for CPT code 38221, our claims data revealed a geometric mean cost of approximately \$1,799 based on 59,892 single claims (out of 60,467 total claims). Because the geometric mean costs of approximately \$1,787 for CPT code 38220 and \$1,799 for CPT code 38221 are similar to the geometric mean cost of approximately \$1,347 for C-APC 5072, we continue to believe that C-APC 5072 is the most appropriate APC assignment for both codes for CY 2018.

In addition, based on input from our medical advisors, we believe that C-

APC 5072 is the most appropriate APC assignment for new CPT code 38222, consistent with the APC assignment for similar diagnostic bone marrow aspiration and biopsy procedures. As noted in Table 29, CPT codes 38220 and 38221 are assigned to C-APC 5072, and we believe that the service described by new CPT code 38222 is similar to the existing bone marrow aspiration and biopsy codes. Consistent with the statutory requirement under section 1833(t)(9)(A) of the Act, we will reevaluate the APC groupings during the next rulemaking cycle.

After consideration of the public comment we received, we are finalizing our CY 2018 proposals, without modification, for the bone marrow aspiration and biopsy codes, specifically, CPT codes 20939, 38220, 38221, and 38222. Table 30 below lists the final APC and status indicator assignments for CPT codes 20939, 38220, 38221, and 38222 for CY 2018. We refer readers to Addendum B to this final rule with comment period for the payment rates for all codes reported under the OPSS. In addition, we refer readers to Addendum A to this final rule with comment period for the status indicator meanings for all codes reported under the OPSS. Both Addendum A and Addendum B are available via the Internet on the CMS Web site.

TABLE 30—FINAL CY 2018 STATUS INDICATOR (SI) AND APC ASSIGNMENT FOR THE BONE MARROW ASPIRATION AND BIOPSY CODES

HCPCS code	CY 2018 OPSS/ASC proposed rule placeholder code	Short descriptor	CY 2017 OPSS SI	CY 2017 OPSS APC	CY 2017 OPSS payment rate	CY 2018 OPSS SI	CY 2018 OPSS APC	CY 2018 OPSS payment rate
20939	2093X	Bone marrow aspir bone grfg	N/A	N/A	N/A	N	N/A	N/A.
38220	N/A	Dx bone marrow aspirations	J1	5072	\$1,236.62	J1	5072	Refer to OPSS Addendum B.

TABLE 30—FINAL CY 2018 STATUS INDICATOR (SI) AND APC ASSIGNMENT FOR THE BONE MARROW ASPIRATION AND BIOPSY CODES—Continued

HCCPS code	CY 2018 OPPS/ASC proposed rule placeholder code	Short descriptor	CY 2017 OPPS SI	CY 2017 OPPS APC	CY 2017 OPPS payment rate	CY 2018 OPPS SI	CY 2018 OPPS APC	CY 2018 OPPS payment rate
38221	N/A	Dx bone marrow biopsies	J1	5072	\$1,236.62	J1	5072	Refer to OPPS Addendum B.
38222	382X3	Dx bone marrow bx & aspir	N/A	N/A	N/A	J1	5072	Refer to OPPS Addendum B.
G0364 .....	.....	Bone marrow aspirate & biopsy.	N	N/A	N/A	D	N/A	N/A.

8. Discussion of Comment Solicitation in the Proposed Rule on Intraocular Procedure APCs

As discussed in the CY 2018 OPPS/ASC proposed rule (82 FR 33609 through 33610), as part of our CY 2018 comprehensive review of the structure of the APCs and procedure code assignments, we evaluated the intraocular procedure APCs with a particular focus on C-APC 5491 (Level 1 Intraocular Procedures) that contains cataract surgery procedures. We strive to maintain APCs that contain procedures that are relatively homogenous in resource costs and clinical characteristics. While it is impracticable and contrary to the principles of a prospective payment system to assign each procedure to its own APC, thus resulting in a cost-based, fee schedule payment system, we seek to ensure our clinical groupings appropriately group like items and services while maintaining the integrity of a prospective payment system under which bundled, encounter-based payments are essential.

For CY 2018, we considered proposing a new intraocular procedure APC that would further distinguish the resource costs and clinical characteristics between cataract surgery and complex cataract surgery. As listed in Addendum B of the CY 2018 OPPS/ASC proposed rule, we proposed to continue to assign CPT code 66984 (Cataract surgery with IOL 1 stage procedure) and CPT code 66982 (Cataract surgery complex) to C-APC 5491. However, because the 2017 AMA CPT Code manual describes a complex cataract surgery case as “requiring devices or techniques not generally used in routine cataract surgery (e.g., iris

expansion device, suture support for intraocular lens, or primary posterior capsulorrhexis),” we stated that we believe it may be more appropriate to assign CPT code 66982 to a C-APC that is separate from the C-APC assignment for CPT code 66984. However, because this potential APC grouping would assign CPT code 66982 to a higher paying C-APC than CPT code 66984, we indicated that we would monitor claims data for changes in the distribution of coding complex cataract surgery and routine cataract surgery if we were to adopt this change. In the proposed rule, we sought public comments from stakeholders, including ophthalmologists, organizations representing ophthalmologists, beneficiaries, hospitals, and all other interested parties on whether we should create a new C-APC that includes complex cataract surgeries identified by CPT code 66982 (along with other intraocular procedures that are similar in resources) in a newly created C-APC that is separate from those identified by CPT code 66984. That is, we are considering whether to establish a new Level 2 Intraocular Procedures C-APC in between existing C-APCs 5491 and 5492.

Comment: Commenters, including several ophthalmologists and organizations representing ophthalmologists, did not support separation of complex cataract surgery identified by CPT code 66982 and simple cataract surgery identified by CPT code 66984 into separate APCs. Commenters recommended that CMS maintain the current assignment of CPT code 66982 and 66984 in the same APC (APC 5491) because the procedures are similar clinically and the modest variation in cost between the two

procedures does not warrant reassignment of CPT code 66982 into a higher payment APC. However, commenters supported CMS’ intent to monitor the data for these procedures and make future changes, if needed. In addition, one commenter indicated that variations in payment between simple and complex cataract surgery should be reflected in the physician payment rather than the facility fee.

Response: We thank the commenters for providing detailed responses to the comment solicitation on whether to separate simple and complex cataract surgery into separate APCs. Based on the points raised in response to the comment solicitation with respect to the facility resource costs and clinical similarity between simple and complex cataract surgery, it does not appear necessary to separate these procedures into separate APCs.

After consideration of the public comments we received, we are continuing the assignment of simple and complex cataract surgery procedures (described by CPT codes 66984 and 66982, respectively) to the same APC for CY 2018. We appreciate the commenters’ support of CMS’ continuing efforts to monitor both the cost and utilization of simple and complex cataract surgery to determine if an APC reassignment or other change may be needed in the future.

9. Endovascular APCs (C-APCs 5191 through 5194)

For CY 2018, we proposed to continue the existing four levels of Endovascular C-APCs (C-APCs 5191 through 5194) as displayed in Table 31 below and in Addendum B to the CY 2018 OPPS/ASC proposed rule.

TABLE 31—PROPOSED CY 2018 GEOMETRIC MEAN COST AND PAYMENT FOR ENDOVASCULAR C-APCS

C-APC	CY 2018 geometric mean cost	Proposed CY 2018 OPPS payment
5191—Level 1 Endovascular Procedures	\$2,958.89	\$2,844

TABLE 31—PROPOSED CY 2018 GEOMETRIC MEAN COST AND PAYMENT FOR ENDOVASCULAR C–APCs—Continued

C–APC	CY 2018 geometric mean cost	Proposed CY 2018 OPPS payment
5192—Level 2 Endovascular Procedures	5,199.87	4,999
5193—Level 3 Endovascular Procedures	10,627.86	10,218
5194—Level 4 Endovascular Procedures	16,197.55	15,572

Comment: Commenters disagreed with the proposal to continue the four levels of the endovascular C–APCs and requested that CMS create more levels within the endovascular C–APCs to improve resource homogeneity within these C–APCs. Specifically, the commenters requested that CMS create a six-level endovascular C–APC family by reassigning endovascular procedures with costs greater than approximately \$7,000 up one level, from the current C–

APC 5192 (Level 2 Endovascular Procedures) to a new Level 3 Endovascular Procedures C–APC (519X), and reassigning procedures with costs less than approximately \$9,000 down one level, from the current C–APC 5193 (Level 3 Endovascular Procedures) to the new requested Level 3 Endovascular Procedures C–APC. Commenters also requested that procedures with costs greater than approximately \$12,000 in the current C–

APC 5193 be moved up one level to a new Level 5 Endovascular Procedures C–APC (519Y), and those procedures with costs greater than approximately \$13,000 to be moved down one level from current C–APC 5194 (Level 4 Endovascular Procedures) to the new requested Level 5 C–APC (519Y). The commenters’ requested the C–APC structure and estimated payment amount for each C–APC as listed in Table 32 below.

TABLE 32—CY 2018 STRUCTURE FOR ENDOVASCULAR C–APCs REQUESTED BY COMMENTERS

C–APC	Estimated CY 2018 OPPS payment
5191—Level 1 Endovascular Procedures	\$2,845
5192—Level 2 Endovascular Procedures	4,875
519X—New Level 3 Endovascular Procedures	8,042
5193—Current Level 3 Endovascular Procedures/New Level 4 Endovascular Procedures	10,084
519Y—New Level 5 Endovascular Procedures	12,149
5194—Current Level 4 Endovascular Procedures/New Level 6 Endovascular Procedures	15,713

At the annual meeting for the HOP Panel held on August 21, 2017, the HOP Panel recommended that, for CY 2018, CMS examine the number of APCs for endovascular procedures. The HOP Panel also recommended that the appropriate Panel subcommittee review the APCs for endovascular procedures to determine whether more granularity (that is, more APCs) is warranted.

Other commenters opposed a reorganization of the endovascular C–APCs for CY 2018 and expressed concerns regarding changing the number of C–APCs in this family without a chance for the public to comment. These commenters

encouraged CMS to consider the impact that adding APCs for the endovascular procedures may have on other procedures in existing APCs and recommended that, if CMS plans to make a change to the endovascular APCs, it include a proposal in the CY 2019 OPSS/ASC proposed rule to allow the opportunity for the public to comment.

Response: We thank the commenters for their input. At this time, we continue to believe that the current C–APC levels for the endovascular C–APC family provide an appropriate distinction between the resource costs at each level and provide clinical

homogeneity. We will continue to review this C–APC structure, including consultation with the appropriate HOP Panel subcommittee, to determine if additional granularity is necessary for this C–APC family.

10. Esophagogastroduodenoscopy (EGD) (C–APC 5362)

For CY 2018, as displayed in Table 33 below and in Addendum B to the CY 2018 OPSS/ASC proposed rule, we proposed to continue to assign CPT code 43210 to APC 5331 (Complex GI Procedures), with a proposed payment rate of \$4,119.27.

TABLE 33—PROPOSED CY 2018 STATUS INDICATOR (SI), APC ASSIGNMENT, AND PAYMENT RATE FOR CPT CODE 43210

CPT code	Long descriptor	CY 2017 OPPS SI	CY 2017 OPPS APC	CY 2017 OPPS payment rate	Proposed CY 2018 OPPS SI	Proposed CY 2018 OPPS APC	Proposed CY 2018 OPPS payment rate
43210	Esophagogastroduo-denoscopy, flexible, transoral; with esophagogastric fundoplasty, partial or complete, includes duodenoscopy when performed.	J1	5331	\$3,940.61	J1	5331	\$4,119.27

Comment: One commenter disagreed with the proposed APC assignment for CPT code 43210 and stated that the proposed payment is inadequate to cover the cost of the procedure. The commenter stated that the device associated with the procedure costs approximately \$4,100. The commenter elaborated that because of the inadequate payment for the procedure, providers are reluctant to perform the procedure, and instead are opting to perform the higher paying procedures for the treatment of gastroesophageal reflux disease (GERD). The commenter also stated that, based on the geometric mean cost of \$7,013 for CPT code 43210, the code is inappropriately assigned to APC 5331, which has a geometric mean cost of approximately \$4,284. To correct the inadequate payment for the procedure, the commenter suggested that CMS either reassign CPT code 43210 to C-APC 5362 (Level 2 Laparoscopy and Related Services), which had a proposed payment rate of \$7,214, or establish a new Level 2 Complex GI Procedures APC that contains only the surgical procedures described by the following CPT codes:

- 43210 (Esophagogastroduodenoscopy, flexible, transoral; with esophagogastric fundoplasty, partial or complete, includes duodenoscopy when performed);
- 43257 (Esophagogastroduodenoscopy, flexible, transoral; with delivery of thermal

energy to the muscle of lower esophageal sphincter and/or gastric cardia, for treatment of gastroesophageal reflux disease);

- 43280 (Laparoscopy, surgical, esophagogastric fundoplasty (e.g., nissen, toupet procedures));
- 43281 (Laparoscopy, surgical, repair of paraesophageal hernia, includes fundoplasty, when performed; without implantation of mesh);
- 43284 (Laparoscopy, surgical, esophageal sphincter augmentation procedure, placement of sphincter augmentation device (i.e., magnetic band), including cruroplasty when performed);
- 43770 (Laparoscopy, surgical, gastric restrictive procedure; placement of adjustable gastric restrictive device (e.g., gastric band and subcutaneous port components)); and
- 46762 (Sphincteroplasty, anal, for incontinence, adult; implantation artificial sphincter).

Response: For the second suggestion, we believe the grouping of procedures in the suggested APC may be inappropriate based on lack of clinical homogeneity. Specifically, CPT code 46762 describes a sphincteroplasty procedure, which is unlike that of the other GERD-related procedures in the suggested APC. However, for the first suggestion, based on our analysis of the final rule claims data, we believe that it would be appropriate to reassign CPT code 43210 to C-APC 5362. We note that, for this final rule with comment period, we used claims data with dates

of service between January 1, 2016, and December 31, 2016, that were processed on or before June 30, 2017. Our analysis of the final rule claims data revealed a geometric mean cost of approximately \$6,759 for CPT code 43210 based on 91 single claims (out of 92 total claims), which is comparable to the geometric mean cost of approximately \$7,591 for C-APC 5362. Compared to the geometric mean cost of approximately \$4,291 for C-APC 5331, we agree with the commenter that C-APC 5362 is the more appropriate C-APC assignment for CPT code 43210 based on its clinical homogeneity and resource costs.

In summary, after consideration of the public comment we received, we are finalizing our CY 2018 proposal with modification. Specifically, we are reassigning CPT code 43210 from C-APC 5331 to C-APC 5362 for CY 2018. As we do every year under the OPPS, we will reevaluate the cost of the procedure and its APC assignment for next year's OPPS rulemaking. Table 34 below lists the final status indicator and APC assignments for CPT code 43210. We refer readers to Addendum B of this final rule with comment period for the payment rates for all codes reported under the OPPS. In addition, we refer readers to Addendum A of this final rule with comment period for the status indicator meanings for all codes reported under the OPPS. Both Addendum A and Addendum B are available via the Internet on the CMS Web site.

TABLE 34—FINAL CY 2018 STATUS INDICATOR (SI) AND APC ASSIGNMENT FOR CPT CODE 43210

CPT code	Long descriptor	CY 2017 OPPS SI	CY 2017 OPPS APC	CY 2017 OPPS payment rate	CY 2018 OPPS SI	CY 2018 OPPS APC	CY 2018 OPPS payment rate
43210	Esophagogastroduo-denoscopy, flexible, transoral; with esophagogastric fundoplasty, partial or complete, includes duodenoscopy when performed.	J1	5331	\$3,940.61	J1	5362	Refer to OPPS Addendum B.

11. Hemorrhoid Treatment by Thermal Energy (APC 5312)

For CY 2018, as displayed in Table 35 below and in Addendum B to the CY

2018 OPSS/ASC proposed rule, we proposed to continue to assign CPT code 46930 to APC 5311 (Level 1 Lower

GI Procedures), with a proposed payment rate of \$690.37.

TABLE 35—PROPOSED CY 2018 STATUS INDICATOR (SI), APC ASSIGNMENT, AND PAYMENT RATE FOR CPT CODE 46930

HCPCS code	Long descriptor	CY 2017 OPSS SI	CY 2017 OPSS APC	CY 2017 OPSS payment rate	Proposed CY 2018 OPSS SI	Proposed CY 2018 OPSS APC	Proposed CY 2018 OPSS payment rate
46930	Destruction of internal hemorrhoid(s) by thermal energy (e.g., infrared coagulation, cautery, radiofrequency).	T	5311	\$667.67	T	5311	\$690.37

Comment: One commenter requested a reassignment of CPT code 46930 to APC 5312 (Level 2 Lower GI Procedures), which had a CY 2018 proposed payment rate of \$907.04. The commenter indicated that review of the geometric mean cost of approximately \$879 for CPT code 46930 from the CY 2018 proposed rule claims data is more in line with the geometric mean cost for APC 5312. Specifically, the commenter noted that the geometric mean cost for APC 5312 is approximately \$943, which is comparable to the geometric cost of \$879 for CPT code 46930, rather than the geometric mean cost of approximately \$718 for APC 5311.

Response: For this final rule with comment period, we reviewed the claims data associated with CPT codes 46930. We used claims data for this final rule with comment period with dates of service between January 1, 2016, and December 31, 2016 that were processed on or before June 30, 2017.

Our analysis of the final rule claims data revealed that a change in the APC assignment to APC 5312 for CPT code 46930 is appropriate. Specifically, we found a geometric mean cost of approximately \$858 for CPT code 46930 based on 363 single claims (out of 970 total claims), which is similar to the geometric mean cost of approximately \$936 for APC 5312 rather than the geometric mean cost of approximately \$710 for APC 5311. In addition, our analysis of the range of geometric mean costs for the significant procedures within APCs 5311 and 5312 shows that the geometric mean cost for CPT code 46930 is comparable to the costs of procedures assigned to APC 5312. Specifically, the geometric mean costs of the significant procedures assigned to APC 5311 range between approximately \$382 (for CPT code 46221) and \$750 (for CPT code 45378), while the range for procedures assigned to APC 5312 is between approximately \$824 (for CPT

code 45341) and \$1,579 (for CPT 45390). Consequently, we agree that a reassignment of CPT code 46930 to APC 5312 is more appropriate.

Therefore, after consideration of the public comment we received, we are finalizing our CY 2018 proposal with modification to the APC assignment for CPT code 46930. Specifically, we are reassigning CPT code 46930 from C-APC 5311 to C-APC 5312 for CY 2018. Table 36 below lists the final status indicator and APC assignments for CPT code 46930. We refer readers to Addendum B to this final rule with comment period for the payment rates for all codes reported under the OPSS. In addition, we refer readers to Addendum A to this final rule with comment period for the status indicator meanings for all codes reported under the OPSS. Both Addendum A and Addendum B are available via the Internet on the CMS Web site.

TABLE 36—FINAL CY 2018 STATUS INDICATOR (SI) AND APC ASSIGNMENT FOR CPT CODE 46930

CPT code	Long descriptor	CY 2017 OPSS SI	CY 2017 OPSS APC	CY 2017 OPSS payment rate	CY 2018 OPSS SI	CY 2018 OPSS APC	CY 2018 OPSS payment rate
46930	Destruction of internal hemorrhoid(s) by thermal energy (e.g., infrared coagulation, cautery, radiofrequency).	T	5311	\$667.67	T	5312	Refer to OPSS Addendum B.

12. Ileoscopy Through Stoma With Stent Placement (C-APC 5303)

For CY 2018, as displayed in Table 37 below and in Addendum B to the CY

2018 OPSS/ASC proposed rule, we proposed to continue to assign CPT code 44384 to C-APC 5303 (Level 3 Upper GI Procedures).

TABLE 37—PROPOSED CY 2018 STATUS INDICATOR (SI), APC ASSIGNMENT, AND PAYMENT RATE FOR CPT CODE 44384

CPT code	Long descriptor	CY 2017 OPPS SI	CY 2017 OPPS APC	CY 2017 OPPS payment rate	Proposed CY 2018 OPPS SI	Proposed CY 2018 OPPS APC	Proposed CY 2018 OPPS payment rate
44384	Ileoscopy, through stoma; with placement of endoscopic stent (includes pre- and post-dilation and guide wire passage, when performed).	J1	5303	\$2,510.70	J1	5303	\$2,630.93

Comment: Several commenters opposed the proposed continued assignment of CPT code 44384 to C-APC 5303. The commenters stated that the procedure includes the use of a stent that costs approximately \$1,500, and that the resources required to perform the procedure are similar to those other small and large bowel procedures that require stent placement in C-APC 5331 (Complex GI Procedures), which had a CY 2018 proposed payment rate of \$4,119.27. The commenters further added that because C-APC 5303 is not a device-dependent designated APC, the continued assignment of CPT code 44384 to C-APC 5303 results in an ASC payment that is below the cost of performing the procedure. Consequently, the commenters urged CMS to revise the APC assignment for CPT code 44384 back to its CY 2016 APC assignment, specifically, C-APC 5331.

Response: We proposed to continue the APC assignment for CPT code 44384 based on claims data used for the CY 2018 OPPS/ASC proposed rule. We note that the proposed rule data was based on claims data submitted between January 1, 2016, and December 31, 2016, that were processed on or before December 31, 2016. For CPT code 44384, our analysis of the claims data revealed a geometric mean cost of approximately \$2,404 for the CPT code based on 25 single claims (out of 26 total claims), which is similar to the geometric mean cost of approximately \$2,736 for C-APC 5303 rather than the geometric mean cost of approximately \$4,284 for C-APC 5331. Consequently, we proposed to continue the APC assignment for CPT code 44384 to C-APC 5303 for CY 2018.

For this final rule with comment period, we again examined updated claims data associated with CPT code 44384. We note that for this final rule with comment period we used claims data with dates of service between January 1, 2016, and December 31, 2016, that were processed on or before June 30, 2017. Our examination of the final rule claims data revealed a similar pattern for CPT code 44384. Specifically, we found a geometric mean cost of approximately \$2,492 for CPT code 44384 based on 32 single claims (out of 33 total claims), which is similar to the geometric mean cost of approximately \$2,742 for C-APC 5303 rather than the geometric mean cost of approximately \$4,291 for C-APC 5331. Assigning CPT code 44384 to C-APC 5331 would result in an overpayment for the procedure. C-APC 5303 contains several GI-related procedures, which are similar to those procedures described by CPT code 44384, based on clinical homogeneity and resource costs.

In response to the comment related to device-dependent APCs, we note that device-dependent APCs are no longer recognized under the OPPS as of CY 2015 and that, effective January 1, 2017, device-intensive status is assigned at the HCPCS code level, not at the APC level. We note that when we implemented the C-APC policy in CY 2015, we eliminated the device-dependent APC policy and replaced it with the device-intensive policy, effective January 1, 2015. For more information on this change, we refer readers to the CY 2015 OPPS/ASC final rule with comment period (79 FR 66793 through 66795), the CY 2016 OPPS/ASC final rule with comment period (80 FR 70421 through 70422), and the CY 2017 OPPS/ASC final rule with comment period (81 FR 79657 through 79659). In addition, we

refer readers to section IV.B. of this final rule with comment period for the discussion related to the device-intensive policy under the OPPS. For a discussion of ASC procedures designated as device-intensive, we refer readers to section XII.C.1.c. of this final rule with comment period.

Finally, we remind readers that, as we have stated since the implementation of the OPPS in August 2000, section 1833(t)(9) of the Act requires that we annually review all the items and services within an APC group and revise the APC structures accordingly. Included in this review is the identification of any 2 times rule violations as provided under section 1833(t)(2) of the Act and, to the extent possible, rectification of these violations. We review our claims data every year and determine whether we need to make changes to the current APC assignment for the following year. Although CPT code 44384 was assigned to C-APC 5331 in CY 2016, we revised the assignment to C-APC 5303 for CY 2017 based on the latest claims data.

In summary, after consideration of the public comments we received, we are finalizing our CY 2018 proposal without modification to continue the assignment of CPT code 44384 to C-APC 5303. Table 38 below lists the final status indicator and APC assignments for CY 2018. We refer readers to Addendum B to this final rule with comment period for the payment rates for all codes reported under the OPPS. In addition, we refer readers to Addendum A to this final rule with comment period for the status indicator meanings for all codes reported under the OPPS. Both Addendum A and Addendum B are available via the Internet on the CMS Web site.

TABLE 38—FINAL CY 2018 STATUS INDICATOR (SI) AND APC ASSIGNMENT FOR CPT CODE 44384

CPT code	Long descriptors	CY 2017 OPPTS SI	CY 2017 OPPTS APC	CY 2017 OPPTS payment rate	CY 2018 OPPTS SI	CY 2018 OPPTS APC	CY 2018 OPPTS payment rate
44384	Ileoscopy, through stoma; with placement of endoscopic stent (includes pre- and post-dilation and guide wire passage, when performed).	J1	5303	\$2,510.70	J1	5303	Refer to OPPTS Addendum B.

13. Laparoscopic Nephrectomy (C-APC 5362) 2018 OPPTS/ASC proposed rule, we proposed to reassign CPT code 50543 from C-APC 5377 (Level 7 Urology and Related Services), which had a proposed payment rate of \$15,220.83 to C-APC 5362 (Level 2 Laparoscopy and Related Services), which had a proposed payment rate of \$7,213.53.

For CY 2018, as displayed in Table 39 below and in Addendum B to the CY

TABLE 39—PROPOSED CY 2018 STATUS INDICATOR (SI), APC ASSIGNMENT, AND PAYMENT RATE FOR CPT CODE 50543

CPT code	Long descriptor	CY 2017 OPPTS SI	CY 2017 OPPTS APC	CY 2017 OPPTS payment	Proposed CY 2018 OPPTS SI	Proposed CY 2018 OPPTS APC	Proposed CY 2018 OPPTS payment
50543	Laparoscopy, surgical; partial nephrectomy.	J1	5377	\$14,363.61	J1	5362	\$7,213.53

Comment: One commenter applauded CMS’ proposal to remove CPT code 50543 from C-APC 5377. The commenter indicated that the code was inappropriately placed in C-APC 5377 because the procedure involves no implantable device, which is in contrast to the device-related procedures in C-APC 5377. The commenter believed that the addition of this CPT code to C-APC 5377 for CY 2017 was an error that disrupted the clinical homogeneity of the APC. The commenter suggested that CMS finalize the proposal to reassign CPT code 50543 from C-APC 5377 to APC 5362.

Response: We appreciate the commenter’s support. For this final rule with comment period, we again reviewed the updated claims data associated with CPT code 50543 and continue to believe that C-APC 5362 is the more appropriate assignment for the

CPT code based on its clinical coherence and resource similarity to the other procedures in the APC. Although our analysis showed a geometric mean cost of approximately \$7,591 for C-APC 5362, which is lower than the geometric mean cost of approximately \$10,247 for CPT code 50543 based on 1,008 single claims (out of 1,016 total claims), we found that the geometric mean cost for the CPT code falls within the range of costs for significant procedures assigned to C-APC 5362. Specifically, the cost range for procedures assigned to C-APC 5362 is between approximately \$5,997 (for CPT code 50593) and \$10,247 (for CPT code 50543). Based on the final rule claims data, we believe that CPT code 50543 is more appropriately assigned to C-APC 5362 based on its clinical coherence and resource similarity to the other procedures assigned to C-APC 5362.

Therefore, after consideration of the public comment we received, we are finalizing our proposal, without modification, to reassign CPT code 50543 to C-APC 5362 for CY 2018. As we do every year, we will review our claims data for the procedure for the CY 2019 OPPTS rulemaking. Table 40 below lists the final CY 2018 status indicator and APC assignments for CPT code 50543. We refer readers to Addendum B to this final rule with comment period for the payment rates for all codes reported under the OPPTS. In addition, we refer readers to Addendum A to this final rule with comment period for the status indicator meanings for all codes reported under the OPPTS. Both Addendum A and Addendum B are available via the Internet on the CMS Web site.

TABLE 40—FINAL CY 2018 STATUS INDICATOR (SI) AND APC ASSIGNMENT FOR CPT CODE 50543

CPT code	Long descriptor	CY 2017 OPPTS SI	CY 2017 OPPTS APC	CY 2017 OPPTS payment rate	CY 2018 OPPTS SI	CY 2018 OPPTS APC	CY 2018 OPPTS payment rate
50543	Laparoscopy, surgical; partial nephrectomy.	J1	5377	\$14,363.61	J1	5362	Refer to OPPTS Addendum B.

14. Multianalyte Assays With Algorithmic Analyses (MAAA)

For CY 2018, as displayed in Table 41 below and as listed in Addendum B to

the CY 2018 OPPTS/ASC proposed rule, we proposed to continue to assign CPT codes 81490, 81503, 81535, 81536, 81538, and 81539, to status indicator

“Q4” to indicate that the codes are conditionally packaged. Specifically, as defined in Addendum D1 to the CY 2018 OPPTS/ASC proposed rule, an

assignment to status indicator “Q4” indicates that payment for the laboratory test is either packaged if billed on the same claim as a HCPCS code assigned to status indicator “J1”, “J2”, “S”, “T”, “V”, “Q1”, “Q2”, or “Q3”, or in other circumstances, is paid through the CLFS.

TABLE 41—PROPOSED CY 2018 STATUS INDICATOR (SI) FOR CPT CODES 81490, 81503, 81535, 81536, 81538, AND 81539

CPT code	Long descriptor	CY 2017 OPSS SI	Proposed CY 2018 OPSS SI
81490	Autoimmune (rheumatoid arthritis), analysis of 12 biomarkers using immunoassays, utilizing serum, prognostic algorithm reported as a disease activity score.	Q4	Q4
81503	Oncology (ovarian), biochemical assays of five proteins (ca-125, apolipoprotein a1, beta-2 microglobulin, transferrin, and pre-albumin), utilizing serum, algorithm reported as a risk score.	Q4	Q4
81535	Oncology (gynecologic), live tumor cell culture and chemotherapeutic response by dapi stain and morphology, predictive algorithm reported as a drug response score; first single drug or drug combination.	Q4	Q4
81536	Oncology (gynecologic), live tumor cell culture and chemotherapeutic response by dapi stain and morphology, predictive algorithm reported as a drug response score; each additional single drug or drug combination (list separately in addition to code for primary procedure).	Q4	Q4
81538	Oncology (lung), mass spectrometric 8-protein signature, including amyloid a, utilizing serum, prognostic and predictive algorithm reported as good versus poor overall survival.	Q4	Q4
81539	Oncology (high-grade prostate cancer), biochemical assay of four proteins (total psa, free psa, intact psa, and human kallikrein-2 [hk2]), utilizing plasma or serum, prognostic algorithm reported as a probability score.	Q4	Q4

Comment: Some commenters requested a revision to the status indicator assignment for the six MAAA codes (CPT codes 81490, 81503, 81535, 81536, 81538, and 81539) from “Q4” to “A” (Not paid under the OPSS but may be paid under a different Medicare payment system), consistent with the status indicator assignment for the DNA and RNA-based MAAA tests. The commenters stated that these tests are generally not performed in the HOPD setting. Also, the commenters indicated that all of the Category I CPT MAAA codes are already assigned to status indicator “A” except for CPT codes 81490, 81503, 81535, 81536, 81538, and 81539, which are protein-based MAAA codes. The commenters asserted that, based on the June 23, 2016 CLFS final rule entitled “Medicare Program; Medicare Clinical Diagnostic Laboratory Tests Payment System,” CMS defined an ADLT under section 1834A(d)(5)(A) of the Act to include DNA, RNA, and

protein-based tests, and, as such, the six protein-based MAAA codes should be reassigned to status indicator “A”.

Response: As we stated in the CY 2017 OPSS/ASC final rule with comment period (81 FR 79594), we will assign status indicator “A” (Separate payment under the CLFS) to ADLTs once a laboratory test is designated as an ADLT under the CLFS. Before a test can be designated as an ADLT, applicants must submit an application for successful designation as an ADLT by CMS. These 6 codes (CPT codes 81490, 81503, 81535, 81536, 81538, and 81539) have not been designated as ADLTs by CMS at this time, and therefore we do not believe they should be reassigned to status indicator “A”. However, once a code has been designated under the CLFS as an ADLT that meets the criteria of section 1834A(d)(5)(A) of the Act, we will update the OPSS payment file (Addendum B) on a quarterly basis to

reflect the appropriate status indicator assignment.

Therefore, after consideration of the public comments, we are finalizing our proposal, without modification, for CPT codes 81490, 81503, 81535, 81536, 81538, and 81539. As stated earlier, we will update the OPSS payment file (Addendum B) to appropriately reflect the status indicator assignment once a CPT code has been designated under the CLFS as an ADLT that meets the criteria of section 1834A(d)(5)(A) of the Act. Table 42 below lists the final status indicator for the CPT codes. We refer readers to Addendum B to this final rule with comment period for the payment rates for all codes reported under the OPSS. In addition, we refer readers to Addendum A to this final rule with comment period for the status indicator meanings for all codes reported under the OPSS. Both Addendum A and Addendum B are available via the Internet on the CMS Web site.

TABLE 42—FINAL CY 2018 STATUS INDICATOR (SI) FOR CPT CODES 81490, 81503, 81535, 81536, 81538, AND 81539

CPT code	Long descriptor	CY 2017 OPSS SI	CY 2018 OPSS SI
81490	Autoimmune (rheumatoid arthritis), analysis of 12 biomarkers using immunoassays, utilizing serum, prognostic algorithm reported as a disease activity score.	Q4	Q4
81503	Oncology (ovarian), biochemical assays of five proteins (ca-125, apolipoprotein a1, beta-2 microglobulin, transferrin, and pre-albumin), utilizing serum, algorithm reported as a risk score.	Q4	Q4
81535	Oncology (gynecologic), live tumor cell culture and chemotherapeutic response by dapi stain and morphology, predictive algorithm reported as a drug response score; first single drug or drug combination.	Q4	Q4
81536	Oncology (gynecologic), live tumor cell culture and chemotherapeutic response by dapi stain and morphology, predictive algorithm reported as a drug response score; each additional single drug or drug combination (list separately in addition to code for primary procedure).	Q4	Q4
81538	Oncology (lung), mass spectrometric 8-protein signature, including amyloid a, utilizing serum, prognostic and predictive algorithm reported as good versus poor overall survival.	Q4	Q4

TABLE 42—FINAL CY 2018 STATUS INDICATOR (SI) FOR CPT CODES 81490, 81503, 81535, 81536, 81538, AND 81539—Continued

CPT code	Long descriptor	CY 2017 OPSS SI	CY 2018 OPSS SI
81539	Oncology (high-grade prostate cancer), biochemical assay of four proteins (total psa, free psa, intact psa, and human kallikrein-2 [hk2]), utilizing plasma or serum, prognostic algorithm reported as a probability score.	Q4	Q4

15. Musculoskeletal APCs (APC 5111 Through 5116)

For CY 2018, we proposed to continue the existing C-APCs for the six levels of

musculoskeletal procedures (C-APCs 5111 through 5116), as displayed in Table 43 below and in Addendum B to the CY 2018 OPSS/ASC proposed rule.

TABLE 43—PROPOSED CY 2018 GEOMETRIC MEAN COST AND PAYMENT FOR MUSCULOSKELETAL C-APCs

C-APC	CY 2018 geometric mean cost	Proposed CY 2018 OPSS payment
5111—Level 1 Musculoskeletal Procedures	\$222.10	\$214
5112—Level 2 Musculoskeletal Procedures	1,311.47	1,261
5113—Level 3 Musculoskeletal Procedures	2,600.94	2,501
5114—Level 4 Musculoskeletal Procedures	5,602.87	5,385
5115—Level 5 Musculoskeletal Procedures	10,310.27	9,913
5116—Level 6 Musculoskeletal Procedures	15,783.57	15,175

Comment: Commenters disagreed with the proposal for six levels of the musculoskeletal C-APCs and requested that CMS create two additional levels within the musculoskeletal C-APCs. The commenters stated concerns about the range of costs of procedures assigned to Level 4, Level 5, and Level 6. The commenters believed that the gap between the musculoskeletal procedure levels and payments is too large and results in APCs that include disparate procedures in terms of clinical complexity and resource use.

Response: At this time, we continue to believe that the proposed C-APC levels for the musculoskeletal procedures C-APC family provide an appropriate distinction between the resource costs at each level and provide clinical homogeneity. We will continue to review this C-APC structure to determine if additional granularity is necessary for this C-APC family.

16. Nasal/Sinus Endoscopy Procedures (C-APC 5155)

For CY 2018, the AMA CPT Editorial Panel established several new bundled nasal/sinus endoscopy CPT codes. Table 44 below lists the complete descriptors for the new CPT codes. These codes were listed in Addendum B and Addendum O to the CY 2018 OPSS/ASC proposed rule (which is available via the Internet on the CMS Web site). Addendum B listed the proposed status indicator assignments for the new codes and assigned them to comment indicator “NP” (New code for the next calendar year or existing code with substantial revision to its code descriptor in the next calendar year as compared to current calendar year, proposed APC assignment; comments will be accepted on the proposed APC assignment for the new code), while Addendum O listed the proposed/placeholder CY 2018 CPT codes and the long descriptors. We note that the CPT code descriptors that appeared in the OPSS Addendum B were short descriptors and did not accurately

describe the complete procedure, service, or item described by the CPT code. Therefore, we included the 5-digit placeholder codes and their long descriptors in Addendum O to the proposed rule, specifically under the column labeled “CY 2018 OPSS/ASC Proposed Rule 5-Digit AMA Placeholder Code” so that the public could adequately comment on our proposed APC and status indicator assignments. We also indicated that the final CPT code numbers would be included in this CY 2018 OPSS/ASC final rule with comment period. The final CPT code numbers, along with their corresponding 5-digit placeholder codes, can be found in Table 45 below.

As displayed in Table 44 below and in Addendum B of the CY 2018 OPSS/ASC proposed rule, we proposed to assign CPT code 31241 to status indicator “C” to indicate that this is an inpatient only procedure, and to assign CPT codes 31253, 31257, 31259, and 31298 to C-APC 5155 (Level 5 Airway Endoscopy), with a proposed payment rate of \$4,628.89.

TABLE 44—PROPOSED CY 2018 STATUS INDICATOR (SI), APC ASSIGNMENT, AND PAYMENT RATES FOR THE NEW NASAL/SINUS ENDOSCOPY CPT CODES EFFECTIVE JANUARY 1, 2018

CPT code	CY 2018 OPPS/ASC proposed rule placeholder code	Long descriptor	Proposed CY 2018 OPPS SI	Proposed CY 2018 OPPS APC	Proposed CY 2018 OPPS payment rate
31241	31XX1	Nasal/sinus endoscopy, surgical; with ligation of sphenopalatine artery.	C	N/A	N/A
31253	31XX2	Nasal/sinus endoscopy, surgical with ethmoidectomy; total (anterior and posterior), including frontal sinus exploration, with removal of tissue from frontal sinus, when performed.	J1	5155	\$4,628.89
31257	31XX3	Nasal/sinus endoscopy, surgical with ethmoidectomy; total (anterior and posterior), including sphenoidotomy.	J1	5155	4,628.89
31259	31XX4	Nasal/sinus endoscopy, surgical with ethmoidectomy; total (anterior and posterior), including sphenoidotomy, with removal of tissue from the sphenoid sinus.	J1	5155	4,628.89
31298	31XX5	Nasal/sinus endoscopy, surgical; with dilation of frontal and sphenoid sinus ostia (e.g., balloon dilation).	J1	5155	4,628.89

Comment: Several commenters expressed concern with the APC placement and indicated that assignment to C-APC 5155 in the OPPS would reduce the ASC payment for the procedures by 32 percent. The commenters requested that CMS assign the new bundled codes to a higher paying APC to provide appropriate payment in the ASC setting. Some commenters clarified that, in CY 2017, these bundled procedures were reported under two separate codes that were separately payable. Because of the effect on the ASC payment, the commenters recommended that CMS establish a new APC for multiple (five or more) sinus procedures, reconfigure the airway APCs to better recognize the complexity associated with performing multiple sinus procedures in a single surgery, or create a complexity adjustment for sinus procedures billed with a device or drug HCPCS C-code or J-code.

Response: C-APC 5155 contains several endoscopic sinus procedures, including the single endoscopic sinus surgeries. Based on input from our medical advisors, we believe this APC is the most appropriate assignment for CPT codes 31253, 31257, 31259, and 31298. C-APC 5155, which has a final rule geometric mean cost of approximately \$4,861, is currently the highest paying APC within the airway endoscopy APC series. Because CPT codes 31253, 31257, 31259, and 31298 are new codes for CY 2018, we believe

that we should assign these codes to C-APC 5155 where similar endoscopic sinus procedures are assigned.

With regards to the comment recommending separate payment for the single endoscopic sinus procedures performed in 2017, because the codes describing single endoscopic sinus surgery are assigned to status indicator “J1”, HOPDs receive one payment for the multiple surgeries, regardless of the number of endoscopic sinus procedures performed in a day. The status indicator assignment of “J1” to C-APC 5155 indicates that the APC is designated as a comprehensive APC (C-APC) under the OPPS. C-APCs provide a single payment for a primary service, and payment for all adjunctive services reported on the same claim is packaged into payment for the primary service. With few exceptions, all other services reported on a hospital outpatient claim in combination with the primary service are considered to be related to the delivery of the primary service and packaged into the single payment for the primary service and, therefore, separate payment is not available. We note that C-APCs do not apply to ASCs; consequently, the procedures would not be packaged. Instead, the procedures would be separately payable in the ASC setting. As we stated in the CY 2017 OPPS/ASC final rule with comment period, we did not implement C-APCs in the ASC payment system, and consequently, procedures paid

separately through the ASC payment system are paid based on the standard ASC methodology (81 FR 79738). We refer readers to section II.A.2.b. (Comprehensive APCs) of this final rule with comment period for the discussion on the payment methodology for C-APCs and to section XII. (ASC Payment System) of this final rule with comment period for the discussion on the ASC Payment System. For the history on the establishment of C-APCs under the OPPS, we refer readers to the CY 2014 OPPS/ASC final rule (78 FR 74861-4910).

In summary, after consideration of the public comments we received, we are finalizing our proposal for CPT codes 31241, 31253, 31257, 31259, and 31298 without modification. Consistent with the statutory requirement under section 1833(t)(9)(A) of the Act, we will reevaluate the APC assignment for these codes in the next rulemaking cycle. Table 45 below lists the final status indicator and APC assignments for CPT codes 31241, 31253, 31257, 31259, and 31298 for CY 2018. We refer readers to Addendum B to this final rule with comment period for the payment rates for all codes reported under the OPPS. In addition, we refer readers to Addendum A to this final rule with comment period for the status indicator meanings for all codes reported under the OPPS. Both Addendum A and Addendum B are available via the Internet on the CMS Web site.

TABLE 45—FINAL CY 2018 STATUS INDICATOR (SI) AND APC ASSIGNMENT FOR THE NEW NASAL/SINUS ENDOSCOPY CPT CODES EFFECTIVE JANUARY 1, 2018

CPT code	CY 2018 OPSS/ASC proposed rule placeholder code	Long descriptor	CY 2018 OPSS SI	CY 2018 OPSS APC	CY 2018 OPSS payment rate
31241	31XX1	Nasal/sinus endoscopy, surgical; with ligation of sphenopalatine artery.	C	N/A	Refer to OPSS Addendum B.
31253	31XX2	Nasal/sinus endoscopy, surgical with ethmoidectomy; total (anterior and posterior), including frontal sinus exploration, with removal of tissue from frontal sinus, when performed.	J1	5155	Refer to OPSS Addendum B.
31257	31XX3	Nasal/sinus endoscopy, surgical with ethmoidectomy; total (anterior and posterior), including sphenoidotomy.	J1	5155	Refer to OPSS Addendum B.
31259	31XX4	Nasal/sinus endoscopy, surgical with ethmoidectomy; total (anterior and posterior), including sphenoidotomy, with removal of tissue from the sphenoid sinus.	J1	5155	Refer to OPSS Addendum B.
31298	31XX5	Nasal/sinus endoscopy, surgical; with dilation of frontal and sphenoid sinus ostia (eg, balloon dilation).	J1	5155	Refer to OPSS Addendum B.

17. Nuclear Medicine Services (APCs 5592 and 5593)

For CY 2018, as illustrated in Table 46 below, we proposed to continue to

assign CPT codes 78018 and 78121 to APC 5592 (Level 2 Nuclear Medicine and Related Services) and to also continue to assign CPT codes 78110 and

78111 to APC 5593 (Level 3 Nuclear Medicine and Related Services).

TABLE 46—PROPOSED CY 2018 STATUS INDICATOR (SI), APC ASSIGNMENT, AND PAYMENT RATE FOR CPT CODES 78018, 78110, 78111, AND 78121

CPT code	Long descriptor	CY 2017 OPSS SI	CY 2017 OPSS APC	CY 2017 OPSS payment rate	Proposed CY 2018 OPSS SI	Proposed CY 2018 OPSS APC	Proposed CY 2018 OPSS payment Rate
78018	Thyroid carcinoma metastases imaging; whole body.	S	5592	\$429.13	S	5592	\$439.56
78110	Plasma volume, radiopharmaceutical volume-dilution technique (separate procedure); single sampling.	S	5593	1,138.94	S	5593	1,163.30
78111	Plasma volume, radiopharmaceutical volume-dilution technique (separate procedure); multiple samplings.	S	5593	1,138.94	S	5593	1,163.30
78121	Red cell volume determination (separate procedure); multiple samplings.	S	5592	429.13	S	5592	439.56

Comment: One commenter stated that CMS proposed to reassign CPT codes 78018, 78110, 78111 and 78121 to new APC groups, and recommended that CMS maintain the CPT codes in the “new APC groups” to ensure stability within the coding structure. The commenter added that CMS has moved these codes several times over the years and believed they are currently assigned to appropriate APC groups. This commenter noted that the codes are low volume with high costs, and recommended that CMS defer to the specialty societies for appropriate APC assignment.

Response: For the CY 2017 update, as indicated in the OPSS Addendum B that was released with the CY 2017 OPSS/ASC final rule with comment period, we assigned CPT codes 78018, 78110, 78111 and 78121 to comment indicator

“CH” to indicate that their APC assignments were revised. However, as displayed in Table 46, we proposed to make no change to the APC assignments for all four codes for the CY 2018 OPSS update. Specifically, we proposed to continue to assign CPT codes 78018, 78110, 78111, and 78121 to the same CY 2017 APCs for CY 2018 based on claims data used for the CY 2018 OPSS/ASC proposed rule. We note that the proposed rule data was based on claims data submitted between January 1, 2016, and December 31, 2016, that were processed on or before December 31, 2016. For CPT code 78018, our examination of the claims data revealed a geometric mean cost of approximately \$418 based on 5,604 single claims (out of 6,327 total claims). Because the geometric mean cost of \$418 is similar to the geometric mean cost of

approximately \$457 for APC 5592, we proposed to maintain the assignment of this code to APC 5592. For CPT code 78110, our claims data showed a geometric mean cost of approximately \$1,046 based on 12 single claims (out of 14 total claims). We believe that the geometric mean cost of \$1,046 for CPT code 78110 is comparable to the geometric mean cost of approximately \$1,210 for APC 5593. Consequently, we proposed to maintain the assignment of this code to APC 5593. For CPT code 78111, we had no claims data. However, based on its clinical similarity to CPT code 78110, we proposed to continue to assign the CPT code to APC 5593. For CPT code 78121, our analysis revealed a geometric mean cost of approximately \$807 based on 3 single claims (out of 3 total claims). Based on the low volume and because revising the assignment to

APC 5593, which had a proposed geometric mean cost of approximately \$1,210 would result in an overpayment for the test, we proposed to continue to assign CPT code 78121 to APC 5592, and to review the claims data for the final rule to determine whether a revision to the APC assignment would be necessary.

For this final rule with comment period, we again analyzed updated claims data associated with the four codes. We note that, for this final rule with comment period, we used claims data with dates of service between January 1, 2016, and December 31, 2016, that were processed on or before June 30, 2017. Our review of the final rule claims data revealed a similar pattern for all four codes. For CPT code 78018, we found a geometric mean cost of approximately \$418 based on 6,113 single claims (out of 6,923 total claims), which is similar to the geometric mean cost of approximately \$453 for APC 5592. Consequently, we believe that it continues to be appropriate to assign CPT code 78018 to APC 5592. For CPT code 78110, our claims data revealed a geometric mean cost of approximately \$1,037 based on 12 single claims (out of 14 total claims), which is similar to the geometric mean cost of approximately \$1,202 for APC 5593.

Consequently, we are maintaining CPT code 78110 in APC 5593. For CPT

code 78111, we again had no claims data. However, because of its clinical similarity to CPT code 78110, we will maintain the assignment to APC 5593. For CPT code 78121, we found a geometric mean cost of approximately \$808 based on 3 single claims (out of 3 total claims). Based on the comment received that the APC assignment is appropriate, we will retain CPT code 78121 in APC 5592, whose geometric mean cost is approximately \$453, for CY 2018. In addition, given the low volume for the CPT code, we do not believe that we should reassign CPT code 78121 to APC 5593, whose geometric mean cost is approximately \$1,202 for CY 2018. To reassign CPT code 78121 to APC 5593 would result in an overpayment for CPT code 78121.

Further, we remind the commenter, that as we do every year, we review the latest OPSS claims data to set the payment rates for the following year. Section 1833(t)(9) of the Act requires that we annually review all the items and services within an APC group and revise the APC structures accordingly. Included in this review is the identification of any 2 times rule violations as provided under section 1833(t)(2) of the Act and, to the extent possible, rectification of these violations.

With regard to the comment of deferring to specialty societies for

appropriate APC placement for designated codes, while we rely on our latest claims data to appropriately set payment rates under the OPSS, we welcome and appreciate comments from all stakeholders on our proposals. We note that every year we publish the OPSS/ASC proposed rules with requests for public comments on the OPSS and ASC payment assignments from interested parties, including hospitals, specialty societies, physicians, nurses, health care technicians, other health care professionals, interested individuals, patients, and any other stakeholders interested on commenting on our proposed payment assignments.

In summary, after consideration of the public comment we received, we are finalizing our CY 2018 proposals, without modification, for CPT codes 78018, 78110, 78111, and 78121. Table 47 below lists the final status indicator and APC assignments for the CPT codes. We refer readers to Addendum B to this final rule with comment period for the payment rates for all codes reported under the OPSS. In addition, we refer readers to Addendum A to this final rule with comment period for the status indicator meanings for all codes reported under the OPSS. Both Addendum A and Addendum B are available via the Internet on the CMS Web site.

TABLE 47—FINAL CY 2018 STATUS INDICATOR (SI) AND APC ASSIGNMENT FOR CPT CODES 78018, 78110, 78111, AND 78121

CPT code	Long descriptors	CY 2017 OPSS SI	CY 2017 OPSS APC	CY 2017 OPSS payment rate	CY 2018 OPSS SI	CY 2018 OPSS APC	CY 2018 OPSS payment rate
78018	Thyroid carcinoma metastases imaging; whole body.	S	5592	\$429.13	S	5592	Refer to OPSS Addendum B.
78110	Plasma volume, radiopharmaceutical volume-dilution technique (separate procedure); single sampling.	S	5593	1,138.94	S	5593	Refer to OPSS Addendum B.
78111	Plasma volume, radiopharmaceutical volume-dilution technique (separate procedure); multiple samplings.	S	5593	1,138.94	S	5593	Refer to OPSS Addendum B.
78121	Red cell volume determination (separate procedure); multiple samplings.	S	5592	429.13	S	5592	Refer to OPSS Addendum B.

18. Percutaneous Transluminal Mechanical Thrombectomy (C-APC 5192)

For CY 2018, as noted in Table 48 below and in Addendum B to the CY

2018 OPSS/ASC proposed rule, we proposed to revise the APC assignment for the percutaneous transluminal mechanical thrombectomy procedures, specifically, CPT codes 37184 and 37187. Specifically, we proposed to

reassign CPT codes 37184 and 37187 from APC 5183 (Level 3 Vascular Procedures) to APC 5184 (Level 4 Vascular Procedures), with a proposed payment rate of \$4,084.25.

TABLE 48—PROPOSED CY 2018 U (SI), APC ASSIGNMENT, AND PAYMENT RATE FOR CPT CODES 37184 AND 37187

CPT code	Long descriptor	CY 2017 OPPS SI	CY 2017 OPPS APC	CY 2017 OPPS payment rate	Proposed CY 2018 OPPS SI	Proposed CY 2018 OPPS APC	Proposed CY 2018 OPPS payment rate
37184	Primary percutaneous transluminal mechanical thrombectomy, noncoronary, non-intracranial, arterial or arterial bypass graft, including fluoroscopic guidance and intraprocedural pharmacological thrombolytic injection(s); initial vessel.	T	5183	\$3,924.28	T	5184	\$4,084.25
37187	Percutaneous transluminal mechanical thrombectomy, vein(s), including intraprocedural pharmacological thrombolytic injections and fluoroscopic guidance.	T	5183	3,924.28	T	5184	4,084.25

Comment: One commenter requested that CMS revise the proposed APC assignment for CPT codes 37184 and 37187 from APC 5184 to C-APC 5192 based on their clinical and resource homogeneity to the procedures assigned to C-APC 5192 (Level 2 Endovascular Procedures). The commenter indicated that both procedures are clinically similar to other percutaneous transluminal procedures assigned to C-APC 5192, including CPT code 36904 (Percutaneous transluminal mechanical thrombectomy and/or infusion for thrombolysis, dialysis circuit, any method, including all imaging and radiological supervision and interpretation, diagnostic angiography, fluoroscopic guidance, catheter placement(s), and intraprocedural pharmacological thrombolytic injection(s)), which CMS proposed to assign to C-APC 5192 for CY 2018, with a proposed payment of \$4,999.36. This commenter added that the geometric mean costs associated with the procedures described by CPT codes 37184 and 37187 are similar to the geometric mean costs of other procedures currently assigned to C-APC 5192.

Response: For this final rule with comment period, we reviewed the

updated CY 2016 claims data associated with CPT codes 37184 and 37187. We note that, for this final rule with comment period, we used claims data with dates of service between January 1, 2016, and December 31, 2016, that were processed on or before June 30, 2017. Our analysis of the final rule claims data revealed that a change in the APC assignment for CPT codes 37184 and 37187 to C-APC 5192 (rather than proposed APC 5184) is appropriate. Specifically, we found a geometric mean cost of approximately \$8,459 for CPT code 37184 based on 149 single claims (out of 150 total claims), and a geometric mean cost of approximately \$6,343 for CPT code 37187 based on 188 single claims (out of 190 total claims). We believe that the geometric mean costs for CPT codes 37184 and 37187 are more similar to the geometric mean costs of other procedures assigned to C-APC 5192, whose geometric mean cost is approximately \$5,082, rather than the geometric mean costs of procedures assigned to APC 5184, whose geometric mean cost is approximately \$4,262. We note that we also considered whether we should reassign CPT codes 37184 and 37187 to C-APC 5193 (Level 3 Endovascular Procedures), which has a geometric mean cost of approximately

\$10,504. However, based on our review, we believe that C-APC 5192 is more appropriate. Therefore, based on their clinical homogeneity and resource costs in relation to the other procedures assigned to C-APC 5192, we agree with the commenter that C-APC 5192 is the most appropriate APC assignment for CPT codes 37184 and 37187.

After consideration of the public comment we received, we are finalizing our CY 2018 proposal, with modification, for CPT codes 37184 and 37187. Specifically, we are reassigning CPT codes 37184 and 37187 from APC 5183 to C-APC 5192 for CY 2018. As we do every year under the OPSS, we will reevaluate the cost of CPT codes 37184, and 37187 and their APC assignment for next year's OPSS update. Table 49 below lists the final status indicator and APC assignments for both CPT codes. We refer readers to Addendum B to this final rule with comment period for the payment rates for all codes reported under the OPSS. In addition, we refer readers to Addendum A to this final rule with comment period for the status indicator meanings for all codes reported under the OPSS. Both Addendum A and Addendum B are available via the Internet on the CMS Web site.

TABLE 49—FINAL CY 2018 STATUS INDICATOR (SI) AND APC ASSIGNMENT FOR CPT CODES 37184 AND 37187

CPT code	Long descriptor	CY 2017 OPPS SI	CY 2017 OPPS APC	CY 2017 OPPS payment rate	CY 2018 OPPS SI	CY 2018 OPPS APC	CY 2018 OPPS payment rate
37184	Primary percutaneous transluminal mechanical thrombectomy, noncoronary, non-intracranial, arterial or arterial bypass graft, including fluoroscopic guidance and intraprocedural pharmacological thrombolytic injection(s); initial vessel.	T	5183	\$3,924.28	J1	5192	Refer to OPPS Addendum B.
37187	Percutaneous transluminal mechanical thrombectomy, vein(s), including intraprocedural pharmacological thrombolytic injections and fluoroscopic guidance.	T	5183	3,924.28	J1	5192	Refer to OPPS Addendum B.

19. Peripherally Inserted Central Venous Catheter (PICC) (APC 5182) code 36569 from APC 5181 (Level 1 Vascular Procedures) to APC 5182 (Level 2 Vascular Procedures), with a proposed payment rate of \$945.33.

For CY 2018, as noted in Table 50 below, we proposed to reassign CPT

TABLE 50—PROPOSED CY 2018 STATUS INDICATOR (SI), APC ASSIGNMENT, AND PAYMENT RATE FOR CPT CODE 36569

CPT code	Long descriptor	CY 2017 OPPS SI	CY 2017 OPPS APC	CY 2017 OPPS payment rate	Proposed CY 2018 OPPS SI	Proposed CY 2018 OPPS APC	Proposed CY 2018 OPPS payment rate
36569	Insertion of peripherally inserted central venous catheter (picc), without subcutaneous port or pump; age 5 years or older.	T	5181	\$684.13	T	5182	\$945.33

We proposed to revise the APC assignment for CPT code 36569 based on claims data used for the CY 2018 OPPS/ASC proposed rule. We note that the proposed rule data was based on claims data submitted between January 1, 2016, and December 31, 2016, that were processed on or before December 31, 2016. Our analysis of the proposed rule claims data revealed a geometric mean cost of approximately \$934 for CPT code 36569 based on 29,514 single claims (out of 52,035 total claims). Our analysis further revealed a geometric mean cost of approximately \$983 for APC 5182 and \$610 for APC 5181. Based on the geometric mean costs of APCs 5181 and 5182, we believed it was necessary to revise the APC assignment for CPT code 36569 from APC 5181 to APC 5182 to pay appropriately for the procedure. Consequently, we proposed to revise the APC assignment for CPT code 36569, whose geometric mean cost of approximately \$934 is comparable to

the geometric mean cost of approximately \$983 for APC 5182.

For this final rule with comment period, we again reviewed the updated claims data associated with CPT code 36569. We note that, for this final rule with comment period, we used claims data with dates of service between January 1, 2016, and December 31, 2016, that were processed on or before June 30, 2017. Our analysis of the final rule claims data revealed a similar pattern for CPT code 36569. Specifically, we found a geometric mean cost of approximately \$929 for CPT code 36569 based on 31,559 single claims (out of 56,891 total claims). We also found the geometric mean cost of approximately \$982 for APC 5182 to be similar to the geometric mean cost of CPT code 36569 compared to the geometric mean cost of approximately \$612 for APC 5181.

Comment: One commenter supported the proposed APC reassignment for CPT code 36569 and stated that APC 5182

more appropriately reflects the resources to perform the procedure.

Response: We appreciate the commenter's support. Based on our latest analysis of the final rule claims data, we are finalizing our proposal to reassign CPT code 36569 from APC 5181 to APC 5182.

In summary, after consideration of the public comment we received, we are finalizing our CY 2018 proposal, without modification, to reassign CPT code 36569 to APC 5182. Table 51 below lists the final status indicator and APC assignments for CPT code 36569 for CY 2018. We refer readers to Addendum B to this final rule with comment period for the payment rates for all codes reported under the OPPS. In addition, we refer readers to Addendum A to this final rule with comment period for the status indicator meanings for all codes reported under the OPPS. Both Addendum A and Addendum B are available via the Internet on the CMS Web site.

TABLE 51—FINAL CY 2018 STATUS INDICATOR (SI) AND APC ASSIGNMENT FOR CPT CODE 36569

CPT code	Long descriptor	CY 2017 OPPTS SI	CY 2017 OPPTS APC	CY 2017 OPPTS payment rate	CY 2018 OPPTS SI	CY 2018 OPPTS APC	CY 2018 OPPTS payment rate
36569	Insertion of peripherally inserted central venous catheter (picc), without subcutaneous port or pump; age 5 years or older.	T	5181	\$684.13	T	5182	Refer to OPPTS Addendum B.

20. Pulmonary Rehabilitation Services (APCs 5732 and 5733) and Cardiac Rehabilitation Services (APC 5771)

For CY 2018, as displayed in Table 52 below, and as listed in Addendum B of the CY 2018 OPPTS/ASC proposed rule, we did not propose to make any change to the APC assignments for the pulmonary rehabilitation services and

cardiac rehabilitation services codes. Currently, there are four HCPCS codes that describe pulmonary rehabilitation services, specifically, HCPCS codes G0237, G0238, G0239, and G0424. For CY 2018, we proposed to continue to assign HCPCS codes G0237, G0238, and G0239 to APC 5732 (Level 2 Minor Procedures) and to continue to assign HCPCS code G0424 to APC 5733 (Level

3 Minor Procedures) for CY 2018. In addition, there are currently four HCPCS codes that describe the cardiac rehabilitation services, specifically, HCPCS codes 93797, 93798, G0422, and G0423. For CY 2018, we proposed to continue to assign the cardiac rehabilitation services codes to APC 5771 (Cardiac Rehabilitation) for CY 2018.

TABLE 52—PROPOSED CY 2018 STATUS INDICATOR (SI), APC ASSIGNMENT, AND PAYMENT RATE FOR THE PULMONARY REHABILITATION SERVICES AND CARDIAC REHABILITATION SERVICES HCPCS CODES

HCPCS code	Long descriptor	CY 2017 OPPTS SI	CY 2017 OPPTS APC	CY 2017 OPPTS payment rate	Proposed CY 2018 OPPTS SI	Proposed CY 2018 OPPTS APC	Proposed CY 2018 OPPTS payment rate
Pulmonary Rehabilitation Services							
G0237	Therapeutic procedures to increase strength or endurance of respiratory muscles, face to face, one on one, each 15 minutes (includes monitoring).	S	5732	\$28.38	S	5732	\$29.65
G0238	Therapeutic procedures to improve respiratory function, other than described by g0237, one on one, face to face, per 15 minutes (includes monitoring).	S	5732	28.38	S	5732	29.65
G0239	Therapeutic procedures to improve respiratory function or increase strength or endurance of respiratory muscles, two or more individuals (includes monitoring).	S	5732	28.38	S	5732	29.65
G0424	Pulmonary rehabilitation, including exercise (includes monitoring), one hour, per session, up to two sessions per day.	S	5733	54.55	S	5733	53.22
Cardiac Rehabilitation Services							
93797	Physician or other qualified health care professional services for outpatient cardiac rehabilitation; without continuous ecg monitoring (per session).	S	5771	\$110.22	S	5771	\$113.71
93798	Physician or other qualified health care professional services for outpatient cardiac rehabilitation; with continuous ecg monitoring (per session).	S	5771	110.22	S	5771	113.71
G0422	Intensive cardiac rehabilitation; with or without continuous ecg monitoring with exercise, per session.	S	5771	110.22	S	5771	113.71
G0423	Intensive cardiac rehabilitation; with or without continuous ecg monitoring; without exercise, per session.	S	5771	110.22	S	5771	113.71

Comment: Several commenters expressed concern that the payment rates for the pulmonary rehabilitation services are significantly less than those for the cardiac rehabilitation services. The commenters stated that, despite the legislative and clinical similarity between both services, CMS has taken different approaches to implementing the services, with pulmonary rehabilitation services paid less than cardiac rehabilitation services. One commenter indicated that, since 2010, the code describing pulmonary rehabilitation services has had three different status indicator assignments and payment volatility. This commenter recommended that CMS reassign the pulmonary rehabilitation HCPCS code G0464 from APC 5733 to the cardiac rehabilitation APC group, specifically, APC 5771. Another commenter recommended that CMS revisit its approach to payment for pulmonary rehabilitation services to improve access to care. One commenter recommended that both types of services be placed in one composite APC under the OPSS.

Response: The payment rates for both the pulmonary and cardiac rehabilitation services are based on claims data that are analyzed each year. As we do every year, we review the latest OPSS claims data to set the payment rates for the following year. We note that section 1833(t)(9) of the Act requires that we annually review all the items and services within an APC group and revise the APC structures accordingly. Included in this review is the identification of any 2 times rule violations as provided under section 1833(t)(2) of the Act and, to the extent possible, rectification of these violations.

For the proposed rule, we based the proposed payment rates on claims data submitted between January 1, 2016, and December 31, 2016, that were processed on or before December 31, 2016. Based on our analysis, we found the costs for both types of services to be significantly different.

For the pulmonary rehabilitation services, our analysis revealed a geometric mean cost of approximately \$26 for HCPCS code G0237 (based on 19,925 single claims), \$22 for HCPCS code G0238 (based on 17,361 single claims), and \$33 for HCPCS code G0239 (based on 168,295 single claims). We note that the range of costs (between \$26 and \$33) for HCPCS codes G0237, G0238, and G0239 are similar to the geometric mean cost of approximately \$31 for APC 5732. Consequently, we proposed to continue to assign all three pulmonary rehabilitation services HCPCS codes to APC 5732 for CY 2018.

In addition, we found a geometric mean cost of approximately \$45 for HCPCS code G0424 (based on 468,571 single claims) that is comparable to the geometric mean cost of approximately \$55 for APC 5733. Therefore, we proposed to continue to assign HCPCS code G0424 to APC 5733.

For the cardiac rehabilitation services, our analysis revealed a geometric mean cost of approximately \$101 for HCPCS code 93797 (based on 129,124 single claims), \$118 for HCPCS code 93798 (based on 2,698,534 single claims), \$212 for HCPCS code G0422 (based on 38,094 single claims), and \$174 for HCPCS code G0423 (based on 18,001 single claims). Because the range of costs (between \$101 and \$212) for the cardiac rehabilitation services are comparable to the geometric mean cost of approximately \$118 for APC 5771, we proposed to continue to assign the cardiac rehabilitation HCPCS codes to APC 5771 for CY 2018.

For this final rule with comment period, we again analyzed the updated claims data associated with the pulmonary and cardiac rehabilitation services. We note that, for this final rule with comment period, we used claims data with dates of service between January 1, 2016, and December 31, 2016, that were processed on or before June 30, 2017. Similar to our proposed rule findings, we found the costs to be different for both services.

For the pulmonary rehabilitation services, our final rule claims data revealed a geometric mean cost of approximately \$25 for HCPCS code G0237 (based on 22,097 single claims), \$22 for HCPCS code G0238 (based on 18,900 single claims), and \$33 for HCPCS code G0239 (based on 187,134 single claims). Based on the range of costs (between \$22 and \$33), we believe that HCPCS codes G0237, G0238, and G0239 are appropriately assigned to APC 5732, whose geometric mean cost is approximately \$32. Similarly, we believe that the geometric mean cost of approximately \$44 (based on 514,478 single claims) for HCPCS code G0424 is comparable to the geometric mean costs of those services assigned to APC 5733, whose geometric mean cost is approximately \$56 for CY 2018.

For the cardiac rehabilitation services, our final rule claims data revealed a geometric mean cost of approximately \$224 for HCPCS code G0422 (based on 44,754 single claims), \$186 for HCPCS code G0423 (based on 22,188 single claims), \$101 for HCPCS code 93797 (based on 143,507 single claims), and \$116 for HCPCS code 93798 (based on 2,991,759 single claims). Based on the costs for the cardiac rehabilitation

HCPCS codes (between \$101 to \$224), we believe that the geometric mean cost of approximately \$117 for APC 5771 appropriately reflects the resources in providing cardiac rehabilitation services.

In addition, while the commenters believed that pulmonary and cardiac rehabilitation services are similar, our analysis of the available OPSS data reveals that their costs are significantly different. Consequently, we do not agree that we should assign both services to one APC, or even assign the pulmonary rehabilitation HCPCS code G0424 to the cardiac rehabilitation services group (APC 5771). We note that the commenters did not provide data to suggest that the hospital reported costs in our data are incorrect or that the resources (costs) incurred to furnish these two types of services are equal. Accordingly, we have no reason to believe that the data reported to us by hospitals are incorrect.

Moreover, we do not agree that we should create a composite APC for the pulmonary and cardiac rehabilitation services. Composite APCs provide a single payment for groups of services that are typically performed together during a single clinical encounter that result in the provision of a complete service. Combining payment for multiple, independent services into a single OPSS payment in this way enables hospitals to manage their resources with maximum flexibility by monitoring and adjusting the volume and efficiency of services themselves. Establishing a composite APC for these services would not be appropriate because pulmonary and cardiac rehabilitation services are generally not performed on the same day. We refer readers to the CY 2008 OPSS/ASC final rule with comment period for a full discussion of the development of the composite APC methodology (72 FR 66611 through 66614 and 66650 through 66652) and the CY 2012 OPSS/ASC final rule with comment period (76 FR 74163) for more recent background.

Comment: Some commenters stated that, despite evidence that pulmonary rehabilitation is a valuable service, few patients with chronic obstructive pulmonary disease (COPD) are able to access this treatment. The commenters further indicated that a study of Medicare beneficiaries revealed that only 3.7 percent of COPD patients received pulmonary rehabilitation in 2012, and believe this number may be higher for non-Medicare beneficiaries. The commenters noted that payment for pulmonary rehabilitation is lower than cardiac rehabilitation (a similar service) in the Medicare program, and believed

this difference is based on idiosyncratic hospital billing and OPPS rules, not based on rational policy or evidence. Specifically, the commenter indicated that, for CY 2017, payment for 1 hour of pulmonary rehabilitation is \$54.55 under the OPPS. These commenters suggested that the payment discrepancy between cardiac services and pulmonary rehabilitation services may be a contributing factor to inadequate access of the pulmonary rehabilitation services.

Response: As stated in section III.B. of this final rule with comment period, payments for OPPS services and procedures are based on our analysis of the latest claims data. Under the OPPS, we pay for covered hospital outpatient services on a rate-per-service basis, where the service may be reported with

one or more HCPCS codes. Payment varies according to the APC group to which the independent service or combination of services is assigned. Under the Medicare program, we pay separately for both cardiac and pulmonary rehabilitation services. We have not found evidence that there is an access to care issue for pulmonary rehabilitation services compared to cardiac rehabilitation services. We note that there are a variety of treatment options for patients with COPD and pulmonary rehabilitation remains a covered service for those beneficiaries for whom physicians order this service. We note that, under the Medicare program, when the service is provided in the hospital outpatient setting, we make two payments, one to the hospital outpatient department under the OPPS

and another for the professional services under the MPFS.

In addition, as illustrated in Table 52–1 below, the number of services paid by Medicare for both cardiac rehabilitation and pulmonary rehabilitation has grown in the last several years. For the CY 2018 OPPS update, our claims data reveal over 514,000 single claims for pulmonary rehabilitation services as described by HCPCS code G0424 alone. Accordingly, we do not believe that beneficiary access to pulmonary rehabilitation services is inadequate. Details pertaining to the volume of these services furnished in the physician office setting can be derived from the CY 2018 MPFS final rule and associated public use files.

TABLE 52–1—OPPS CLAIMS DATA FOR THE PULMONARY AND CARDIAC (INCLUDING INTENSIVE CARDIAC) REHABILITATION HCPCS CODES FOR THE CY 2014 THROUGH CY 2018 OPPS UPDATES

HCPCS code	Short descriptor	2014 OPPS single claims data	2015 OPPS single claims data	2016 OPPS single claims data	2017 OPPS single claims data	2018 OPPS single claims data
Cardiac Rehabilitation Services						
93797	Cardiac rehab	87,689	94,769	109,420	120,821	143,507
93798	Cardiac rehab/monitor	2,428,984	2,481,175	2,581,446	2,761,806	2,991,759
G0422	Intens cardiac rehab w/exerc	12,060	12,043	17,646	30,165	44,754
G0423	Intens cardiac rehab no exer	703	1,325	6,654	11,979	22,188
Pulmonary Rehabilitation Services						
G0237	Therapeutic procd strg endure	15,337	43,591	47,046	19,098	22,097
G0238	Oth resp proc, indiv	14,437	22,736	23,960	18,482	18,900
G0239	Oth resp proc, group	132,475	111,755	127,425	165,799	187,134
G0424	Pulmonary rehab w exer	457,226	459,572	454,121	443,777	514,478

In summary, after consideration of the public comments we received and after our analysis of the updated claims data for this final rule with comment period, we believe that the current APC assignments for the pulmonary and cardiac rehabilitation services appropriately reflects their clinical coherence and resource costs. Consequently, we are finalizing our proposal to continue the current APC

assignment of the pulmonary and cardiac rehabilitation HCPCS codes, without modification, for CY 2018. As we do every year, we will review our claims data for these services for the CY 2019 OPPS rulemaking. Table 53 below lists the final status indicator and APC assignments for the codes for pulmonary and cardiac rehabilitation services. We refer readers to Addendum B to this final rule with comment period for the

payment rates for all codes reported under the OPPS. In addition, we refer readers to Addendum A to this final rule with comment period for the status indicator meanings for all codes reported under the OPPS. Both Addendum A and Addendum B are available via the Internet on the CMS Web site.

TABLE 53—FINAL CY 2018 STATUS INDICATOR (SI) AND APC ASSIGNMENT FOR THE PULMONARY REHABILITATION SERVICES AND CARDIAC REHABILITATION SERVICES

HCPCS code	Long descriptor	CY 2017 OPPS SI	CY 2017 OPPS APC	CY 2017 OPPS payment rate	CY 2018 OPPS SI	CY 2018 OPPS APC	CY 2018 OPPS payment rate
Pulmonary Rehabilitation Services							
G0237	Therapeutic procedures to increase strength or endurance of respiratory muscles, face to face, one on one, each 15 minutes (includes monitoring).	S	5732	\$28.38	S	5732	Refer to OPPS Addendum B.

TABLE 53—FINAL CY 2018 STATUS INDICATOR (SI) AND APC ASSIGNMENT FOR THE PULMONARY REHABILITATION SERVICES AND CARDIAC REHABILITATION SERVICES—Continued

HCPCS code	Long descriptor	CY 2017 OPPS SI	CY 2017 OPPS APC	CY 2017 OPPS payment rate	CY 2018 OPPS SI	CY 2018 OPPS APC	CY 2018 OPPS payment rate
G0238	Therapeutic procedures to improve respiratory function, other than described by g0237, one on one, face to face, per 15 minutes (includes monitoring).	S	5732	28.38	S	5732	Refer to OPPS Addendum B.
G0239	Therapeutic procedures to improve respiratory function or increase strength or endurance of respiratory muscles, two or more individuals (includes monitoring).	S	5732	28.38	S	5732	Refer to OPPS Addendum B.
G0424	Pulmonary rehabilitation, including exercise (includes monitoring), one hour, per session, up to two sessions per day.	S	5733	54.55	S	5733	Refer to OPPS Addendum B.
Cardiac Rehabilitation Services							
93797	Physician or other qualified health care professional services for outpatient cardiac rehabilitation; without continuous ecg monitoring (per session).	S	5771	\$110.22	S	5771	Refer to OPPS Addendum B.
93798	Physician or other qualified health care professional services for outpatient cardiac rehabilitation; with continuous ecg monitoring (per session).	S	5771	110.22	S	5771	Refer to OPPS Addendum B.
G0422	Intensive cardiac rehabilitation; with or without continuous ecg monitoring with exercise, per session.	S	5771	110.22	S	5771	Refer to OPPS Addendum B.
G0423	Intensive cardiac rehabilitation; with or without continuous ecg monitoring; without exercise, per session.	S	5771	110.22	S	5771	Refer to OPPS Addendum B.

21. Radiology and Imaging Procedures and Services

a. Imaging APCs

Section 1833(t)(9)(A) of the Act requires the Secretary to review not less often than annually, and revise the APC group assignments, relative payment weights, and the wage and other adjustments to take into account changes in medical practice, changes in technology, the addition of new services, new cost data, and other relevant information and factors. In addition, section 1833(t)(2)(G) of the Act requires the Secretary to create additional groups of covered OPD services that classify separately those procedures that utilize contrast agents from those procedures that do not utilize contrast agents.

In CY 2016, as a part of our comprehensive review of the structure of the APCs and procedure code assignments, we restructured the APCs that contain imaging services (80 FR

70392). The purpose of this restructuring was to more appropriately reflect the resource costs and clinical characteristics of the services classified within the imaging APCs. The restructuring of the imaging APCs resulted in broader groupings that removed the excessive granularity of grouping imaging services according to organ or physiologic system, which did not necessarily reflect either significant differences in resources or how these services are delivered in the hospital outpatient setting. In CY 2017, in response to public comments on the CY 2017 OPPS/ASC proposed rule, we further consolidated the imaging APCs from 17 APCs in CY 2016 to 7 APCs in CY 2017 (81 FR 79633). These included four imaging APCs without contrast and three imaging APCs with contrast.

As discussed in the CY 2018 OPPS/ASC proposed rule (82 FR 33608), for CY 2018, we reviewed the services assigned to the imaging without contrast APCs and imaging with contrast APCs.

Specifically, we evaluated the resource costs and clinical coherence of the procedures associated with the four levels of imaging without contrast APCs and the three levels of imaging with contrast APCs, as well as identified and corrected any 2 times rule violations as discussed in section III.B.2. of the CY 2018 OPPS/ASC proposed rule. In addition, we reviewed and considered stakeholder recommendations to make additional refinements to the structure of the APC groupings of the imaging procedures classified within the imaging APCs that would maintain clinical homogeneity while more appropriately addressing resource cost fluctuation and volatility. As a result of our analysis and review of the claims data used for CY 2018 ratesetting, we stated in the proposed rule that we believed a Level 5 Imaging without Contrast APC was needed to more appropriately group certain imaging services with higher resource costs. Specifically, we stated our belief that

the data supported splitting the current (CY 2017) Level 4 Imaging without Contrast APC into two APCs such that the Level 4 Imaging without Contrast APC would include high frequency, low-cost services and the proposed Level 5 Imaging without Contrast APC would include low frequency high-cost services. Therefore, for CY 2018, we proposed to add a fifth level within the Imaging without Contrast APCs. In Table 19 of the proposed rule, we listed the CY 2017 imaging APCs, and in Table 20 of the proposed rule, we listed the proposed CY 2018 imaging APCs with the addition of a fifth level within the Imaging without Contrast APCs. The specific APC assignments for each service grouping were listed in Addendum B to the proposed rule, which is available via the Internet on the CMS Web site. We stated that this proposal would increase the imaging APCs from 7 APCs in CY 2017 to 8 in CY 2018. The specific APC assignments for each imaging service HCPCS code were listed in Addendum B to the proposed rule, which is available via the Internet on the CMS Web site. We noted that some of the imaging procedures are assigned to APCs that are not listed in the tables (for example, the vascular procedures APCs). Also, the nuclear medicine services APCs were not included in this proposal. These imaging services were not included in this proposal because we did not propose changes to their APC structure.

We invited public comments on our proposal to add a Level 5 Imaging without Contrast APC in CY 2018.

Comment: Commenters generally disagreed with CMS' proposal to add a fifth level within the Imaging without Contrast APC series. These commenters represented various imaging specialty societies and individual practitioners who utilize various imaging modalities. Many of the commenters opposed adding a fifth level because of the proposed resultant reduction in payment to several vascular ultrasound procedures. The commenters urged CMS to not finalize the proposal because it would destabilize and drastically decrease payments for certain imaging services compared to CY 2017 rates. The commenters noted that the proposed rate for certain imaging services would cause certain providers to no longer be able to furnish these services, thereby impeding access to these important services for Medicare beneficiaries. However, some commenters recommended various alternative HCPCS code placements within the Imaging without Contrast APC series if CMS finalized its proposal to add a fifth level. Some of these same

commenters suggested that maintaining the CY 2017 APC groupings and payment rates, to the extent possible, would address their concerns.

Response: We appreciate these comments and recommendations on how to structure and assign HCPCS codes to the Imaging without Contrast APC series. We analyzed the various alternative suggestions for the various recommended HCPCS code placements, including maintaining the CY 2017 APC groupings. After consideration of the public comments and suggestions we received, we are not finalizing our proposal to add a fifth level to the Imaging without Contrast APC series. Instead, we are maintaining the CY 2017 APC structure of four levels of Imaging Without Contrast APCs and making minor reassignments to the HCPCS codes within this series to resolve or mitigate any violations of the 2 times rule or both. We understand the importance of payment stability for providers and believe that continuation of the four levels of Imaging without Contrast APCs would minimize fluctuation in payment rates from CY 2017 to CY 2018. As displayed in the "2 Times Rule" for this final rule with comment period, which is available via the Internet on the CMS Web site, the APC geometric mean costs for APCs 5521 through 5524 are consistent with the CY 2017 APC geometric mean costs for the same APCs, indicating the cost-based relative weights that are used to calculate payment are stable.

Comment: A few commenters objected to the proposed exception to the violation of the 2 times rule for APC 5573 (Level 3 Imaging With Contrast) and recommended alternative approaches to resolving the violation, such as the creation of a Level 4 Imaging With Contrast or maintaining the CY 2017 APC groupings. Commenters stated that the proposed reassignment of nine high-volume contrast magnetic resonance imaging (MRI) procedures from Level 2 (CY 2017 placement) to Level 3 (proposed CY 2018 placement) would result in a significant reduction and underpayment for contrast echocardiography procedures and would significantly lower the payment rate for contrast echocardiography procedures, which has been relatively stable for the past several years, consistent with the procedure costs. These nine high-volume contrast MRI procedures are described by the following CPT codes:

- CPT code 70543 (Magnetic resonance imaging, orbit, face, and/or neck; without contrast material(s) and further sequences);

- CPT code 70553 (Magnetic resonance imaging, brain (including brain stem); without contrast material, followed by contrast material(s) and further sequences);

- CPT code 71552 (Magnetic resonance imaging, chest; without contrast material(s), followed by contrast material(s) and further sequences);

- CPT code 72156 (Magnetic resonance imaging, spinal canal and contents, without contrast material, followed by contrast material(s) and further sequences; cervical);

- CPT code 72157 (Magnetic resonance imaging spinal canal and contents, without contrast material, followed by contrast material(s) and further sequences; thoracic);

- CPT code 72158 (Magnetic resonance imaging spinal canal and contents, without contrast material, followed by contrast material(s) and further sequences; lumbar);

- CPT code 72197 (Magnetic resonance imaging pelvis; without contrast material(s), followed by contrast material(s) and further sequences);

- CPT code 73223 (Magnetic resonance imaging, any joint of upper extremity; without contrast material(s), followed by contrast material(s) and further sequences); and

- CPT code 74183 (Magnetic resonance imaging abdomen; without contrast material(s), followed by with contrast material(s) and further sequences).

Response: We were persuaded by the points raised by the commenters and agree that continuation of the CY 2017 groupings is appropriate to maintain payment stability for imaging services assigned to APC 5572 and APC 5573. Although the proposed grouping for APC 5573 achieved clinical similarity, based on analysis of the claims data used for this final rule with comment period, we believe we should take a deliberate approach to maintain consistency in payment assignment by not adopting the proposals to reassign the nine high-volume contrast MRI procedures from APC 5572 to APC 5573 and to allow for an exception for APC 5573 from the 2 times rule. Therefore, we are modifying our proposed grouping for APC 5573 by moving the nine high-volume contrast MRI procedures from Level 3 (Imaging with Contrast) to Level 2 (Imaging with Contrast), which is consistent with their CY 2017 APC assignment. In addition, we are making a few other code reassignments to resolve the 2 times rule violation in APC 5573.

In summary, after consideration of the public comments we received and for the reasons discussed above, we are not finalizing the proposal to create a Level

5 (Imaging without Contrast) APC or the proposal to assign nine high-volume contrast MRI procedures to Level 3 (Imaging with Contrast) for CY 2018.

Table 54 below compares the CY 2017 and 2018 APC geometric mean costs for the imaging APCs.

TABLE 54—COMPARISON OF CY 2017 AND CY 2018 GEOMETRIC MEAN COSTS FOR THE IMAGING APCS

APC	APC group title	CY 2017 APC geometric mean cost	CY 2018 APC geometric mean cost
5521	Level 1 Imaging without Contrast	\$61.53	\$62.08
5522	Level 2 Imaging without Contrast	115.88	118.68
5523	Level 3 Imaging without Contrast	232.21	245.08
5524	Level 4 Imaging without Contrast	462.23	486.38
5571	Level 1 Imaging with Contrast	272.40	252.58
5572	Level 2 Imaging with Contrast	438.42	456.08
5573	Level 3 Imaging with Contrast	675.23	681.45

The specific APC assignments for each imaging procedure grouping are listed in Addendum B to this final rule with comment period, which is available via the Internet on the CMS Web site.

b. Non-Ophthalmic Fluorescent Vascular Angiography (APC 5523)

As discussed in the CY 2018 OPPTS/ASC proposed rule (82 FR 33609), for the CY 2018 OPPTS update, we proposed to reassign HCPCS code C9733 (Non-ophthalmic fluorescent vascular angiography) from APC 5523 (Level 3 Imaging without Contrast) to APC 5524 (Level 4 Imaging without Contrast) based on the latest claims data available for the proposed rule. We proposed to maintain the status indicator assignment of “Q2” (T-packaged) to indicate that the service is conditionally packaged when performed in conjunction with other procedures on the same day but paid separately when performed as a stand-alone service.

Our claims data used for the proposed rule, which included claims submitted between January 1, 2016, and December 31, 2016, and processed on or before December 31, 2016, showed a geometric mean cost of approximately \$236 for HCPCS code C9733 based on 216 single claims (out of 953 total claims), which is closely aligned with the geometric mean cost of approximately \$275 for APC 5524. Because HCPCS code C9733 is an imaging service which is similar to the codes assigned to APC 5524, we proposed to reassign HCPCS code C9733 from APC 5523 to APC 5524. We stated that we believe this proposed reassignment would improve the clinical homogeneity of APC 5524 and appropriately align the resource costs of HCPCS code C9733 to the resource costs of those procedures assigned to APC 5524.

As we have stated in previous OPPTS/ASC final rules, specifically, in the CY

2013 OPPTS/ASC final rule with comment period (77 FR 68345 through 68346), the CY 2014 OPPTS/ASC final rule with comment period (78 FR 74976 through 74977), and the CY 2017 OPPTS/ASC final rule with comment period (81 FR 79632), the service described by HCPCS code C9733 is primarily an intraoperative imaging service that is performed in combination with a number of primary procedures, including facial reconstruction and reanimation, muscle flaps, trauma reconstruction, digital and limb reattachment, and breast reconstruction. Therefore, payment for the service described by HCPCS code C9733 is conditionally packaged under 42 CFR 419.2(b)(14), which contains the policies governing packaging of intraoperative items and services. Consequently, we proposed to maintain the status indicator assignment of “Q2” to indicate that the payment for the service will be packaged in the APC payment if billed on the same date of service as a HCPCS code assigned to status indicator “T”, but in all other circumstances, a separate APC payment for the service will be made. We believe that the OPPTS payments, separate or packaged, for surgical procedures with which this service is performed are more than adequate to cover the cost of the service described by HCPCS code C9733 for Medicare beneficiaries in need of this service.

Comment: Several commenters supported the proposed APC reassignment for HCPCS code C9733 to APC 5524. A few commenters also suggested assignment of HCPCS code C9733 in a higher payment APC (compared to the CY 2017 payment rate) that would cover the cost of the service, but did not recommend a specific APC. In addition, commenters requested that CMS change the status indicator assignment from “Q2” to a separately payable status indicator “S”. The

commenters noted that status indicator “Q2” indicates that payment for the procedure described by HCPCS code C9733 is conditionally packaged when provided in conjunction with other procedures assigned to status indicator “T,” which are primarily surgical procedures.

Response: Regarding the status indicator assignment of HCPCS code C9733, we have addressed this comment in prior rules (81 FR 79632). The service described by HCPCS code C9733 is primarily an intraoperative imaging service. Therefore, payment for the service is conditionally packaged under § 419.2(b)(14), which packages intraoperative items and services. When the procedure described by HCPCS code C9733 is not furnished in conjunction with a surgical procedure, the service is paid separately. We believe that the OPPTS payments, separate or packaged, for surgical procedures with which this test is performed (for example, breast reconstruction) are more than adequate to cover the cost of the service described by HCPCS code C9733 for Medicare beneficiaries in need of this service. With respect to the APC reassignment for APC 5524, because we are maintaining the CY 2017 APC group assignments for imaging services, we are not finalizing our proposal to reassign HCPCS code C9733 from APC 5523 to APC 5524. Rather, we are maintaining the assignment of the procedure described by HCPCS code C9733 to APC 5523 for CY 2018. Based on our review of the CY 2018 final rule claims data, the procedure described by HCPCS code C9733 has a geometric mean unit cost of approximately \$237 and the geometric mean cost of APC 5523 is approximately \$245 for CY 2018. Therefore, it is not necessary to reassign the procedure described by HCPCS code C9733 to APC 5524, which has a geometric mean unit cost of about \$486. It is more appropriate to maintain the assignment

of the procedure described by HCPCS code C9733 to APC 5523 because of the similarity in clinical characteristics and resource use for this procedure and other imaging procedures assigned to APC 5523.

After consideration of the public comments we received, we are not finalizing our proposal to reassign HCPCS code C9733 from APC 5523 to APC 5524 for CY 2018. Instead, for CY 2018, we are continuing to assign HCPCS code C9733 to APC 5523 and continuing to assign the code to status indicator “Q2” to indicate that the service is conditionally packaged. The final CY 2018 OPPS payment rate for HCPCS code C9733 can be found in OPPS Addendum B to this final rule with comment period, which is available via the Internet on the CMS Web site.

22. Sclerotherapy (APC 5054)

For CY 2018, the AMA CPT Editorial Panel established two new codes to

describe the injection of a noncompounded foam sclerosant for treatment of incompetent veins. Table 55 below lists the complete descriptors for the new CPT codes. These codes were listed in Addendum B and Addendum O to the CY 2018 OPPS/ASC proposed rule (which are available via the Internet on the CMS Web site). Addendum B listed the proposed status indicator assignments for the new codes and assigned them to comment indicator “NP” (New code for the next calendar year or existing code with substantial revision to its code descriptor in the next calendar year as compared to current calendar year, proposed APC assignment; comments will be accepted on the proposed APC assignment for the new code), while Addendum O listed the proposed/placeholder CY 2018 CPT codes and the long descriptors. We note that the CPT code descriptors that appeared in Addendum B to the CY 2018 proposed rule were short descriptors and did not

accurately describe the complete procedure, service, or item described of the CPT code. Therefore, we included the 5-digit placeholder codes and their long descriptors in Addendum O to the proposed rule, specifically under the column labeled “CY 2018 OPPS/ASC Proposed Rule 5-Digit AMA Placeholder Code” so that the public could adequately comment on our proposed APC and status indicator assignments. We also indicated that the final CPT code numbers would be included in this CY 2018 OPPS/ASC final rule with comment period. The final CPT code numbers, along with their corresponding 5-digit placeholder codes, can be found in Table 55 below.

As displayed in Table 55 below and in Addendum B of the CY 2018 OPPS/ASC proposed rule, we proposed to assign CPT codes 36465 and 36466 to APC 5053 (Level 3 Skin Procedures), with a proposed payment rate of \$468.82.

TABLE 55—PROPOSED CY 2018 STATUS INDICATOR (SI), APC ASSIGNMENT, AND PAYMENT RATES FOR CPT CODES 36465 AND 36466

CPT code	CY 2018 OPPS/ASC proposed rule placeholder code	Long descriptor	Proposed CY 2018 OPPS SI	Proposed CY 2018 OPPS APC	Proposed CY 2018 OPPS payment rate
36465	364X5	Injection of non-compounded foam sclerosant with ultrasound compression maneuvers to guide dispersion of the injectate, inclusive of all imaging guidance and monitoring; single incompetent extremity truncal vein (e.g., great saphenous vein, accessory saphenous vein).	T	5053	\$468.82
36466	364X6	Injection of non-compounded foam sclerosant with ultrasound compression maneuvers to guide dispersion of the injectate, inclusive of all imaging guidance and monitoring; multiple incompetent truncal veins (e.g., great saphenous vein, accessory saphenous vein), same leg.	T	5053	468.82

Comment: Several commenters opposed the proposed assignment of new CPT codes 36465 and 36466 to APC 5053 and requested the assignment to APC 5183 (Level 3 Vascular Procedures), which had a proposed payment rate of \$2,409.72. The commenters stated that CMS inappropriately proposed to assign these codes to APC 5053 based on a comparison to CPT codes 36470 (Injection of sclerosing solution; single vein) and 36471 (Injection of sclerosing solution; multiple veins, same leg). However, the commenters indicated that CPT codes 36465 and 36466 are dissimilar to the procedures assigned to APC 5053, which describe simple skin procedures (for example, debridement, Moh’s surgery, and skin lesion destruction). They stated that the procedures assigned to APC 5053 are

not comparable to the procedures described by new CPT codes 36465 and 36466 based on complexity, staff type, staff time, and use of ultrasound guidance. The commenters further added that the two procedures are most similar to the endovenous ablative procedures that treat incompetent veins in APC 5183, specifically, the procedures described by the following CPT codes:

- CPT code 36473 (Endovenous ablation therapy of incompetent vein, extremity, inclusive of all imaging guidance and monitoring, percutaneous, mechanochemical; first vein treated);
- CPT code 36474 (Endovenous ablation therapy of incompetent vein, extremity, inclusive of all imaging guidance and monitoring, percutaneous, mechanochemical; subsequent vein(s) treated in a single extremity, each

through separate access sites (list separately in addition to code for primary procedure));

- CPT code 36475 (Endovenous ablation therapy of incompetent vein, extremity, inclusive of all imaging guidance and monitoring, percutaneous, radiofrequency; first vein treated);
- CPT code 36476 (Endovenous ablation therapy of incompetent vein, extremity, inclusive of all imaging guidance and monitoring, percutaneous, radiofrequency; subsequent vein(s) treated in a single extremity, each through separate access sites (list separately in addition to code for primary procedure))
- CPT code 36478 (Endovenous ablation therapy of incompetent vein, extremity, inclusive of all imaging guidance and monitoring, percutaneous, laser; first vein treated); and

- CPT code 36479 (Endovenous ablation therapy of incompetent vein, extremity, inclusive of all imaging guidance and monitoring, percutaneous, laser; subsequent vein(s) treated in a single extremity, each through separate access sites (list separately in addition to code for primary procedure)).

One commenter stated that the procedures described by CPT codes 36465 and 36466 share similar characteristics and comparable anticipated costs as the procedures assigned to APC 5183, and consequently, requested an assignment to APC 5183 for the two new CPT codes. Another commenter noted that CPT codes 36473, 36475, and 36478 are currently assigned to APC 5183, and requested that CMS also assign new CPT codes 36465 and 36466 to APC 5183. One commenter reported that, in the CY 2018 MPFS proposed rule, CMS proposed a nonfacility payment of \$1,605.17 for new CPT code 36465 and \$1,678.23 for new CPT code 36466 for CY 2018. This commenter also listed a

practice expense input price of \$1,054 for the Varithena (foam) used in the procedures.

Response: Because CPT codes 36465 and 36466 are new codes for CY 2018, we have no claims data on which to base our payment rate. However, in the absence of claims data, we reviewed the clinical characteristics of the procedures to determine whether they are similar to existing procedures. After reviewing information from the public commenters and input from our clinical advisors, we believe that new CPT codes 36465 and 36466 are clinically similar to those procedures assigned to APC 5053. However, in light of the commenter's reported supply expense of \$1,054 for the Varithena (foam), we believe that an assignment to APC 5054 is necessary. We note that the final CY 2018 geometric mean cost for APC 5054 is approximately \$1,567. Therefore, we believe that APC 5054 is a more appropriate APC assignment for the new CPT codes. Consistent with the statutory requirement under section 1833(t)(9)(A)

of the Act, we will reevaluate the APC assignment for CPT codes 36465 and 36466 in the next rulemaking cycle.

In summary, after consideration of the public comments we received, we are finalizing our proposal for the APC assignment of the procedures described by new CPT codes 36465 and 36466, with modification. Specifically, we are assigning both codes to APC 5054, instead of proposed APC 5053, for CY 2018. Table 56 below lists the final status indicator and APC assignments for CPT codes 36465 and 36466 for CY 2018. We refer readers to Addendum B to this final rule with comment period for the payment rates for all codes reported under the OPPS. In addition, we refer readers to Addendum A to this final rule with comment period for the status indicator meanings for all codes reported under the OPPS. Both Addendum A and Addendum B are available via the Internet on the CMS Web site.

TABLE 56—FINAL CY 2018 STATUS INDICATOR (SI) AND APC ASSIGNMENT FOR CPT CODES 36465 AND 36466

CPT code	CY 2018 OPPS/ASC proposed rule placeholder code	Long descriptor	Proposed CY 2018 OPPS SI	Proposed CY 2018 OPPS APC	CY 2018 OPPS payment rate
36465	364X5	Injection of non-compounded foam sclerosant with ultrasound compression maneuvers to guide dispersion of the injectate, inclusive of all imaging guidance and monitoring; single incompetent extremity truncal vein (e.g., great saphenous vein, accessory saphenous vein).	T	5054	Refer to OPPS Addendum B.
36466	364X6	Injection of non-compounded foam sclerosant with ultrasound compression maneuvers to guide dispersion of the injectate, inclusive of all imaging guidance and monitoring; multiple incompetent truncal veins (e.g., great saphenous vein, accessory saphenous vein), same leg.	T	5054	Refer to OPPS Addendum B.

23. Skin Substitutes (APCs 5053, 5054, and 5055)

For CY 2018, we proposed to assign skin substitute procedures to APCs 5053 through 5055 (Level 3 through 5 Skin Procedures). The cost of the procedures is affected by whether the skin substitute product is low cost or high cost, the surface area of the wound, and the location of the wound.

Comment: Commenters requested that CPT codes for large wounds be assigned to higher paying APCs. One commenter asked that HCPCS code C5277 (Application of low cost skin substitute graft to face, scalp, eyelids, mouth, neck, ears, orbits, genitalia, hands, feet, and/or multiple digits, total wound surface area greater than or equal to 100 sq cm; first 100 sq cm wound surface area, or 1% of body area of infants and children) be moved from APC 5053 (Level 3 Skin

Procedures) to APC 5054 (Level 4 Skin Procedures) and that CPT code 15277 (Application of skin substitute graft to face, scalp, eyelids, mouth, neck, ears, orbits, genitalia, hands, feet, and/or multiple digits, total wound surface area greater than or equal to 100 sq cm; first 100 sq cm wound surface area, or 1% of body area of infants and children) be moved from APC 5054 (Level 4 Skin Procedures) to APC 5055 (Level 5 Skin Procedures). Another commenter focused on the payment for large venous leg ulcers that are over 100 cm². This commenter requested that the skin substitute procedures used to treat large venous leg ulcers and other large wounds be moved to a higher paying APC.

Response: We reviewed the procedures assigned to both APC 5053 and APC 5054 and continue to believe

that the procedures described by HCPCS code C5277 and CPT code 15277 are appropriately assigned to APCs 5053 and 5054, respectively. While the geometric mean cost of the procedure described by HCPCS code C5277 (\$2,187) is higher than the geometric mean cost of other procedures assigned to APC 5053 (\$488), there are fewer than 25 single claims billed for the procedure described by HCPCS code C5277. Therefore, HCPCS code C5277 is not a significant procedure code and does not create a 2 times rule violation in APC 5053. Likewise, while the geometric mean cost of the procedure described by CPT code 15277 (\$2,464) is higher than the geometric mean cost for all procedures assigned to APC 5054 (\$1,567), there are fewer than 80 single claims billed for the procedure described by CPT code 15277.

Therefore, CPT code 15277 is not a significant procedure and does not create a 2 times violation in APC 5054. Accordingly, we continue to believe that both HCPCS code C5277 and CPT code 15277 are appropriately assigned to APCs 5053 and 5054, respectively. As we do every year, we will evaluate the costs and APC assignment of both of these codes in the next annual rulemaking cycle.

After consideration of the public comments we received, we are finalizing our proposal for CY 2018 for assignment of skin substitute procedures to APCs 5053 through 5055, including the assignment of HCPCS code C5277 to APC 5053 and CPT code 15277 to APC 5054.

24. Subdermal Drug Implants for the Treatment of Opioid Addiction (APC 5735)

In the CY 2018 MPFS proposed rule (82 FR 34011 through 34012), CMS proposed to establish three G-codes to appropriately report the insertion and removal of buprenorphine hydrochloride, formulated as a 4-rod, 80 mg, long-acting subdermal drug implant for the treatment of opioid addiction (82 FR 34011 through 34012). Specifically, we proposed to establish the following HCPCS G-codes:

- Placeholder HCPCS Code GDDD1 (Insertion, non-biodegradable drug delivery implants, 4 or more);
- Placeholder HCPCS Code GDDD2 (Removal, non-biodegradable drug delivery implants, 4 or more); and

- Placeholder HCPCS code GDDD3 (Removal with reinsertion, non-biodegradable drug delivery implants, 4 or more).

We did not make any proposal related to HCPCS codes GDDD1 through GDDD3 in the CY 2018 OPPS/ASC proposed rule because there are existing codes that can be used to report the insertion and removal of buprenorphine hydrochloride, as well as a HCPCS J-code to report use of the buprenorphine hydrochloride drug. Listed below in Table 57 are the specific CPT and HCPCS codes for the buprenorphine hydrochloride subdermal drug and its administration, and the proposed OPPS payment rates for CY 2018.

TABLE 57—PROPOSED CY 2018 STATUS INDICATOR (SI), APC ASSIGNMENT, AND PAYMENT RATE FOR CPT CODES 11981, 11982, AND 11983 AND HCPCS CODE J0570

HCPCS code	Long descriptor	CY 2017 OPPS SI	CY 2017 OPPS APC	CY 2017 OPPS payment rate	Proposed CY 2018 OPPS SI	Proposed CY 2018 OPPS APC	Proposed CY 2018 OPPS payment rate
11981	Insertion, non-biodegradable drug delivery implant.	Q1	5734	\$100.02	Q1	5734	\$94.27
11982	Removal, non-biodegradable drug delivery implant.	Q1	5735	263.61	Q1	5735	265.20
11983	Removal with reinsertion, non-biodegradable drug delivery implant.	Q1	5735	263.61	Q1	5735	265.20
J0570	Buprenorphine implant, 74.2 mg	G	9058	* 1,260.59	G	9058	** 1,261.31

* The proposed payment rate of \$1,260.59 was based on the April 1, 2017 OPPS update.

** The payment rate of \$1,261.31 was based on the October 1, 2017 OPPS update. Payments for the HCPCS drug codes are updated on a quarterly basis, and this payment rate will be updated for the January 2018 OPPS update. Refer to the January 2018 OPPS Addendum B payment file for the payment rate.

Comment: Some commenters requested that the MPFS proposal for establishment of HCPCS G-codes for insertion and removal of buprenorphine hydrochloride also apply to the OPPS and ASC payment systems. In addition, the commenters recommended that CMS assign the HCPCS G-codes to APC 5735 (Level 5 Minor Procedures), which had a proposed payment rate of \$265.20, for CY 2018.

Response: We agree with the commenters that the HCPCS G-codes GDDD1 through GDDD3 (now HCPCS codes G0516, G0517, and G0518 in this final rule with comment period) should also be recognized under the OPPS because the service associated with the insertion and removal of buprenorphine

hydrochloride can be performed in the hospital outpatient department. However, because these services are conditionally packaged under the OPPS, they will be packaged when performed in the ASC and, therefore, not separately paid. Accordingly, to adequately track and improve data collection and analysis associated with subdermal buprenorphine implants, we are recognizing these HCPCS G-codes in the OPPS.

In summary, after consideration of the public comments we received, we are establishing HCPCS G-codes G0516, G0517, and G0518 under the OPPS, effective January 1, 2018. Table 58 below lists the final status indicator and APC assignments for HCPCS G-codes

G0516, G0517, G0518, and HCPCS code J0570 for CY 2018. We remind hospitals that the HCPCS drug code for buprenorphine hydrochloride (HCPCS code J0570) should also be reported when billing for the subdermal administration of the drug. We refer readers to Addendum B to this final rule with comment period for the payment rates for all codes reported under the OPPS. In addition, we refer readers to Addendum A to this final rule with comment period for the status indicator meanings for all codes reported under the OPPS. Both Addendum A and Addendum B are available via the Internet on the CMS Web site.

TABLE 58—FINAL CY 2018 STATUS INDICATOR (SI) AND APC ASSIGNMENT FOR HCPCS CODES G0516, G0517, G0518 AND HCPCS CODE J0570

HCPCS code	CY 2018 MPFS proposed rule placeholder code	Long descriptor	CY 2018 OPSS SI	CY 2018 OPSS APC	CY 2018 OPSS payment rate
G0516	GDDD1	Insertion of non-biodegradable drug delivery implants, 4 or more (services for subdermal implants).	Q1	5735	Refer to OPSS Addendum B.
G0517	GDDD2	Removal of non-biodegradable drug delivery implants, 4 or more (services for subdermal implants).	Q1	5735	Refer to OPSS Addendum B.
G0518	GDDD3	Removal with reinsertion, non-biodegradable drug delivery implants, 4 or more (services for subdermal implants).	Q1	5735	Refer to OPSS Addendum B.
J0570	N/A	Buprenorphine implant, 74.2 mg	G	9058	Refer to OPSS Addendum B.

25. Suprachoroidal Delivery of Pharmacologic Agent (APC 5694)

For CY 2018, as noted in Table 59 below, we proposed to continue to assign CPT codes 67028 and 0465T to

APC 5694 (Level 4 Drug Administration), with a proposed payment rate of \$286.62. We also proposed to continue to assign CPT code 67028 to status indicator “S”

(Procedure or Service, Not Discounted When Multiple) and to continue to assign CPT code 0465T to status indicator “T” (Procedure or Service, Multiple Procedure Reduction Applies).

TABLE 59—PROPOSED CY 2018 STATUS INDICATOR (SI), APC ASSIGNMENT, AND PAYMENT RATE FOR CPT CODES 67028 AND 0465T

CPT code	Long descriptors	CY 2017 OPSS SI	CY 2017 OPSS APC	CY 2017 OPSS payment rate	Proposed CY 2018 OPSS SI	Proposed CY 2018 OPSS APC	Proposed CY 2018 OPSS payment rate
67028	Intravitreal injection of a pharmacologic agent (separate procedure).	S	5694	\$279.45	S	5694	\$286.62
0465T	Suprachoroidal injection of a pharmacologic agent (does not include supply of medication).	T	5694	279.45	T	5694	286.62

Comment: Some commenters stated that the different status indicator assignment for both CPT codes 67028 and 0465T appears to be an error and contradicts CMS’ decision in the CY 2017 OPSS/ASC final rule with comment period where CMS indicated that both procedures are similar from a clinical and resource consideration (81 FR 79617). The commenters reported that the different status indicators suggest that the procedures are not similar. Consequently, the commenters requested the reassignment of CPT code 0465T from status indicator “T” to “S”.

Response: We note that while many HCPCS codes within a given APC may have the same status indicator, having an identical status indicator is not a prerequisite for APC assignment. That is, assignment of a HCPCS code to an APC is based on the resource and clinical similarity of the service described by the HCPCS code, while assignment of a status indicator is based on service-specific characteristics. Status indicator “T” is used to denote that the procedure is subject to the multiple procedure reduction under the

OPSS, while status indicator “S” describes a procedure or service that is not discounted. Within APC 5694, there are four CPT codes that are assigned to status indicator “T”. These include the following procedures:

- CPT code 0465T (Suprachoroidal injection of a pharmacologic agent (does not include supply of medication));
- CPT code 36593 (Declothing by thrombolytic agent of implanted vascular access device or catheter);
- CPT code 37195 (Thrombolysis, cerebral, by intravenous infusion); and
- CPT code 92977 (Thrombolysis, coronary; by intravenous infusion).

As stated earlier, status indicator “T” indicates that the service will be reduced by 50 percent if it is the lower priced service on the same claim with another procedure that is also assigned to a status indicator “T”. For CPT code 0465T, we expect this reduction to occur when there is a separate procedure performed on the same day as the suprachoroidal injection due to significant efficiencies in administering the pharmacologic agent. If the suprachoroidal injection is performed

by itself or with a visit, or with a service or procedure assigned to status indicator “S”, the multiple procedure reduction will not apply. We remind hospitals that, when reporting CPT code 0465T, the appropriate HCPCS drug code should also be reported on the claim.

Therefore, after consideration of the public comments we received, we are finalizing our CY 2018 proposal, without modification, to continue to assign CPT codes 67028 and 0465T to status indicator “S” and “T” respectively, and to continue to assign the CPT codes to APC 5694. Table 60 below lists the final status indicator and APC assignments for both codes for CY 2018. We refer readers to Addendum B to this final rule with comment period for the payment rates for all codes reported under the OPSS. In addition, we refer readers to Addendum A to this final rule with comment period for the status indicator meanings for all codes reported under the OPSS. Both Addendum A and Addendum B are available via the Internet on the CMS Web site.

TABLE 60—FINAL CY 2018 STATUS INDICATOR (SI) AND APC ASSIGNMENT FOR CPT CODES 67028 AND 0465T

HCPCS code	Long descriptor	CY 2017 OPPTS SI	CY 2017 OPPTS APC	CY 2017 OPPTS payment rate	CY 2018 OPPTS SI	CY 2018 OPPTS APC	CY 2018 OPPTS payment rate
67028	Intravitreal injection of a pharmacologic agent (separate procedure).	S	5694	\$279.45	S	5694	Refer to OPPTS Addendum B.
0465T	Suprachoroidal injection of a pharmacologic agent (does not include supply of medication).	T	5694	279.45	T	5694	Refer to OPPTS Addendum B.

26. Transperineal Placement of Biodegradable Material (C-APC 5375)

For CY 2018, the AMA CPT Editorial Panel deleted CPT code 0438T and replaced the code with CPT code 55874, effective January 1, 2018. CPT code 0438T was effective July 1, 2016 and will be deleted on December 31, 2017. Prior to July 2016, the transperineal placement of biodegradable material procedure was described by HCPCS code C9743 (Injection/implantation of bulking or spacer material (any type)

with or without image guidance (not to be used if a more specific code applies)), which was effective October 1, 2015 and was deleted on June 30, 2016, when it was replaced with CPT code 0438T, effective July 1, 2016.

Table 61 below lists the complete descriptors for the deleted and replacement CPT codes. We note that the deleted and replacement CPT codes were both listed in Addendum B and Addendum O to the CY 2018 OPPTS/ASC proposed rule (which are available via the Internet on the CMs Web site).

Addendum B listed the proposed status indicator assignment for the replacement code and assigned it to comment indicator “NP” (New code for the next calendar year or existing code with substantial revision to its code descriptor in the next calendar year as compared to current calendar year, proposed APC assignment; comments will be accepted on the proposed APC assignment for the new code), while Addendum O listed the proposed/placeholder CY 2018 CPT codes and the long descriptors.

TABLE 61—CODING CHANGES FOR CPT CODE 55874

CPT code	CY 2018 OPPTS/ASC proposed rule placeholder code	Long descriptor
0438T	N/A	Transperineal placement of biodegradable material, peri-prostatic (via needle), single or multiple, includes image guidance.
55874	55X87	Transperineal placement of biodegradable material, peri-prostatic, single or multiple injection(s), including image guidance, when performed.

As listed in Table 63 below and in Addendum B of the CY 2018 OPPTS/ASC proposed rule, we proposed to delete CPT code 0438T (status indicator “D”) and assign its replacement code, CPT code 55874 (placeholder code 55X87), to C-APC 5375 (Level 5 Urology and Related Services) with a proposed payment rate of \$3,597.65. As noted in Table 62, the predecessor code 0438T was assigned to C-APC 5374 (Level 4 Urology and Related Services), while this replacement code is proposed to be reassigned to C-APC 5375. We proposed

to revise the APC assignment for CPT code 55874 based on claims data used for the CY 2018 OPPTS/ASC proposed rule. We note that the proposed rule claims data was based on claims data submitted between January 1, 2016, and December 31, 2016, that were processed on or before December 31, 2016. For the predecessor codes HCPCS codes C9743 and 0438T that were in effect during CY 2016, our analysis of the proposed rule claims data revealed a geometric mean cost of approximately \$4,504 based on 157 single claims (out of 159 total

claims), which is similar to the geometric mean cost of approximately \$3,742 for C-APC 5375 rather than the geometric mean cost of approximately \$2,714 for C-APC 5374 or the geometric mean cost of approximately \$7,747 for C-APC 5376 (Level 6 Urology and Related Services). Based on its clinical homogeneity and resource similarity to the other procedures assigned to C-APC 5375, we proposed to reassign replacement CPT code 55874 from C-APC 5374 to C-APC 5375 for CY 2018.

TABLE 62—PROPOSED CY 2018 STATUS INDICATOR (SI), APC ASSIGNMENT, AND PAYMENT RATE FOR CPT CODE 55874

CPT code	CY 2018 OPPTS/ASC proposed rule placeholder code	Short descriptor	CY 2017 OPPTS SI	CY 2017 OPPTS APC	CY 2017 OPPTS payment rate	Proposed CY 2018 OPPTS SI	Proposed CY 2018 OPPTS APC	Proposed CY 2018 OPPTS payment rate
0438T .....	.....	Tprnl plmt biodegrdabl matrl	T	5374	\$2,542.56	D	N/A	N/A
55874	55X87	Tprnl plmt biodegrdabl matrl	N/A	N/A	N/A	T	5375	\$3,597.65

Comment: One commenter supported the reassignment to C-APC 5375 for CPT code 55874 and urged CMS to finalize the proposal. The commenter further indicated that C-APC 5375 is the appropriate APC assignment for CPT code 55874 based on its clinical and resource coherence to the other procedures assigned to C-APC 5375. While supportive of the assignment to C-APC 5375, this same commenter expressed concern with the payment for the procedure under the ASC payment system. The commenter suggested that CPT code 55874 should be designated as a device-intensive procedure.

Response: We appreciate the commenter's support. For this final rule with comment period, we again reviewed the updated claims data associated with predecessor HCPCS codes C9743 and 0438T. We note that, for this final rule with comment period, we used claims data with dates of service between January 1, 2016, and December 31, 2016, that were processed on or before June 30, 2017. Our analysis

of the final rule claims data shows a similar pattern for the predecessor codes. Specifically, we found a geometric mean cost of approximately \$4,452 for the predecessor codes based on 157 single claims (out of 160 total claims), which is similar to the geometric mean cost of approximately \$3,704 for C-APC 5375. In addition, our analysis of the significant procedures within C-APC 5375 shows that the geometric mean cost of \$4,452 for the predecessor codes are similar to the costs of the procedures assigned to C-APC 5375. Specifically, our analysis revealed the range of the significant procedures assigned to C-APC 5375 is between \$3,134 (for CPT code 52320) and \$5,004 (for CPT code 55875). Consequently, we believe that C-APC 5375 is the most appropriate APC assignment for CPT code 55874.

With regards to the device-intensive designation for CPT code 55874, based on our analysis of the predecessor HCPCS code C9743, this code is not eligible for device-intensive status

because it does not meet the criteria of a device offset that is greater than 40 percent. For more information on how codes are designated as device-intensive status, we refer readers to section IV.B. of this final rule with comment period.

In summary, after consideration of the public comments we received and our analysis of the updated claims data for this final rule with comment period, we are finalizing our CY 2018 proposal, without modification, and assigning CPT code 55874 to C-APC 5375. Table 63 below lists the final status indicator and APC assignments for CPT code 55874 for CY 2018. We refer readers to Addendum B to this final rule with comment period for the payment rates for all codes reported under the OPPS. In addition, we refer readers to Addendum A to this final rule with comment period for the status indicator meanings for all codes reported under the OPPS. Both Addendum A and Addendum B are available via the Internet on the CMS Web site.

TABLE 63—FINAL CY 2018 STATUS INDICATOR (SI) AND APC ASSIGNMENT FOR CPT CODE 55874

CPT code	CY 2018 OPPS/ASC proposed rule placeholder code	Short descriptor	CY 2017 OPPS SI	CY 2017 OPPS APC	CY 2017 OPPS payment rate	CY 2018 OPPS SI	CY 2018 OPPS APC	CY 2018 OPPS payment rate
0438T .....	.....	Tprnl plmt biodegrdabl matrl	T	5374	\$2,542.56	D	N/A	N/A.
55874	55X87	Tprnl plmt biodegrdabl matrl	N/A	N/A	N/A	T	5375	Refer to OPPS Addendum B.

27. Transcranial Magnetic Stimulation (TMS) Therapy (APCs 5721 and 5722)

For CY 2018, as listed in Table 64 below, we proposed to continue to

assign CPT code 90867 to APC 5722 (Level 2 Diagnostic Tests and Related Services) and to also continue to assign CPT code 90869 to APC 5721 (Level 1

Diagnostic Tests and Related Services). However, we proposed to reassign CPT code 90868 from APC 5722 to APC 5721.

TABLE 64—PROPOSED CY 2018 STATUS INDICATOR (SI), APC ASSIGNMENT, AND PAYMENT RATE FOR THE TRANSCRANIAL MAGNETIC STIMULATION (TMS) THERAPY CPT CODES

CPT code	Long descriptor	CY 2017 OPPS SI	CY 2017 OPPS APC	CY 2017 OPPS payment rate	Proposed CY 2018 OPPS SI	Proposed CY 2018 OPPS APC	Proposed CY 2018 OPPS payment rate
90867	Therapeutic repetitive transcranial magnetic stimulation (tms) treatment; initial, including cortical mapping, motor threshold determination, delivery and management.	S	5722	\$232.31	S	5722	\$242.21
90868	Therapeutic repetitive transcranial magnetic stimulation (tms) treatment; subsequent delivery and management, per session.	S	5722	232.31	S	5721	129.59
90869	Therapeutic repetitive transcranial magnetic stimulation (tms) treatment; subsequent motor threshold re-determination with delivery and management.	S	5721	127.10	S	5721	129.59

Comment: Several commenters disagreed with CMS' proposal to

reassign CPT code 90868 to APC 5721 and stated that the proposed payment

rate does not cover the cost of providing the service. One commenter stated that

transcranial magnetic stimulation (TMS) therapy requires the use of an expensive machine, technicians to assist with the service, staff to work on insurance approvals, and significant time with physicians. Another commenter stated that the proposed payment rate for CPT codes 90868 and 90869 is insufficient, and that the cost of providing the service exceeds the payment rate. Several commenters requested that CMS reconsider and increase the payment rates for CPT codes 90868 and 90869.

Response: We proposed to revise the APC assignment for CPT code 90868 and to continue the APC assignment for CPT code 90869 based on CY 2016 claims data used for the CY 2018 OPPTS/ASC proposed rule. We note that the proposed rule data was based on claims data submitted between January 1, 2016, and December 31, 2016, that were processed on or before December 31, 2016. For CPT code 90868, our analysis of the claims data showed a geometric mean cost of approximately \$152 for the code based on 6,433 single claims (out of 6,493 total claims), which is similar to the geometric mean cost of approximately \$135 for APC 5721 rather than the geometric mean cost of approximately \$252 for APC 5722. Consequently, we proposed to revise the APC assignment for CPT code 90868 to APC 5721 rather than continue to assign it to APC 5722. For CPT code 90869, our

claims data showed a geometric mean cost of approximately \$119 for CPT code 90869 based on 95 single claims (out of 96 total claims), which is similar to the geometric mean cost of approximately \$135 for APC 5721. Consequently, we proposed to continue to assign CPT code 90869 to APC 5721.

For this final rule with comment period, we again reviewed the updated claims data associated with CPT codes 90868 and 90869. We note that, for this final rule with comment period, we used claims data with dates of service between January 1, 2016, and December 31, 2016, that were processed on or before June 30, 2017. Our analysis of the final rule claims data revealed a similar pattern for both codes. Specifically, we found a geometric mean cost of approximately \$148 for CPT code 90868 based on 7,258 single claims (out of 7,312 total claims), which is similar to the geometric mean cost of approximately \$136 for APC 5721, rather than the geometric mean cost of approximately \$249 for APC 5722. Our analysis also revealed a geometric mean cost of approximately \$125 for CPT code 90869 based on 105 single claims (out of 106 total claims), which is comparable to the geometric mean cost of \$136 for APC 5721. Based on our analysis of the final rule claims data, we believe that APC 5721 is the appropriate APC assignment for both CPT codes

90868 and 90869 based on their clinical homogeneity and resource costs to the other procedures in APC 5721.

With regards to the comment that TMS therapy requires significant time with physicians, we remind readers that payments under the OPPTS are for services provided by hospital outpatient facilities, not physician services. We note that physician services are paid under the MPFS. Medicare payment rates for physician services can be found on the CMS Physician Fee Schedule Web site, specifically at: <https://www.cms.gov/apps/physician-fee-schedule/overview.aspx>.

In summary, after consideration of the public comments we received, we are finalizing our CY 2018 proposal, without modification, for CPT codes 90867, 90868, and 90869. Table 65 below lists the final status indicator and APC assignments for all three CPT codes. We refer readers to Addendum B to this final rule with comment period for the payment rates for all codes reported under the OPPTS. In addition, we refer readers to Addendum A to this final rule with comment period for the status indicator meanings for all codes reported under the OPPTS. Both Addendum A and Addendum B are available via the Internet on the CMS Web site.

TABLE 65—FINAL CY 2018 STATUS INDICATOR (SI) AND APC ASSIGNMENT FOR THE TRANSCRANIAL MAGNETIC STIMULATION (TMS) THERAPY CPT CODES

CPT code	Long descriptor	CY 2017 OPPTS SI	CY 2017 OPPTS APC	CY 2017 OPPTS payment rate	CY 2018 OPPTS SI	CY 2018 OPPTS APC	CY 2018 OPPTS payment rate
90867	Therapeutic repetitive transcranial magnetic stimulation (tms) treatment; initial, including cortical mapping, motor threshold determination, delivery and management.	S	5722	\$232.31	S	5722	Refer to OPPTS Addendum B.
90868	Therapeutic repetitive transcranial magnetic stimulation (tms) treatment; subsequent delivery and management, per session.	S	5722	232.31	S	5721	Refer to OPPTS Addendum B.
90869	Therapeutic repetitive transcranial magnetic stimulation (tms) treatment; subsequent motor threshold re-determination with delivery and management.	S	5721	127.10	S	5721	Refer to OPPTS Addendum B.

28. Transurethral Waterjet Ablation of the Prostate (C-APC 5375)

On June 5, 2017, the Category B Investigational Device Exemption (IDE) study associated with the “Waterjet Ablation Therapy for Endoscopic Resection of Prostate Tissue II (WATER)” met CMS’ standards for

coverage. According to the National Institutes of Health (NIH) clinicaltrials.gov Web site, the estimated completion date of this study is August 2020. Under Medicare, studies with Category A designation are approved for coverage of routine services only, while studies with the Category B designation

are approved for coverage of the Category B device and related services, and routine services. We note that the procedure associated with this study is currently described by CPT code 0421T. Based on the recent Medicare coverage of the IDE study, we revised the OPPTS status indicator assignment for CPT

code 0421T from “E1” (Not paid by Medicare when submitted on outpatient claims (any outpatient bill type)) to “J1” (Hospital Part B services paid through a comprehensive APC) and assigned the code to C-APC 5374 (Level 4 Urology and Related Services) to indicate that the procedure would be paid separately under the OPSS. We announced this

change through the October 2017 OPSS quarterly update CR (Transmittal 3864, Change Request 10236, dated September 15, 2017), and further stated in this same CR that the payment would be effective on June 5, 2017, which is the date of Medicare’s approval for coverage.

In the CY 2018 OPSS/ASC proposed rule, we solicited public comments on the proposed APC and status indicator assignments for the code. Specifically, as listed in Table 66 below, we proposed to continue to assign CPT code 0421T to C-APC 5374 for CY 2018.

TABLE 66—PROPOSED CY 2018 STATUS INDICATOR (SI), APC ASSIGNMENT, AND PAYMENT FOR CPT CODE 0421T

CPT code	Long descriptor	CY 2017 OPSS SI	CY 2017 OPSS APC	CY 2017 OPSS payment rate	Proposed CY 2018 OPSS SI	Proposed CY 2018 OPSS APC	Proposed CY 2018 OPSS payment rate
0421T	Transurethral waterjet ablation of prostate, including control of post-operative bleeding, including ultrasound guidance, complete (vasectomy, meatotomy, cystourethroscopy, urethral calibration and/or dilation, and internal urethrotomy are included when performed).	J1	5374	\$2,542.56	J1	5374	\$2,609.60

Comment: Several commenters expressed concern over the proposed payment rate for CPT code 0421T and requested a reassignment to either C-APC 5375 (Level 5 Urology and Related Services), which had a proposed payment rate of \$3,597.65, or C-APC 5376 (Level 6 Urology and Related Services), which had a proposed payment rate of \$7,448.11 for the Aquablation procedure. The commenters stated that the proposed payment rate for C-APC 5374 does not take into account the cost of the device, the overhead costs, and the personnel costs associated with providing the Aquablation procedure. One commenter stated that the Aquablation procedure is dissimilar to the other procedures assigned to C-APC 5374, some of which require the use of reusable equipment. This same commenter reported that the level of complexity in the performing the Aquablation procedure is comparable to those procedures in C-APC 5375 and C-APC 5376. Specifically, as indicated by the commenter, the Aquablation procedure is similar to implanting brachytherapy seeds into the prostate (CPT code 55875, proposed for assignment to C-APC 5375), cryoablation of the prostate (CPT

code 55873, proposed for assignment to C-APC 5376), and high intensity focused ultrasound (HIFU) of the prostate (HCPCS code C9747, proposed for assignment to C-APC 5376). Another commenter believed the Aquablation procedure requires more effort than the traditional transurethral resection of the prostate (TURP) procedure (CPT code 52601, proposed for assignment to C-APC 5375) or the laser ablation of the prostate procedure (GreenLight Laser Therapy described by CPT code 52648, proposed for assignment to C-APC 5375), and added that the TURP and Aquablation each require general anesthesia and take approximately 1 hour to perform. Several commenters stated that the complexity of performing the Aquablation procedure is similar to the cryoablation of the prostate and HIFU procedures, of which both were proposed to be assigned to C-APC 5376. Consequently, these same commenters requested that CMS revisit the APC assignment for CPT code 0421T and consider a reassignment to C-APC 5376. *Response:* Based on our review of the procedure and input from our clinical advisors, we believe that a reassignment from C-APC 5374 to C-APC 5375 for the Aquablation is appropriate. We note

that this procedure is currently in clinical trial with an estimated study completion date of August 2020. We believe that the procedure is clinically similar to other procedures that are currently assigned to C-APC 5375. As we do every year under the OPSS, we will reevaluate the cost of the procedure described by CPT code 0421T and its APC assignment for next year’s rulemaking update. In summary, after consideration of the public comments, we are finalizing our CY 2018 proposal with modification. Specifically, we are revising the APC assignment for CPT code 0421T from proposed C-APC 5374 to C-APC 5375 for CY 2018. Table 67 below lists the final status indicator and APC assignments for CPT code 0421T for CY 2018. We refer readers to Addendum B to this final rule with comment period for the payment rates for all codes reported under the OPSS. In addition, we refer readers to Addendum A to this final rule with comment period for the status indicator meanings for all codes reported under the OPSS. Both Addendum A and Addendum B are available via the Internet on the CMS Web site.

TABLE 67—FINAL CY 2018 STATUS INDICATOR (SI) AND APC ASSIGNMENT FOR CPT U0421T

CPT code	Long descriptors	CY 2017 OPPTS SI	CY 2017 OPPTS APC	CY 2017 OPPTS payment rate	CY 2018 OPPTS SI	CY 2018 OPPTS APC	CY 2018 OPPTS payment rate
0421T	Transurethral waterjet ablation of prostate, including control of post-operative bleeding, including ultrasound guidance, complete (vasectomy, meatotomy, cystourethroscopy, urethral calibration and/or dilation, and internal urethrotomy are included when performed).	J1	5374	\$2,542.56	J1	5375	Refer to OPPTS Addendum B.

29. Transurethral Water Vapor Thermal Therapy of the Prostate (C-APC 5373)

For CY 2018, CMS received a New Technology APC application requesting a new HCPCS code for the Rezūm therapy. The Rezūm procedure is a new treatment, and the Rezūm System associated with this procedure received a 510(k) FDA clearance on August 27, 2015. The procedure utilizes water vapor for the treatment of benign prostatic hypertrophy (BPH). The applicant maintained that there was coding confusion about whether the procedure could be described by existing CPT code 53852 (Transurethral destruction of prostate tissue; by radiofrequency thermotherapy). We note that CPT code 53852 is assigned to C-APC 5375 (Level 5 Urology and Related

Services), which has a geometric mean cost of approximately \$3,704 for CY 2018.

Based on our review of the application, the procedure, and input from our clinical advisors, we agree that CPT code 53852 does not appropriately describe the Rezūm procedure. Consequently, we are establishing HCPCS code C9748 to appropriately describe the procedure. Effective January 1, 2018, HOPDs should report HCPCS code C9748 to report the use of the Rezūm procedure for the treatment of BPH. In addition, based on cost information submitted to CMS in the application, we believe that the procedure should appropriately be assigned to C-APC 5373 (Level 3 Urology and Related Services), which

has a geometric mean cost of approximately \$1,695. We believe the Rezūm procedure shares similar resource and clinical homogeneity to the other procedures currently assigned to C-APC 5373.

Table 68 below lists the final status indicator and APC assignments for HCPCS code C9748 for CY 2018. We refer readers to Addendum B to this final rule with comment period for the payment rates for all codes reported under the OPPTS. In addition, we refer readers to Addendum A to this final rule with comment period for the status indicator meanings for all codes reported under the OPPTS. Both Addendum A and Addendum B are available via the Internet on the CMS Web site.

TABLE 68—FINAL CY 2018 STATUS INDICATOR (SI) AND APC ASSIGNMENT FOR THE TRANSURETHRAL WATER VAPOR THERMAL THERAPY OF THE PROSTATE

HCPCS code	Long descriptor	CY 2018 OPPTS SI	CY 2018 OPPTS APC	CY 2018 OPPTS payment rate
C9748	Transurethral destruction of prostate tissue; by radiofrequency water vapor (steam) thermal therapy.	J1	5373	Refer to OPPTS Addendum B.

We note that HCPCS code C9748 is assigned to comment indicator “NI” in Addendum B to this CY 2018 OPPTS/ASC final rule with comment period to indicate that we have assigned the code an interim OPPTS payment status for CY 2018. We are inviting public comments on the interim status indicator and APC assignments that will be finalized in the CY 2019 OPPTS/ASC final rule with comment period.

IV. OPPTS Payment for Devices

A. Pass-Through Payments for Devices

1. Beginning Eligibility Date for Device Pass-Through Status and Quarterly Expiration of Device Pass-Through Payments

a. Background

Under section 1833(t)(6)(B)(iii) of the Act, the period for which a device category eligible for transitional pass-through payments under the OPPTS can be in effect is at least 2 years but not more than 3 years. Prior to CY 2017, our regulation at 42 CFR 419.66(g) provided that this pass-through payment eligibility period began on the date CMS established a particular transitional pass-through category of devices, and

we based the pass-through status expiration date for a device category on the date on which pass-through payment was effective for the category. In the CY 2017 OPPTS/ASC final rule with comment period (81 FR 79654), in accordance with section 1833(t)(6)(B)(iii)(II) of the Act, we amended § 419.66(g) to provide that the pass-through eligibility period for a device category begins on the first date on which pass-through payment is made under the OPPTS for any medical device described by such category.

In addition, prior to CY 2017, our policy was to propose and finalize the dates for expiration of pass-through status for device categories as part of the OPPTS annual update. This means that device pass-through status would expire

at the end of a calendar year when at least 2 years of pass-through payments have been made, regardless of the quarter in which the device was approved. In the CY 2017 OPPS/ASC final rule with comment period (81 FR 79655), we changed our policy to allow for quarterly expiration of pass-through payment status for devices, beginning with pass-through devices approved in CY 2017 and subsequent calendar years, to afford a pass-through payment period that is as close to a full 3 years as possible for all pass-through payment devices. We refer readers to the CY 2017 OPPS/ASC final rule with comment period (81 FR 79648 through 79661) for a full discussion of the changes to the device pass-through payment policy. We also have an established policy to package the costs of the devices that are no longer eligible for pass-through payments into the costs of the procedures with which the devices are reported in the claims data used to set the payment rates (67 FR 66763).

b. Expiration of Transitional Pass-Through Payments for Certain Devices

As stated earlier, section 1833(t)(6)(B)(iii) of the Act requires that, under the OPPS, a category of devices be eligible for transitional pass-through payments for at least 2 years, but not more than 3 years. There currently are three device categories eligible for pass-through payment: (1) HCPCS code C2623 (Catheter, transluminal angioplasty, drug-coated, non-laser), which was established effective April 1, 2015; (2) HCPCS code C2613 (Lung biopsy plug with delivery system), which was established effective July 1, 2015; and (3) HCPCS code C1822 (Generator, neurostimulator (implantable), high frequency, with rechargeable battery and charging system), which was established effective January 1, 2016. The pass-through payment status of the device categories for HCPCS codes C2623, C2613, and C1822 will end on December 31, 2017. We note that our new policy adopted in the CY 2017 OPPS/ASC final rule with comment period to allow for quarterly expiration of pass-through payment status for devices applies to devices approved in CY 2017 and subsequent years. As all the devices in these three device categories were approved prior to CY 2017, we are applying our policy to expire them at the end of the calendar year when at least 2 years of pass-through payments have been made. Therefore, in the CY 2018 OPPS/ASC proposed rule (82 FR 33610), we proposed, beginning in CY 2018, to package the costs of each of the devices described by HCPCS codes C2623,

C2613, and C1822 into the costs related to the procedure with which each device is reported in the hospital claims data.

Comment: Various stakeholders, including physicians, device manufacturers, and professional societies, opposed the proposal to package the costs of the device described by HCPCS code C2623 into the costs related to the procedure(s) with which the device is reported. The commenters specifically opposed packaging of the cost of the drug-coated balloons into the procedure described by CPT code 37224 (Revascularization, endovascular, open or percutaneous, femoral, popliteal artery(s), unilateral; with transluminal angioplasty). These commenters stated concerns that the proposed payment rate for this procedure did not adequately reflect the additional costs of drug-coated balloons over non-drug-coated balloons, which could limit patient access to the technology. Several commenters described the clinical benefits provided by the drug-coated balloon in the treatment of peripheral arterial disease (PAD) and supported the continuation of the pass-through status of the device category for HCPCS code C2623 beyond December 31, 2017. At the August 21, 2017 meeting of the HOP Panel, the HOP Panel made a recommendation that CMS continue to track CPT code 37224 (Revascularization, endovascular, open or percutaneous, femoral, popliteal artery(s), unilateral; with transluminal angioplasty) with HCPCS code C2623, and that the appropriate HOP Panel subcommittee review the APCs for endovascular procedures to determine whether more granularity (that is, more APCs) is warranted. One commenter supported the proposal to package the costs of the device described by HCPCS code C2623 into the costs related to the procedure(s) with which the device is reported. The commenter stated that the proposed payment rate provided under the OPPS for procedures using drug-coated balloons was appropriate. This commenter also stated concerns over a lack of scientific evidence of the effectiveness of these devices outside of clinical trials.

Response: As mentioned earlier, under section 1833(t)(6)(B)(iii) of the Act, the period for which a device category eligible for transitional pass-through payments under the OPPS can be in effect is at least 2 years but not more than 3 years. Our policy for devices approved for pass-through payment status prior to CY 2017 is to propose and finalize the dates for expiration of pass-through payment status for device categories as part of the

OPPS annual update. This means that device pass-through payment status would expire at the end of a calendar year when at least 2 years of pass-through payments had been made, regardless of the quarter in which the device was approved for pass-through payment status. According to our established policy (67 FR 66763), after this eligibility period expires, payments for the costs of the device(s) are packaged into payment for the procedures with which they are billed. The device category for HCPCS code C2623 was established effective April 1, 2015, and will have been in effect for a period of at least 2 years, but not more than 3 years, when its eligibility expires on December 31, 2017. Therefore, this category is no longer eligible for pass-through payments. In accordance with our established policy, we are finalizing our proposal to package payment for the costs of the device(s) described by this category into payment for the costs of the procedures with which they are reported. In response to the recommendation of the HOP Panel from the August 21, 2017 meeting, we will continue to track CPT code 37224 (Revascularization, endovascular, open or percutaneous, femoral, popliteal artery(s), unilateral; with transluminal angioplasty) with HCPCS code C2623. We will share information on all items and services paid under the OPPS, including endovascular procedures, so that the appropriate HOP Panel subcommittee may review the APCs for endovascular procedures and advise on whether more granularity (that is, more APCs) is warranted.

Comment: Some commenters, including device manufacturers and associations, stated that the geometric mean costs of the procedure described by CPT code 37224 involving a drug-coated balloon were higher than the geometric mean costs of the same angioplasty procedure when a drug-coated balloon was not used and a plain balloon angioplasty catheter was used instead. Specifically, these commenters presented their analysis of Medicare claims data which suggested that when CPT code 37224 is billed with HCPCS code C2623, the geometric mean cost of these claims is \$8,483, while the geometric mean cost of claims including CPT code 37224 without HCPCS code C2623 is \$6,396. The commenters also noted that the total geometric mean costs for CPT code 37224, regardless of whether HCPCS code C2623 is billed with CPT code 37224, is approximately \$7,153. These commenters requested that CMS create a new procedural HCPCS C-code or G-code for hospitals to

use to differentiate procedures described by CPT code 37224 that use drug-coated balloons from procedures described by CPT code 37224 that use plain balloon angioplasty catheters, with a suggested descriptor of “Revascularization, endovascular, open percutaneous, femoral, popliteal artery(s), unilateral; with transluminal drug-coated balloon angioplasty”.

One commenter also referenced the proposal in the CY 2018 OPPI/ASC proposed rule (82 FR 33579 and 33580) to establish a HCPCS C-code to describe blue light cystoscopy (HCPCS code C9738 (Adjunctive blue light cystoscopy with fluorescent imaging agent (List separately in addition to code for primary procedure)) and to apply the C-APC complexity adjustment policy when this C-code is billed with specific white light cystoscopy codes. The commenter pointed out that, in the proposed rule, CMS stated that establishment of this C-code was appropriate because CMS believed that blue light cystoscopy is a distinguishable service in comparison to white light cystoscopy alone. CMS further stated that, with the C-APC complexity adjustment, qualifying combinations of the blue light cystoscopy C-code and white light cystoscopy codes are paid at the next higher paying C-APC when billed together on the same claim. The commenter requested that CMS take comparable steps to separately identify and pay for angioplasty procedures involving drug-coated balloons.

Finally, several commenters referenced the HOP Panel’s recommendation that CMS examine the number of APCs for endovascular procedures for CY 2018 and requested CMS create two new levels within the Endovascular C-APCs to provide higher payment for angioplasty procedures using a drug-coated balloon.

Response: We believe that procedures with which the drug-coated balloons are used, specifically the procedure described by CPT code 37224, are appropriately described by the existing procedure code and do not believe it is necessary at this time to establish a HCPCS C-code or G-code to distinguish an angioplasty procedure with a drug-coated balloon from an angioplasty procedure without a drug-coated balloon. The OPPI is a prospective payment system that relies on the principles of averaging, with some cases in an APC being more costly than others (and some cases being less costly). Although there is some evidence of higher geometric mean costs when a drug-coated balloon is used for certain angioplasty procedures versus a plain

balloon angioplasty catheter, the higher costs of the procedures involving the drug-coated balloon are reflected in the claims data. Our analysis of the final rule claims data revealed a geometric mean cost of approximately \$7,029 for CPT code 37224 based on 11,346 single claims (out of 11,437 total claims). CPT code 37224 is assigned to C-APC 5192 (Level 2 Endovascular Procedures), which has a geometric mean cost of approximately \$5,081. There is no 2 times violation in this C-APC. We also do not believe a C-APC complexity adjustment would be applicable, based on existing criteria used to assign a complexity adjustment. We do not believe that the example the commenter raised is entirely analogous because the HCPCS C-code that the commenter referenced necessarily involves an additional procedure (blue light cystoscopy) in addition to white light cystoscopy and the administration of the fluorescent imaging agent is required, which adds additional procedure time. In contrast, the use of a drug coated balloon does not involve a separate procedure.

We note that stakeholders who are interested in the establishment of a CPT procedure code to describe angioplasty procedures involving the use of drug-coated balloons may request a new procedure code from the AMA CPT Editorial Panel.

With regard to the request to create additional levels within the Vascular C-APC clinical family, this issue is discussed in greater detail in section III.D. of this final rule with comment period. As we do every year, we will review and evaluate the APC groupings based on the latest available data in the next rulemaking cycle.

Comment: Several commenters requested that HCPCS code C1822 (Generator, neurostimulator (implantable), high frequency, with rechargeable battery and charging system), otherwise known as the Senza SCS System, receive an additional year of pass-through payment status for CY 2018. Reasons stated by the commenters included: (1) A belief that CMS has the authority under current law to extend pass-through payment status for one more year, for a total of 3 years, and that, although CMS’ policy to allow devices with transitional pass-through payment status as close to 3 years as possible was effective for device approvals on or after January 1, 2017, CMS has the authority to grant the third year of pass-through payment status on a case-by-case basis for devices that were granted pass-through payment status prior to CY 2017 based on specific characteristics of the device and

procedure with which it is used; (2) the reported costs for devices described by HCPCS code C1822 in CY 2016 were lower than actual cost for the device due to hospital CCR ratios used to calculate device cost instead of implantable device CCRs, which were used for many hospitals to calculate device costs starting in CY 2017; (3) the reported costs for devices described by HCPCS C1822 in CY 2016 were lower than actual costs due to hospital cost reporting errors, billing of HCPCS code C1822 by hospitals that, according to the device manufacturer, had not purchased the device, hospitals not reporting use of the device, and other claims reporting problems; and (4) ending pass-through payment status would reduce access to the Senza SCS System. The commenters stated that the Senza SCS System helps beneficiaries manage chronic pain and reduces opioid usage among beneficiaries with the device.

Response: Historically, a device approved for pass-through payment status under the OPPI had an eligibility period of at least 2 years but no more than 3 years—with the pass-through payment period starting on the date when CMS established a particular transitional category of devices (80 FR 70415) and expiring at the end of a calendar year when at least 2 years but no more than 3 years have passed. Effective January 1, 2017, we revised our policy to allow for a quarterly expiration of pass-through payment status for devices to afford a pass-through payment period that is as close to a full 3 years as possible for all pass-through payment devices (81 FR 79655). HCPCS code C1822 was established as a pass-through payment category on January 1, 2016, and will have received 2 years of pass-through payment status on December 31, 2017, in accordance with the statutory requirement of receiving at least 2 years of pass-through payments, but not more than 3 years, and consistent with the policy in effect at the time the device pass-through payment period began for HCPCS code C1822. Accordingly, the policy adopted in CY 2017 does not apply to devices approved for pass-through payment status prior to that date. Likewise, the change in CY 2017 from using the average hospital-wide CCR to the implantable device CCR also was a prospective policy change to use the best available data in a given year to determine device pass-through payment.

With respect to comments expressing concerns that the reported costs for HCPCS code C1822 for CY 2016 were lower due to hospital cost reporting

errors, as we have stated in Section 20.5 (Clarification of HCPCS Code to Revenue Code Reporting) of Chapter 4 of the Medicare Claims Processing Manual, hospitals are responsible for reporting the correct revenue code on the claim form. Specifically, we state that we do not instruct hospitals on how to report the assignment of HCPCS codes to revenue codes for services provided under OPSS because hospitals' costs vary. Where explicit instructions are not provided, providers should report their charges under the revenue code that will result in the charges being assigned to the same cost center to which the cost of those services are assigned in the cost report. We note that the Medicare cost report form allows hospitals to report in a manner that is consistent with their own financial accounting systems and, therefore, should be accurate for each individual hospital. Moreover, we believe that the cost report data and their use in the OPSS cost estimation and payment rate development process, combined with potential penalties for inaccurate reporting, provide financial incentives for hospitals to report costs accurately. Furthermore, as we have stated repeatedly, beyond our standard OPSS trimming methodology that we apply to those claims that have passed various types of claims processing edits, it is not our general policy to judge the accuracy of hospital coding and charging for purposes of ratesetting. (We refer readers to the CY 2011 OPSS/ASC final rule with comment period (75 FR 71838) for further discussion.)

Commenters writing in support of extending the pass-through payment period for HCPCS code C1822 also stated that access to the service covered by HCPCS code C1822 could be reduced if pass-through payment status for HCPCS code C1822 is removed. Because reported costs for CPT code 63685 appear to be consistent with or without being reported in combination with HCPCS code C1822, we do not anticipate a significant impact to the payment amount for CPT code 63685 once HCPCS code C1822 is removed from pass-through payment status. We anticipate that hospitals will be able to adjust to any possible changes to the payment for the service.

Comment: One commenter, another device manufacturer, agreed with CMS' proposal to end pass-through payment status of HCPCS code C1822 on December 31, 2017, stating that the decision to end pass-through payment status is consistent with CMS policy and there is no need to apply the policy established in CY 2017 retroactively.

Response: We appreciate the commenter's support.

We did not receive any public comments regarding the proposal to package the payment for the costs of the device described by HCPCS code C2623 into the payment for the costs related to the procedure with which the device is reported.

After consideration of the public comments we received, we are finalizing our proposal, without modification, to package the payment for the costs of each of the devices described by HCPCS codes C2623, C2613, and C1822 into the payment for the costs related to the procedure with which each device is reported in the hospital claims data.

2. New Device Pass-Through Applications

a. Background

Section 1833(t)(6) of the Act provides for pass-through payments for devices, and section 1833(t)(6)(B) of the Act requires CMS to use categories in determining the eligibility of devices for pass-through payments. As part of implementing the statute through regulations, we have continued to believe that it is important for hospitals to receive pass-through payments for devices that offer substantial clinical improvement in the treatment of Medicare beneficiaries to facilitate access by beneficiaries to the advantages of the new technology. Conversely, we have noted that the need for additional payments for devices that offer little or no clinical improvement over previously existing devices is less apparent. In such cases, these devices can still be used by hospitals, and hospitals will be paid for them through appropriate APC payment. Moreover, a goal is to target pass-through payments for those devices where cost considerations might be most likely to interfere with patient access (66 FR 55852; 67 FR 66782; and 70 FR 68629).

As specified in regulations at 42 CFR 419.66(b)(1) through (b)(3), to be eligible for transitional pass-through payment under the OPSS, a device must meet the following criteria: (1) If required by FDA, the device must have received FDA approval or clearance (except for a device that has received an FDA investigational device exemption (IDE) and has been classified as a Category B device by the FDA), or another appropriate FDA exemption; and the pass-through payment application must be submitted within 3 years from the date of the initial FDA approval or clearance, if required, unless there is a documented, verifiable delay in U.S.

market availability after FDA approval or clearance is granted, in which case CMS will consider the pass-through payment application if it is submitted within 3 years from the date of market availability; (2) the device is determined to be reasonable and necessary for the diagnosis or treatment of an illness or injury or to improve the functioning of a malformed body part, as required by section 1862(a)(1)(A) of the Act; and (3) the device is an integral part of the service furnished, is used for one patient only, comes in contact with human tissue, and is surgically implanted or inserted (either permanently or temporarily), or applied in or on a wound or other skin lesion. In addition, according to § 419.66(b)(4), a device is not eligible to be considered for device pass-through payment if it is any of the following: (1) Equipment, an instrument, apparatus, implement, or item of this type for which depreciation and financing expenses are recovered as depreciation assets as defined in Chapter 1 of the Medicare Provider Reimbursement Manual (CMS Pub. 15-1); or (2) a material or supply furnished incident to a service (for example, a suture, customized surgical kit, or clip, other than a radiological site marker).

Separately, we use the following criteria, as set forth under § 419.66(c), to determine whether a new category of pass-through payment devices should be established. The device to be included in the new category must—

- Not be appropriately described by an existing category or by any category previously in effect established for transitional pass-through payments, and was not being paid for as an outpatient service as of December 31, 1996;
- Have an average cost that is not “insignificant” relative to the payment amount for the procedure or service with which the device is associated as determined under § 419.66(d) by demonstrating: (1) The estimated average reasonable costs of devices in the category exceeds 25 percent of the applicable APC payment amount for the service related to the category of devices; (2) the estimated average reasonable cost of the devices in the category exceeds the cost of the device-related portion of the APC payment amount for the related service by at least 25 percent; and (3) the difference between the estimated average reasonable cost of the devices in the category and the portion of the APC payment amount for the device exceeds 10 percent of the APC payment amount for the related service (with the exception of brachytherapy and temperature-monitored cryoblation, which are exempt from the cost

requirements as specified at §§ 419.66(c)(3) and (e)); and

- Demonstrate a substantial clinical improvement, that is, substantially improve the diagnosis or treatment of an illness or injury or improve the functioning of a malformed body part compared to the benefits of a device or devices in a previously established category or other available treatment.

Beginning in CY 2016, we changed our device pass-through evaluation and determination process. Device pass-through applications are still submitted to CMS through the quarterly subregulatory process, but the applications will be subject to notice-and-comment rulemaking in the next applicable OPPTS annual rulemaking cycle. Under this process, all applications that are preliminarily approved upon quarterly review will automatically be included in the next applicable OPPTS annual rulemaking cycle, while submitters of applications that are not approved upon quarterly review will have the option of being included in the next applicable OPPTS annual rulemaking cycle or withdrawing their application from consideration. Under this notice-and-comment process, applicants may submit new evidence, such as clinical trial results published in a peer-reviewed journal or other materials for consideration during the public comment process for the proposed rule. This process allows those applications that we are able to determine meet all the criteria for device pass-through payment under the quarterly review process to receive timely pass-through payment status, while still allowing for a transparent, public review process for all applications (80 FR 70417 through 70418).

More details on the requirements for device pass-through payment applications are included on the CMS Web site in the application form itself at: http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/HospitalOutpatientPPS/passthrough_payment.html, in the “Downloads” section. In addition, CMS is amenable to meeting with applicants or potential applicants to discuss research trial design in advance of any device pass-through application or to discuss application criteria, including the substantial clinical improvement criterion.

b. Applications Received for Device Pass-Through Payment for CY 2018

We received five applications by the March 1, 2017 quarterly deadline, which was the last quarterly deadline for applications to be received in time

to be included for the CY 2018 OPPTS/ASC proposed rule. All applications were received in the second quarter of 2016. None of the five applications were approved for device pass-through payment during the quarterly review process.

Applications received for the later deadlines for the remaining 2017 quarters (June 1, September 1, and December 1), if any, will be presented in the CY 2019 OPPTS/ASC proposed rule. We note that the quarterly application process and requirements have not changed in light of the addition of rulemaking review. Detailed instructions on submission of a quarterly device pass-through payment application are included on the CMS Web site at: <https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/HospitalOutpatientPPS/Downloads/catapp.pdf>. A discussion of the five applications received by the March 1, 2017 deadline is presented below, as detailed in the CY 2018 OPPTS/ASC proposed rule (82 FR 33611 through 33618).

(1) Architect® Px

Harbor MedTech, Inc. submitted an application for a new device category for transitional pass-through payment status for Architect® Px. Architect® Px is a collagen biomatrix comprised of a stabilized extracellular matrix derived from equine pericardium. The equine pericardium is stabilized to become a catalyst and scaffold for use by autologous tissue regeneration factors. Architect® Px is packaged as an individual unit in sizes ranging from 2 cm x 2 cm up to 10 cm x 15 cm and is approximately 0.75 mm thick. Architect® Px typically requires only one application. The applicant asserted that it is clinically superior to other skin substitutes that work by flooding the wound with nonautologous collagen and growth factors because Architect® Px attracts and concentrates the patient’s own autologous collagen and growth factors to support healing.

With respect to the newness criterion at § 419.66(b)(1), the applicant received FDA clearance for Architect® Px on September 12, 2014, and its June 1, 2016 application was submitted within 3 years of FDA clearance. However, Unite BioMatrix, cleared by the FDA on June 20, 2007, is claimed as a predicate of Architect® Px. The Architect® Px application states that “. . . while packaged differently, Architect® Px and Unite BioMatrix are identical . . . they are both stabilized equine pericardium manufactured using the same processes” If the date for FDA clearance for Unite BioMatrix is used to evaluate the

newness criterion, Architect® Px may not meet the newness criterion. We invited public comments on this issue.

Comment: One commenter, the manufacturer, stated that Architect® Px is substantially different than its predicate product, Unite Biomatrix, and should be considered to meet the newness criterion for device pass-through payment. The commenter pointed out the following: Architect® Px uses a different process from Unite Biomatrix to stabilize the equine pericardium. Architect® Px is dehydrated, packaged dry in a foil pouch, and is sterilized by radiation. Unite Biomatrix is packaged wet in a jar and is not sterilized using radiation. The new process that is used to manufacture Architect® Px was found by researchers in 2016 to add key properties to the device that promote the use of endogenous collagen and growth factors to support healing. The commenter implied that Unite Biomatrix does not contain these key properties.

Response: The statements by the manufacturer about the differences in performance between Architect® Px and Unite Biomatrix appear to be different than what was stated in the device pass-through application. The application stated that, despite different packaging, the two products were identical. However, we acknowledge that the research cited by the manufacturer of substantial performance differences between Architect® Px and Unite Biomatrix is from 2016, and the findings may not have been available when the device pass-through payment application was submitted. For purposes of the device pass-through payment process, we are persuaded by this additional information and have determined that Architect® Px does meet the newness criterion based on the additional performance information supplied by the manufacturer.

With respect to the eligibility criterion at § 419.66(b)(3), according to the applicant, Architect® Px is a skin substitute product that is integral to the service provided, is used for one patient only, comes in contact with human skin, and is surgically inserted into the patient. The applicant also claims Architect® Px meets the device eligibility requirements of § 419.66(b)(4) because Architect® Px is not an instrument, apparatus, implement, or item for which depreciation and financing expenses are recovered, and it is not a supply or material.

The criteria for establishing new device categories are specified at § 419.66(c). The first criterion, at § 419.66(c)(1), provides that CMS

determines that a device to be included in the category is not appropriately described by any of the existing categories or by any category previously in effect, and was not being paid for as an outpatient service as of December 31, 1996. We have not identified an existing pass-through category that describes Architect® Px. Harbor MedTech, Inc. suggested a new device category descriptor of “Stabilized Skin Substitute for Autologous Tissue Regeneration” for Architect® Px. We invited public comments on this issue.

We did not receive any public comments on this issue. We are confirming that there is no existing pass-through category that describes Architect® Px and have determined that Architect® Px meets this eligibility criterion.

The second criterion for establishing a device category, at § 419.66(c)(2), provides that CMS determines that a device to be included in the category has demonstrated that it will substantially improve the diagnosis or treatment of an illness or injury or improve the functioning of a malformed body part compared to the benefits of a device or devices in a previously established category or other available treatment. With regard to the substantial clinical improvement criterion, the applicant only identified two references, neither of which we believe provide evidence of substantial clinical improvement. One reference is a 2012 summary report³ of skin substitute products that can be used to treat chronic wounds that only describes characteristics of the predecessor product to Architect® Px with no efficacy or performance information. The second reference⁴ is a small observational study of 34 subjects with no comparison group. We invited public comments on whether Architect® Px meets the substantial clinical improvement criterion.

Comment: One commenter, the manufacturer, stated that the inclusion of stabilized equine pericardium is an extremely important property of Architect® Px and Unite Biomatrix, and that this property allows these products to stay on a chronic wound, resist degradation, and remain on the wound until it heals. The commenter stated that Architect® Px is a nondegrading skin substitute that constantly supports

healing and does not need to be reapplied. The commenter also stated that skin substitutes that degrade need to be reapplied multiple times and there is the risk that reapplying the skin substitute may interrupt the wound healing process which drives up the costs of medical care. The commenter believed that Architect® Px is the first skin substitute that totally aligned with the Quality and Value of Care objectives of the Medicare Access and CHIP Reauthorization Act of 2015 (MACRA). Lastly, the commenter stated that other skin substitute products have previously received pass-through payment approval by presenting similar data as have been presented for Architect® Px.

Response: The commenter has provided additional information about the potential beneficial qualities of Architect® Px. However, the commenter has provided no additional studies that demonstrate that its use results in a substantial clinical improvement relative to other skin substitute and wound healing products available on the market. The commenter mentioned that skin substitutes had previously received pass-through payment status based on the same type of information the manufacturer provided in its device pass-through payment application and in its comments on the proposed rule. However, the commenter is referring to a previous process to evaluate skin substitutes for pass-through payment eligibility (the drugs and biological pass-through payment process), which did not require evidence of a substantial clinical improvement. Since CY 2015, skin substitutes have been evaluated using the medical device pass-through payment process (79 FR 66885 through 66888), which includes the criterion for substantial clinical improvement. Applicants must demonstrate that the device under consideration for pass-through payment status will substantially improve the diagnosis or treatment of an illness or injury or improve the functioning of a malformed body part compared to the benefits of a device or devices in a previously established category or other available treatment. The commenter has not provided additional information showing substantial clinical improvement. Therefore, we determine that Architect® Px does not meet the criterion for substantial clinical improvement.

The third criterion for establishing a device category, at § 419.66(c)(3), requires us to determine that the cost of the device is not insignificant, as described in § 419.66(d). Section 419.66(d) includes three cost significance criteria that must each be

met. The applicant provided the following information in support of the cost significance requirements: Architect® Px would be reported with CPT codes 15271 through 15278, which cover the application of skin substitute grafts to different areas of the body for high-cost skin substitutes. To meet the cost criterion for device pass-through payment, a device must pass all three tests of the cost criteria for at least one APC. CPT codes 15271 through 15278 are assigned to either APC 5054 (Level 4 Skin Procedures), with a CY 2016 payment rate of \$1,411.21 and a device offset of \$4.52, or APC 5055 (Level 5 Skin Procedures), with a CY 2016 payment rate of \$2,137.49 and a device offset of \$25.44. According to the applicant, the cost of the substitute graft procedures when performed with Architect® Px is \$5,495.

Section 419.66(d)(1), the first cost significance requirement, provides that the estimated average reasonable cost of devices in the category must exceed 25 percent of the applicable APC payment amount for the service related to the category of devices. The estimated average reasonable cost of \$5,495 for Architect® Px exceeds the applicable APC amount for the service related to the category of devices of \$1,411.21 by 389 percent ($\$5,495/\$1,411.21 \times 100$ percent = 389 percent). Therefore, it appears that Architect® Px meets the first cost significance test.

The second cost significance test, at § 419.66(d)(2), provides that the estimated average reasonable cost of the devices in the category must exceed the cost of the device-related portion of the APC payment amount for the related service by at least 25 percent, which means the device cost needs to be at least 125 percent of the offset amount (the device-related portion of the APC found on the offset list). The estimated average reasonable cost of \$5,495 for Architect® Px exceeds the device-related portion of the APC payment amount for the related service of \$4.52 by 121,571 percent ($\$5,495/\4.52×100 percent = 121,571 percent). Therefore, we stated in the proposed rule that it appears that Architect® Px meets the second cost significance test.

Section 419.66(d)(3), the third cost significance test, requires that the difference between the estimated average reasonable cost of the devices in the category and the portion of the APC payment amount for the device must exceed 10 percent of the APC payment amount for the related service. The difference between the estimated average reasonable cost of \$5,495 for Architect® Px and the portion of the APC payment amount for the device of

³ Snyder, D.L. et al. Skin Substitutes for Treating Chronic Wounds. Technology Assessment Report. Project ID: HCPR0610. AHRQ. December 18, 2012.

⁴ Alexander JH, Yeager DA, et al. Equine Pericardium as a Biological Covering for the Treatment of Diabetic Foot Wounds; a Prospective Study. J Am Podiatric Assoc., 2012 Sep–Oct;102(5): 352–358.

\$4.52 exceeds 10 percent at 389 percent $((\$5,495 - \$4.52)/\$1,411.21) \times 100$ percent = 389 percent). Therefore, it appears that Architect® Px meets the third cost significance test. Based on the costs submitted by the applicant and the calculations noted earlier, we believe that Architect® Px meets the cost criterion at § 419.66(c)(3) for new device categories.

We invited public comments on whether Architect® Px meets the device pass-through payment criteria discussed in this section.

We did not receive any public comments relating to whether Architect® Px meets the device pass-through payment cost criterion. As stated earlier, we believe that Architect® Px meets the cost criterion at § 419.66(c)(3) for new device categories. However after consideration of the public comments we received, we are not approving device pass-through payment status for Architect® Px for CY 2018.

(2) Dermavest and Plurivest Human Placental Connective Tissue Matrix (HPCTM)

Aedicell, Inc. submitted an application for a new device category for transitional pass-through payment status for Dermavest and Plurivest human placental connective tissue matrix (HPCTM). Dermavest and Plurivest HPCTM use tissue sourced from the placental disk, amnion/chorion, and umbilical cord to replace or supplement damaged tissue. The applicant stated that Dermavest and Plurivest replace or supplement damaged or inadequate integumental tissue by providing a scaffold to entrap migrating cells for repopulation. The applicant stated that the products may be clinically indicated for the following conditions: Partial and full thickness wounds; pressure ulcers; venous ulcers; chronic vascular ulcers; diabetic ulcers; trauma wounds (abrasions, lacerations, second degree burns, and skin tears); drainage wounds; and surgical wounds (donor sites/grafts post mohs surgery, post laser surgery, and podiatric). Dermavest and Plurivest HPCTM are applied to the area of inadequate or damaged tissue, moistened if necessary and covered with a nonadherent secondary dressing. While the application does not distinguish between the Dermavest and Plurivest products, the AediCell Inc. Web site states that the two products differ by dosage. According to information on the Web site at www.aedicell.com, each product contains different tissue cell attachment proteins (CAP) and cytokine/growth factors (GF) profiles.

There is a lower cytokine/GF concentration profile in Plurivest and a higher concentration of CAP and cytokine/GF in Dermavest.

With respect to the newness criterion at § 419.66(b)(1), the applicant indicated that the product conforms to the requirements for Human Cells, Tissues, and Cellular and Tissue-Based Products (HCT/Ps) regulated solely under section 361 of the Public Health Service (PHS) Act and 21 CFR part 1271. For these products, FDA requires, among other things, that the manufacturer register and list its HCT/Ps with the Center for Biologics Evaluation and Research (CBER) within 5 days after beginning operations and update their registrations annually. AediCell, Inc. has an FDA field establishment identifier (FEI) under the HHS-FDA-Establishment Registration and Listing for Human Cells, Tissues, and Cellular and Tissue-Based Products (HCT/Ps) and submitted with its application the annual registration/listing for Dermavest and Plurivest dated November 9, 2015. The applicant noted that the initial registration for the manufacture of Dermavest was submitted to the CBER on October 28, 2013, and the registration of Plurivest was submitted the following year on November 14, 2014. The registration forms including these dates were not included in the application. Therefore, it is unclear if the newness criterion is met.

Comment: One commenter, the manufacturer, provided an FDA registration form for the product that indicated that there was change in information for the Dermavest product submitted on December 18, 2013. The manufacturer also submitted a document indicating that a registration form was submitted to FDA on October 20, 2014 to change the name of the product to Dermavest/Plurivest.

Response: Based on the information submitted by the manufacturer, we are unable to determine that Dermavest and Plurivest meet the newness criterion at § 419.66(b)(1).

With respect to the eligibility criterion at § 419.66(b)(3), according to the applicant, Dermavest and Plurivest are skin substitute products that are integral to the service provided, are used for one patient only, come in contact with human skin, and are applied in or on a wound or other skin lesion. The applicant also claimed Dermavest and Plurivest meet the device eligibility requirements of § 419.66(b)(4) because they are not instruments, apparatuses, implements, or items for which depreciation and financing expenses are recovered, and they are not supplies or

materials furnished incident to a service.

The criteria for establishing new device categories are specified at § 419.66(c). The first criterion, at § 419.66(c)(1), provides that CMS determines that a device to be included in the category is not appropriately described by any of the existing categories or by any category previously in effect, and was not being paid for as an outpatient service as of December 31, 1996. We have not identified an existing pass-through payment category that describes Dermavest and Plurivest HPCTM. The applicant proposed a category descriptor for Dermavest and Plurivest of “Human placental connective tissue matrix (HPCTM), comprised of tissue sourced from the placental disk, amnion/chorion, and umbilical cord for the intention of replacing or supplementing damaged or inadequate integumental issue.” We invited public comments on this issue.

Comment: One commenter, the manufacturer, supported CMS’ statement that CMS had not identified an existing pass-through payment category that describes Dermavest and Plurivest HPCTM.

Response: At this time, we still have not identified an existing pass-through payment category that describes Dermavest and Plurivest HPCTM.

The second criterion for establishing a device category, at § 419.66(c)(2), provides that CMS determines that a device to be included in the category has demonstrated that it will substantially improve the diagnosis or treatment of an illness or injury or improve the functioning of a malformed body part compared to the benefits of a device or devices in a previously established category or other available treatment. With respect to this criterion, the applicant provided several background studies showing general evidence that placental tissue, umbilical cord, and amnion membrane products are effective in the treatment of various wounds and ulcers. However, these studies were not specific to Dermavest and Plurivest HPCTM. The applicant submitted two poster presentations describing case studies that evaluated the wound healing time and wound characteristics of patients with diabetic and venous ulcers treated with Dermavest and Plurivest HPCTM. Both studies were described as case series and, as such, lacked blinding, randomization, and control groups. The first poster,⁵ presented in 2015,

⁵ Connell et al., Human placental connective tissue matrix in the treatment of chronic wounds: A prospective multi-center case series. 2015 at

described a prospective, multi-center case series with a small number of participants (n=15). The study evaluated wound healing time and wound characteristics of patients with various etiologies. The patients were treated with up to two 6 cm² pieces of Dermavest per application on wounds up to 44 cm². Results were presented for diabetic and venous ulcer cases and showed a week 4 percent area reduction (PAR) of 71 percent for diabetic ulcers and 50 percent for venous ulcers. Eighty percent of the diabetic ulcer cases and 50 percent of the venous ulcer cases had a week 4 PAR of greater than 40 percent.

The second poster,⁶ presented in 2016, also described a case series that evaluated wound healing time and wound characteristics of patients with various etiologies (n=8). The poster stated that the patients were treated with pieces of HPCTM according to manufacturer guidelines on wounds ranging in size up to 3.8 cm². The methods presented in the poster do not specify whether the patients were treated with Dermavest or Plurivest, or both. The results presented in the poster compile Dermavest data from two case series presented at the Society for Advanced Wound Care (SAWC) annual meeting. It was unclear whether there was overlap between the patients used in the 2015 and 2016 case series included in the application. The compiled Dermavest data were compared to the 4-week PAR results for diabetic and venous ulcers from two other noncontemporaneous studies evaluating different skin replacement products. The results showed, at week 4, approximately 80 percent of the Dermavest-treated diabetic ulcer cases had a PAR of greater than 50 percent in comparison to approximately 60 percent of cases and approximately 30 percent of cases, respectively, in the comparison studies using other skin replacement products. The results also showed that, at week 4, approximately 60 percent of the Dermavest-treated venous ulcer cases had a PAR of greater than 40 percent in comparison to approximately 50 percent of cases and approximately 30 percent of cases in the comparison studies treated with other skin replacement products. There were multiple differences between the Dermavest studies included in the poster presentations and these two additional studies presented as

comparators, including the number of patients included in the studies, the number of wounds treated, and the purpose of the study. Based on the results presented in the poster, the applicant concluded that HPCTM provides an effective alternative to other skin replacement products.

In the CY 2018 OPPS/ASC proposed rule, we stated that we were concerned that the research provided did not clinically demonstrate the active ingredients of the product(s) that might distinguish the product from others, the correct dosing of the product(s), the amount of durable wound closure with the product(s) compared to standard of care in studies with rigorous trial design/implementation, and the amount of durable wound closure with the product(s) compared to other products in studies with rigorous trial design/implementation. We stated in the proposed rule that, based on the evidence submitted with the application, we were not yet convinced that the Dermavest and Plurivest HPCTM provide a substantial clinical improvement over other treatments for wound care. We invited public comments on whether the Dermavest and Plurivest HPCTM meet this criterion.

Comment: One commenter, the manufacturer, provided information regarding the active ingredients and concentrations of active ingredients of the product as compared to other skin substitutes. The comment also included personal statements from physicians who used the product and attested to its clinical benefit over the current standard of care. The physicians' statements also noted that a randomized controlled trial that compares the product to the standard of care and to other advanced human tissue products, as well as registry studies, would be helpful in proving the substantial clinical improvement provided by Dermavest/Plurivest HPCTM. The manufacturer also stated that it was endeavoring to enter into a registry study and two randomized controlled trials using other high tiered skin substitutes as comparators.

Response: We appreciate the commenters' responses on the Dermavest and Plurivest HPCTM application. However, the commenters did not provide new empirical evidence that addressed our concerns that the studies included with the application were described as case series and, as such, lacked blinding, randomization, and control groups. At this time, we have not been able to determine that Dermavest and Plurivest HPCTM represents a substantial clinical

improvement relative to existing therapies currently available for wound care.

The third criterion for establishing a device category, at § 419.66(c)(3), requires us to determine that the cost of the device is not insignificant, as described in § 419.66(d). Section 419.66(d) includes three cost significance criteria that must each be met. The applicant provided the following information in support of the cost significance requirements. The applicant stated that Dermavest and Plurivest HPCTM would be reported with CPT codes 15271, 15272, 15273, 15274, 15275, 15276, 15277, and 15278. CPT codes 15272, 15274, 15276, and 15278 are add-on codes assigned status indicator "N", which means payment is packaged under the OPPS. CPT codes 15271 and 15275 are assigned to APC 5054 (Level 4 Skin Procedures), and CPT codes 15273 and 15277 are assigned to APC 5055 (Level 5 Skin Procedures). To meet the cost criterion for device pass-through payment, a device must pass all three tests of the cost criterion for at least one APC. For our calculations, we used APC 5054 (Level 4 Skin Procedures), which had a CY 2016 payment rate of \$1,411 and a device offset amount of \$4.52 at the time the application was received. According to the applicant, the cost of a sheet of 2x3 cm Dermavest is \$550, and the cost of a sheet of 2x3 cm Plurivest is \$500.

Section 419.66(d)(1), the first cost significance requirement, provides that the estimated average reasonable cost of devices in the category must exceed 25 percent of the applicable APC payment amount for the service related to the category of devices. The estimated average reasonable cost of \$550 for Dermavest and Plurivest exceeds 39 percent of the applicable APC payment amount for the service related to the category of devices of \$1,411 ($\$550 / \$1,411 \times 100 = 39$ percent). Therefore, we stated in the proposed rule that we believe Dermavest and Plurivest meet the first cost significance test.

The second cost significance test, at § 419.66(d)(2), provides that the estimated average reasonable cost of the devices in the category must exceed the cost of the device-related portion of the APC payment amount for the related service by at least 25 percent, which means that the device cost needs to be at least 125 percent of the offset amount (the device-related portion of the APC found on the offset list). The estimated average reasonable cost of \$550 for Dermavest and Plurivest exceeds the cost of the device-related portion of the APC payment amount for the related service of \$4.52 by 12,168 percent

Society of Advanced Wound Healing (SAWC) Spring meeting.

⁶McGuire and Sebag, The use of a new placental acellular tissue product in the management of chronic wounds: A case series. 2016 at the Society of Advanced Wound Healing (SAWC) Spring meeting.

$(\$550/\$4.52) \times 100 = 12,168$ percent). Therefore, we stated in the proposed rule that we believe that Dermavest and Plurivest meet the second cost significance test.

The third cost significance test, at § 419.66(d)(3), requires that the difference between the estimated average reasonable cost of the devices in the category and the portion of the APC payment amount for the device must exceed 10 percent of the APC payment amount for the related service. The difference between the estimated average reasonable cost of \$550 for Dermavest and Plurivest and the portion of the APC payment amount for the device of \$4.52 exceeds the APC payment amount for the related service of \$1,411 by 38.6 percent $(\$550 - \$4.52)/\$1,411 \times 100 = 38.6$ percent). Therefore, we stated in the proposed rule that we believe that Dermavest and Plurivest meet the third cost significance test.

We invited public comments on whether Dermavest and Plurivest meet the device pass-through payment cost criteria discussed in this section.

We did not receive any public comments on this issue. We continue to believe that Dermavest and Plurivest meet the device pass-through payment cost criteria.

After consideration of the public comments we received, we are not approving device pass-through payment status for the Dermavest and Plurivest HPCTM for CY 2018.

(3) FlōGraft®/Flōgraft Neogenesis®

Applied Biologics, LLC submitted an application for a new device category for transitional pass-through payment status for FlōGraft®/Flōgraft Neogenesis®. FlōGraft®/Flōgraft Neogenesis® is an injectable, human placental amniotic fluid. It is an allograft derived from human birth tissue recovered from a live, healthy C-section birth. The allograft is used to augment tissue to bone and tissue to tissue repairs. The allograft is implanted at the surgical site at the end of the procedure using a needle and syringe under direct visualization. The applicant claimed that the product helps drive healing towards native tissue regeneration and away from scar formation. FlōGraft® has a standardized potency of 2 million cells. FlōGraft Neogenesis® has a standardized potency of 1.5 million cells. The applicant indicated that the product may be used with several surgical procedures, including joint replacement procedures, traumatic bone and soft tissue injury, meniscal repairs, meniscal transplantation, articular cartilage

restoration, foot and ankle repairs, and chronic wounds.

With respect to the newness criterion at § 419.66(b)(1), the applicant indicated that FlōGraft® and Flōgraft Neogenesis® conform to the requirements for Human Cells, Tissues, and Cellular and Tissue-Based Products (HCT/Ps) regulated solely under section 361 of the PHS Act and 21 CFR part 1271. For these products, FDA requires, among other things, that the manufacturer register and list their HCT/Ps with the Center for Biologics Evaluation and Research (CBER) within 5 days after beginning operations and update their registrations annually. Applied Biologics, LLC has two FDA field establishment identifiers (FEI) under the HHS-FDA-Establishment Registration and Listing for Human Cells, Tissues, and Cellular and Tissue-Based Products (HCT/Ps). Both registration forms list the product as “FlōGraft®”. The applicant submitted an initial registration/listing for one FEI dated June 8, 2015, as well as an annual registration/listing for a different FEI dated December 1, 2014. The first date of U.S. sale for FlōGraft® was May 23, 2013. It is not clear when the initial CBER filing occurred for the FlōGraft® product. Therefore, it is unclear if the newness criterion for the FlōGraft® product is met.

Comment: One commenter, the manufacturer, supplied information indicating that the initial registration forms for FlōGraft® and Flōgraft Neogenesis® were submitted on February 24, 2015 and were validated by FDA on June 8, 2015.

Response: Based on the information submitted by the manufacturer, we believe that the product meets the newness criterion at § 419.66(b)(1).

With respect to the eligibility criterion at § 419.66(b)(3), according to the applicant, FlōGraft® and Flōgraft Neogenesis® are integral to the service provided, are used for one patient only, come in contact with human skin, and are applied in or on a wound or other skin lesion. The applicant also claimed FlōGraft® and Flōgraft Neogenesis meet the device eligibility requirements of § 419.66(b)(4) because they are not instruments, apparatuses, implements, or items for which depreciation and financing expenses are recovered, and they are not supplies or materials furnished incident to a service.

The criteria for establishing new device categories are specified at § 419.66(c). The first criterion, at § 419.66(c)(1), provides that CMS determines that a device to be included in the category is not appropriately described by any of the existing categories or by any category previously

in effect, and was not being paid for as an outpatient service as of December 31, 1996. We have not identified an existing pass-through payment device category that describes FlōGraft®/Flōgraft Neogenesis®. The application suggested a payment device category for FlōGraft®/Flōgraft Neogenesis® with a category descriptor of “Injectable Amniotic Fluid Allograft”. We invited public comments on this issue.

We did not receive any public comments on this issue, and at this time, we have not identified an existing pass-through category that describes FlōGraft®/Flōgraft Neogenesis®.

The second criterion for establishing a device category, at § 419.66(c)(2), provides that CMS determines that a device to be included in the category has demonstrated that it will substantially improve the diagnosis or treatment of an illness or injury or improve the functioning of a malformed body part compared to the benefits of a device or devices in a previously established category or other available treatment. With respect to the substantial clinical improvement criterion, the applicant submitted several peer-reviewed publications that provided general evidence that amniotic fluid and amniotic membrane-based products significantly reduce recovery time. However, these studies did not include the use of the FlōGraft®/Flōgraft Neogenesis® product. The applicant did list several studies in the application that involved the use of the FlōGraft®/Flōgraft Neogenesis® product. Of these studies, five unpublished studies were available for review. The five studies submitted with the application were described as case studies, case series, or retrospective cohort studies. The studies lacked random allocation, blinding, and a comparison group. The first study⁷ described a retrospective cohort study of 30 patients. The studies showed that 93 percent of the patients (n=14) who received a FlōGraft® injection, coupled with conservative, nonsurgical treatment plan to treat their Morton’s Nerve entrapment condition, had their issue resolved compared to 20 percent of patients (n=3) who did not receive FlōGraft® injection, coupled with conservative, nonsurgical treatment plan to treat their Morton’s Nerve entrapment condition. A greater percentage of patients who did not receive a FlōGraft® injection with their conservative treatment required surgery (80 percent versus 7 percent). Patients who required surgery had a 95-percent

⁷ Bregman, Peter. (2014). Addressing Morton’s Nerve Entrapment Surgically and Non-surgically with FlōGraft.

success rate when surgery was coupled with a FlōGraft® injection.

The next study⁸ was a retrospective analysis that involved 27 patients who were treated for stalled wounds. The patients had a broad spectrum of etiologies. Over a 12-month period, the applicant indicated that 96 percent of wounds that had stalled demonstrated rapid acceleration towards closure within a 21-day period when treated with FlōGraft®. The article recommended a randomized controlled trial (RCT) to confirm the results. The applicant also submitted two case studies,^{9,10} each involving one patient, which described the use of FlōGraft® to treat distal fibula fracture and tarsal tunnel compression neuropathy. Lastly, the application included a study¹¹ which presented the results from a case study of one patient as well as a retrospective cohort of 34 patients who received a Broström-Evans procedure with the FlōGraft® product. In general, the studies submitted lacked a clear description of the outcome variable and study population, and did not include statistical analysis.

Based on the evidence submitted, we stated in the proposed rule that we believe there is insufficient data to determine whether FlōGraft®/Flōgraft Neogenesis® offers a substantial clinical improvement over other treatments for wound care. We invited public comments on whether the FlōGraft®/Flōgraft Neogenesis® meets the substantial clinical improvement criterion.

Comment: Several commenters described the clinical benefits that they have observed using the FlōGraft® product in the treatment of wounds, bone, and soft tissue repairs. Other commenters described their current, ongoing studies involving the impact of FlōGraft® on rotator cuff healing after repair. One study described a randomized single blind study (n=20). One commenter was enthusiastic about the potential impact the product could have on improving healing for patients with rotator cuff injuries, while another commenter presented a more neutral position and stated that he could not confirm that the use of the product would impact the healing, but hoped

that the study would guide the use of the product in the future. Other commenters submitted case studies of wound care patients treated with FlōGraft®. One commenter submitted several studies related to amniotic fluid and amniotic membrane-based products; however, none of these studies were specific to the FlōGraft® product.

Response: We appreciate the commenters' responses on the FlōGraft®/Flōgraft Neogenesis® product. However, the commenters did not provide new empirical evidence that addressed our concerns regarding the evidence of substantial clinical improvement that was submitted with the application. These concerns included the lack of a clear description of the outcome variable and study population and the lack of statistical analysis. The comments also did not address our concerns that the studies submitted with the application were case studies, case series, or retrospective cohort studies that lacked random allocation, blinding, and a comparison group. The commenters also discussed studies that did not include the use of FlōGraft®/Flōgraft Neogenesis® and studies that were still in progress. At this time, we have not been able to determine that FlōGraft®/Flōgraft Neogenesis® represents a substantial clinical improvement relative to existing therapies currently available for wound care.

The third criterion for establishing a device category, at § 419.66(c)(3), requires us to determine that the cost of the device is not insignificant, as described in § 419.66(d). Section 419.66(d) includes three cost significance criteria that must each be met. The applicant provided the following information in support of the cost significance requirements. The applicant stated several CPT codes would be used to report FlōGraft®/Flōgraft Neogenesis®, including CPT codes 29826, 29827, 29828, 23473, 23420, 23412, 27605, 27650, 29891, 29888, 29889, 28008, 22551, 22856, 27179, 29861, and 29862. To meet the cost criterion for device pass-through payment, a device must pass all three tests of the cost criterion for at least one APC. These CPT codes are assigned to APCs 5121 through 5125 (Level 1 through Level 5 Musculoskeletal Procedures). For our calculations, we used APC 5121 (Level 1 Musculoskeletal Procedures), which had a CY 2016 payment rate of \$1,455 and a device offset of \$15.86 at the time the application was received. According to the applicant, the FlōGraft®/Flōgraft Neogenesis® product is available in a

variety of vial sizes, the largest size being 18 cc with a cost of \$19,925.

Section 419.66(d)(1), the first cost significance requirement, provides that the estimated average reasonable cost of devices in the category must exceed 25 percent of the applicable APC payment amount for the service related to the category of devices. We used the highest priced product for this determination. The estimated average reasonable cost of \$19,925 for FlōGraft®/Flōgraft Neogenesis® exceeds the applicable APC payment amount for the service related to the category of devices of \$1,455 by 1,369 percent ($\$19,925/\$1,455 \times 100 = 1,369$ percent). Therefore, we stated in the proposed rule that we believe FlōGraft®/Flōgraft Neogenesis® meets the first cost significance test.

The second cost significance test, at § 419.66(d)(2), provides that the estimated average reasonable cost of the devices in the category must exceed the cost of the device-related portion of the APC payment amount for the related service by at least 25 percent, which means that the device cost needs to be at least 125 percent of the offset amount (the device-related portion of the APC found on the offset list). The average reasonable cost of \$19,925 for FlōGraft®/Flōgraft Neogenesis® exceeds the device-related portion of the APC payment amount of \$15.86 by 125,360 percent ($\$19,925/\$15.86 \times 100 = 125,360$ percent). Therefore, in the proposed rule, we stated that we believe that FlōGraft®/Flōgraft Neogenesis® meets the second cost significance test.

The third cost significance test, at § 419.66(d)(3), requires that the difference between the estimated average reasonable cost of the devices in the category and the portion of the APC payment amount for the device must exceed 10 percent of the APC payment amount for the related service. The difference between the average reasonable cost of \$19,925 for FlōGraft®/Flōgraft Neogenesis® and the portion of the APC payment amount for the device of \$15.86 exceeds the APC payment amount for the related service of \$1,455 by 1,368 percent ($(\$19,925 - \$15.86)/\$1,455 \times 100 = 1,368$ percent). Therefore, in the proposed rule, we stated that we believe FlōGraft®/Flōgraft Neogenesis® meets the third cost significance test.

We invited public comments on whether FlōGraft®/Flōgraft Neogenesis® meets the device pass-through payment cost criteria discussed in this section.

We did not receive any public comments on this issue. We continue to believe that FlōGraft®/Flōgraft Neogenesis® meets the device pass-through payment cost criteria.

⁸ Gottlieb, et al. FloGraft Rapidly Moves Stalled Wounds Into the Proliferative Phase.

⁹ Jacoby, Richard. Case Study 221: Non-surgical Resolution of Distal Fibula Fracture with Flograft Implant; 82 YO Male.

¹⁰ Jacoby, Richard. Tarsal Tunnel Compression Neuropathy Case Study Using Flograft.

¹¹ Maling, Scott. A Case Series: A retrospective analysis of 34 patients receiving modified Brinstom-Evans procedure with Flograft reduce time to full mobility by 52%.

After consideration of the public comments we received, we are not approving device pass-through payment status for the FlōGraft®/Flōgraft Neogenesis® product for CY 2018.

(4) Kerecis™ Omega3 Wound (Skin Substitute)

Kerecis, LLC submitted an application for a new device category for transitional pass-through payment status for Kerecis™ Omega3 Wound. Kerecis™ Omega3 Wound is made from acellular fish skin from wild Atlantic cod (*Gadus morhua*) caught in the North Atlantic Ocean that is used to regenerate damaged human tissue in chronic wounds. The applicant claimed that there is no disease transmission risk and noted that the fish skin is not required to undergo the viral inactivation process that the FDA dictates for tissues from farm animals. The applicant noted that the Omega3 fatty acids offer multiple health benefits, including anti-inflammation. Kerecis™ Omega3 Wound is supplied as a sterile, single-use sheet in peel-open pouches. Kerecis™ Omega3 Wound does not elicit an immune response because the major antigenic components present within cell membranes are removed in a gentle manner during processing. Unlike mammalian and human sourced products, the fish skin possesses extremely low risk of disease transmission and offers no known cultural or religious constraints for usage. The fish skin product is both halal and kosher compatible and avoids potential conflicts with Sikhism and Hinduism (Vaishnavism).

With respect to the newness criterion at § 419.66(b)(1), the applicant received FDA clearance for Kerecis™ Omega3 Wound through the premarket notification section 510(k) process on October 23, 2013 and its June 1, 2016 application was within 3 years of FDA clearance.

With respect to the eligibility criterion at § 419.66(b)(3), according to the applicant, Kerecis™ Omega3 Wound is a skin substitute product that is integral to the service provided, is used for one patient only, comes in contact with human skin, and is surgically inserted into the patient. The applicant also claimed Kerecis™ Omega3 Wound meets the device eligibility requirements of § 419.66(b)(4) because it is not an instrument, apparatus, implement, or item for which depreciation and financing expenses are recovered, and it is not a supply or material.

The criteria for establishing new device categories are specified at § 419.66(c). The first criterion, at

§ 419.66(c)(1), provides that CMS determines that a device to be included in the category is not appropriately described by any of the existing categories or by any category previously in effect, and was not being paid for as an outpatient service as of December 31, 1996. We have not identified an existing pass-through payment category that describes Kerecis™ Omega3 Wound. The applicant proposed a pass-through payment device category for Kerecis™ Omega3 Wound with category descriptor of “Piscine skin substitute.” We invited public comments on this issue.

We did not receive any public comments on this issue. As we stated earlier, we have not identified an existing pass-through category that describes Kerecis™ Omega3 Wound. Therefore, for the reasons discussed earlier, we believe Kerecis™ Omega3 Wound meets the eligibility criterion.

The second criterion for establishing a device category, at § 419.66(c)(2), provides that CMS determines that a device to be included in the category has demonstrated that it will substantially improve the diagnosis or treatment of an illness or injury or improve the functioning of a malformed body part compared to the benefits of a device or devices in a previously established category or other available treatment. With regard to the substantial clinical improvement criterion, the applicant stated that individuals who would normally refuse to use skin substitute products from animal sources, including pigs, cows, horses, and sheep, would use Kerecis™ Omega3 Wound because it is a fish-based skin substitute. The applicant also asserted that Kerecis™ Omega3 Wound provides several beneficial outcomes, including faster resolution of the disease process compared to similar products, decreased antibiotic use, decreased pain, and reduced amounts of device-related complications.

The applicant cited three studies in support of the application. The first study¹² was a parallel-group, double-blinded, randomized controlled trial undertaken to determine if healing time of whole thickness biopsy wounds treated with Kerecis™ Omega3 Wound is noninferior to that of wounds treated with porcine SIS ECM (Oasis). The study was an intention-to-treat study. Participants had two 4-mm full thickness punch wounds made on the

proximal anterolateral aspect of their nondominant arm. The study population was comprised of volunteers aged between 18 and 67 years with most volunteers between the ages of 18 and 30. There were 80 volunteers who received Kerecis™ Omega3 Wound and 82 volunteers who received porcine SIS ECM (Oasis).

The results showed that, at 21 days, 58 (72.5 percent) of the fish skin ADM group were healed, compared with 46 (56 percent) of the porcine SIS ECM group. At 25 days, 62 (77.5 percent) of the fish skin ADM and 53 (65 percent) of the porcine SIS ECM group had healed. At the completion of the trial (28 days), 76 of the 80 wounds treated with fish skin ADM (95 percent) and 79 of the 82 wounds treated with porcine SIS ECM (96.3 percent) were healed. The odds ratio of a fish skin ADM-treated wound being healed as compared with that treated with porcine SIS ECM at any given time point was estimated to be 4.75. The difference between the treatments was statistically significant ($P = 0.041$). The immunological part of the study was designed to detect autoimmune reactions in those individuals treated with Kerecis™ Omega3 Wound. There was no evidence of antibodies forming in the presence of Kerecis™ Omega3 Wound.

There were issues with this study that may limit its usefulness to determine substantial clinical improvement including the use of nonpatient volunteers; studying the healing of biopsy sites rather than actual wounds requiring treatment; and the use of a 1-month endpoint of care instead of a longer period, such as a 6-month endpoint of care.

The second study¹³ was a case series study of 18 patients to assess the percentage of wound closure area from baseline after 5 weekly fish-skin graft applications with at least one “hard-to-heal” criterion. Patients underwent application of the fish skin for 5 sequential weeks, followed by 3 weeks of standard care. Wound area, skin assessments, and pain were analyzed weekly.

The study results showed a 40-percent decrease in wound surface area ($P < 0.05$) and a 48-percent decrease in wound depth was seen with 5 weekly applications of the fish-skin graft and secondary dressing ($P < 0.05$). Complete closure was seen in 3 of 18 patients by

¹² Tumi Baldursson, T, MD, Ph.D. et al. Healing Rate and Autoimmune Safety of Full-Thickness Wounds Treated With Fish Skin Acellular Dermal Matrix Versus Porcine Small-Intestine Submucosa: A Noninferiority Study; *The International Journal of Lower Extremity Wounds* 2015, Vol. 14(1) 37–43.

¹³ Yang, CK et al. A Prospective, Postmarket, Compassionate Clinical Evaluation of a Novel Acellular Fish-skin Graft Which Contains Omega-3 Fatty Acids for the Closure of Hard-to-heal Lower Extremity Chronic Ulcers. *Wounds* 2016;28(4): 112–118.

the end of the study phase. This study did not use a comparator group to measure whether there is substantial clinical improvement with Kerecis™ Omega3 Wound compared to other skin substitute products.

The third study¹⁴ was a case series study of five patients with diabetes mellitus and complicated wounds in the lower limbs with exposed bone segments. The five patients had a total of seven wounds. Initial debridement occurred in the operating room, followed by application of wound matrix and covered with silicone mesh. All seven wounds healed and the patients did not have to have planned amputations on the limbs with the wounds. The mean duration of treatment to achieve full closure of the wound was 25 ± 10 weeks and ranged from 13 to 41 weeks. This study did not have a comparator group to determine if there was substantial clinical improvement with Kerecis™ Omega3 Wound compared to other skin substitute products.

There are no clinical data provided by the applicant to suggest that Kerecis™ Omega3 Wound provides a substantial clinical improvement over other similar skin substitute products. We invited public comments on whether Kerecis™ Omega3 Wound meets the substantial clinical improvement criterion.

Comment: One commenter, the manufacturer, stated that Kerecis™ Omega3 Wound significantly improves acute wound healing, nearly eliminates risk from side effects and adverse events, and provides a skin substitute option for beneficiaries who have allergic reactions or personal objections to mammalian or human sourced skin substitutes. The commenter referred to a study, believed to be the first study reviewed in the proposed rule,¹⁵ and stated that it was the largest study performed in skin substitute research and that the study showed substantial clinical improvement from Kerecis™ Omega3 Wound. The commenter believed it had submitted more comparative data than skin substitute products that had previously received pass-through payment approval.

Lastly, the commenter believed that a skin substitute product that eliminates religious objections to its use, because Kerecis™ Omega3 Wound is fish

sourced and not a mammalian or human sourced skin substitute, provides a significant benefit to beneficiaries with those objections, as they now have access to skin substitute products when previously skin substitute products may not be available to them.

Response: The commenter did not provide information to demonstrate that Kerecis™ Omega3 Wound represents a substantial clinical improvement relative to other wound care products currently available on the market. The commenter did not provide additional studies to support its claims of improvement with acute wound healing and low risk of side effects and adverse events. The commenter also did not address the concerns of the first study reviewed for this criterion, including the use of nonpatient volunteers; studying the healing of biopsy sites rather than actual wounds requiring treatment; and the use of an unrealistic 1-month endpoint of care instead of a 6-month endpoint of care. Instead, the manufacturer simply stated the study “epitomizes” substantial clinical improvement.

The commenter stated that other skin substitute products that had presented less evidence of substantial clinical improvement had previously been approved for pass-through payment status. However, we believe that the commenter may have been referring to skin substitutes approved for transitional pass-through payments before these products were subject to the transitional pass-through payment approval for medical devices. Since CY 2015, skin substitutes have been evaluated using the medical device pass-through payment process (79 FR 66885 through 66888), which includes the criterion for substantial clinical improvement. Applicants must demonstrate that the device under consideration for pass-through status will substantially improve the diagnosis or treatment of an illness or injury or improve the functioning of a malformed body part compared to the benefits of a device or devices in a previously established category or other available treatment. The commenter did not provide additional information showing substantial clinical improvement.

Finally, the commenter stated that Kerecis™ Omega3 Wound should meet the substantial clinical improvement criterion because it provides a skin substitute option for beneficiaries with allergies or personal objections to mammalian or human sourced products. However, the commenter did not provide any studies nor cite any data to show that this population would receive

a substantial clinical improvement through the use of Kerecis™ Omega3 Wound, as compared to the wound care treatments available to this group of beneficiaries. Therefore, we determine that Kerecis™ Omega3 Wound does not meet the criterion for substantial clinical improvement.

The third criterion for establishing a device category, at § 419.66(c)(3), requires us to determine that the cost of the device is not insignificant, as described in § 419.66(d). Section 419.66(d) includes three cost significance criteria that must each be met. The applicant provided the following information in support of the cost significance requirements. With respect to the cost criterion, the applicant stated that Kerecis™ Omega3 Wound would be reported with CPT codes 15271 through 15278, which cover the application of skin substitute grafts to different areas of the body for high-cost skin substitutes. To meet the cost criterion for device pass-through payment, a device must pass all three tests of the cost criterion for at least one APC. CPT codes 15271 through 15278 are assigned to either APC 5054 (Level 4 Skin Procedures), with a CY 2016 payment rate of \$1,411.21 and a device offset amount of \$4.52, or APC 5055 (Level 5 Skin Procedures), with a CY 2016 payment rate of \$2,137.49 and a device offset amount of \$25.44. According to the applicant, the cost of substitute graft procedures when performed with Kerecis™ Omega3 Wound is \$2,030.

Section 419.66(d)(1), the first cost significance requirement, provides that the estimated average reasonable cost of devices in the category must exceed 25 percent of the applicable APC payment amount for the service related to the category of devices. The estimated average reasonable cost of \$2,030 for Kerecis™ Omega3 Wound exceeds the applicable APC payment amount for the service related to the category of devices of \$1,411.21 by 144 percent ($\$2,030 / \$1,411.21 \times 100$ percent = 144 percent). Therefore, we stated in the proposed rule that it appears that Kerecis™ Omega3 Wound meets the first cost significance test.

The second cost significance test, at § 419.66(d)(2), provides that the estimated average reasonable cost of the devices in the category must exceed the cost of the device-related portion of the APC payment amount for the related service by at least 25 percent, which means that the device cost needs to be at least 125 percent of the offset amount (the device-related portion of the APC found on the offset list). The average reasonable cost of \$2,030 for Kerecis™

¹⁴ Trinh, TT, et al. Marine Omega3 wound matrix for: the treatment of complicated wounds; *Phlebologie* 2016; 45: 93–98.

¹⁵ Tumi Baldursson, T, MD, Ph.D. et al. Healing Rate and Autoimmune Safety of Full-Thickness Wounds Treated With Fish Skin Acellular Dermal Matrix Versus Porcine Small-Intestine Submucosa: A Noninferiority Study; *The International Journal of Lower Extremity Wounds* 2015, Vol. 14(1) 37–43.

Omega3 Wound exceeds the device-related portion of the APC payment amount of \$4.52 by 44,911 percent ($\$2,030/\4.52×100 percent = 44,911 percent). Therefore, it appears that Kerecis™ Omega3 Wound meets the second cost significance test.

The third cost significance test, at § 419.66(d)(3), requires that the difference between the estimated average reasonable cost of the devices in the category and the portion of the APC payment amount for the device must exceed 10 percent of the APC payment amount for the related service. The difference between the average reasonable cost of \$2,030 for Kerecis™ Omega3 Wound and the portion of the APC payment amount for the device of \$4.52 exceeds the APC payment amount for the related service of \$1,411 by 144 percent ($(\$2,030 - \$4.52)/\$1,411.21 \times 100$ percent = 144 percent). Therefore, we stated in the proposed rule that it appears that Kerecis™ Omega3 Wound meets the third cost significance test. Based on the costs submitted by the applicant and the calculations noted earlier, it appears that Kerecis™ Omega3 Wound meets the cost criterion.

We invited public comments on whether Kerecis™ Omega3 Wound meets the device pass-through payment criteria discussed in this section.

We did not receive any public comments for this section. We confirm that Kerecis™ Omega3 Wound meets the cost criteria for new device categories.

After consideration of the public comments we received, we are not approving device pass-through payment status for Kerecis™ Omega3 Wound for CY 2018.

(5) X-WRAP®

Applied Biologics, LLC submitted an application for a new device category for transitional pass-through payment status for X-WRAP®. X-WRAP® is a chorion-free, amnion membrane allograft that can be used as a biological wrap or patch at any surgical site. It is used as a treatment for surgical or traumatic injury to bone or soft tissue. It is used to minimize adhesions, reduce inflammation, and promote soft tissue healing. The X-WRAP® is made from the intermediate amniotic epithelial layer of the placenta, recovered from a Cesarean delivery of pre-screened donors. It is available in a variety of sizes and is used as a biologic augmentation to a variety of orthopedic repairs.

With respect to the newness criterion at § 419.66(b)(1), the applicant indicated that X-WRAP® conforms to the requirements for Human Cells, Tissues,

and Cellular and Tissue-Based Products (HCT/Ps) regulated solely under section 361 of the PHS Act and 21 CFR part 1271. For these products, FDA requires, among other things, that the manufacturers register and list their HCT/Ps with the Center for Biologics Evaluation and Research (CBER) within 5 days after beginning operations and update their registrations annually. Applied Biologics, LLC has a FDA field establishment identifier (FEI) under the HHS-FDA-Establishment Registration and Listing for Human Cells, Tissues, and Cellular and Tissue-Based Products (HCT/Ps). The applicant submitted an annual registration/listing dated December 30, 2015. It is not clear when the initial CBER filing occurred for the X-WRAP® product, and therefore, it is unclear if the newness criterion for X-WRAP® is met.

Comment: One commenter, the manufacturer, supplied information indicating that the initial registration form for X-WRAP® was submitted on February 24, 2015 and validated by FDA on June 8, 2015.

Response: Based on the information submitted by the manufacturer, we believe that the product meets the newness criterion at § 419.66(b)(1).

With respect to the eligibility criterion at § 419.66(b)(3), according to the applicant, X-WRAP® is integral to the service provided, is used for one patient only, comes in contact with human skin, and is applied in or on a wound or other skin lesion. The applicant also claimed X-WRAP® meets the device eligibility requirements of § 419.66(b)(4) because it is not an instrument, apparatus, implement or item for which depreciation and financing expenses are recovered, and it is not a supply or material furnished incident to a service.

The criteria for establishing new device categories are specified at § 419.66(c). The first criterion, at § 419.66(c)(1), provides that CMS determines that a device to be included in the category is not appropriately described by any of the existing categories or by any category previously in effect, and was not being paid for as an outpatient service as of December 31, 1996. We have not identified an existing pass-through payment device category that describes X-WRAP®. The applicant proposed a pass-through device category for X-WRAP® with a category descriptor of “Amniotic Membrane Soft Tissue Allografts”. We invited public comments on this issue.

We did not receive any public comments on this issue, and at this time, we have not identified an existing pass-through category that describes X-WRAP®.

The second criterion for establishing a device category, at § 419.66(c)(2), provides that CMS determines that a device to be included in the category has demonstrated that it will substantially improve the diagnosis or treatment of an illness or injury or improve the functioning of a malformed body part compared to the benefits of a device or devices in a previously established category or other available treatment. With regard to the substantial clinical improvement criterion, the applicant submitted a list of studies in the application that showed general effectiveness of amniotic fluid and amniotic membrane-based products. However, these studies were not specific to the X-WRAP® product. The applicant also submitted one study¹⁶ that was a retrospective review with prospective follow-up of patients (n=8) with recurrent surgical primary cubital tunnel syndrome (CuTS) who had undergone at least two previous ulnar nerve surgeries before having an ulnar neurolysis with X-WRAP® dry amniotic membrane barrier. The results showed that the participants experienced significant improvement in VAS pain scores, QuickDASH outcome scores, and grip strength in comparison to these scores prior to the surgery. Mean VAS improved by 3.5, from 7.3 to 3.8 (P <.0001). Mean QuickDASH improved by 30, from 80 to 50 (P <.0001). Grip strength improved by 25 pounds on average (P <.0001), a mean improvement of 38 percent relative to the contralateral side compared with preoperative measurements. Also, none of the patients reported progression or worsening of their symptoms compared with preoperatively. The applicant's conclusions from the article were that using the X-WRAP® amniotic membrane with revision neurolysis was a safe and effective treatment for primary cubital syndrome. The study lacked a comparison arm and did not include group assignment or blinding of patients.

Based on the evidence submitted, we believe there are insufficient data to determine whether X-WRAP® offers a substantial clinical improvement over other treatments for wound care. We invited public comments on whether the X-WRAP® meets the substantial clinical improvement criterion.

Comment: Commenters described the clinical benefits that they have observed using the X-WRAP® product in the treatment of wounds, bone, and soft

¹⁶ Gaspar, M.P., et al. (2016). Recurrent cubital tunnel syndrome treated with revision neurolysis and amniotic membrane nerve wrapping. *Journal of Shoulder and Elbow Surgery*, 25, 2057–2065.

tissue repairs. One commenter submitted several studies related to amniotic fluid and amniotic membrane-based products; however, none of these studies were specific to the X-WRAP® product.

Response: We appreciate the commenters' responses on the X-WRAP® product. However, the commenters did not provide new empirical evidence that addressed our concerns regarding the evidence of substantial clinical improvement that was submitted with the application, specifically that this evidence was limited to one retrospective study that lacked a comparison arm and did not include group assignment or blinding of patients. At this time, we have not been able to determine that X-WRAP® represents a substantial clinical improvement relative to existing therapies currently available for wound care.

The third criterion for establishing a device category, at § 419.66(c)(3), requires us to determine that the cost of the device is not insignificant, as described in § 419.66(d). Section 419.66(d) includes three cost significance criteria that must each be met. The applicant provided the following information in support of the cost significance requirements. The applicant stated that several CPT codes would be used to report X-WRAP®, including: CPT codes 29826, 29827, 29828, 23473, 23420, 23412, 27605, 27650, 29891, 29888, 29889, 28008, 22551, 22856, 27179, 29861, 29862, 15271, 15272, 15273, and 15277. To meet the cost criterion for device pass-through payment, a device must pass all three tests for cost threshold for at least one APC. These CPT codes are assigned to APCs 5121 through 5125 (Level 1 through Level 5 Musculoskeletal Procedures) and APCs 5054 and 5055 (Level 4 and Level 5 Skin Procedures). For our calculations, we used APC 5121 (Level 1 Musculoskeletal Procedures), which had a CY 2016 payment rate of \$1,455 and a device offset amount of \$15.86 at the time the application was received. According to the applicant, the X-WRAP® product is available in several sizes, the largest being 4x8 cm with a cost of \$5,280.

Section 419.66(d)(1), the first cost significance requirement, provides that the estimated average reasonable cost of devices in the category must exceed 25 percent of the applicable APC payment amount for the service related to the category of devices. The estimated average reasonable cost of \$5,280 for X-WRAP® exceeds the applicable APC payment amount for the service related to the category of devices of \$1,455 by

363 percent ($\$5,280/\$1,455 \times 100 = 363$ percent). Therefore, we stated in the proposed rule that it appears that X-WRAP® meets the first cost significance test.

The second cost significance test, at § 419.66(d)(2), provides that the estimated average reasonable cost of the devices in the category must exceed the cost of the device-related portion of the APC payment amount for the related service by at least 25 percent, which means that the device cost needs to be at least 125 percent of the offset amount (the device related portion of the APC found on the offset list). The average reasonable cost of \$5,280 for X-WRAP® exceeds the device-related portion of the APC payment amount of \$15.86 by 33,291 percent ($\$5,280/\$15.86 \times 100 = 33,291$ percent). Therefore, we stated in the proposed rule that it appears that X-WRAP® meets the second cost significance test.

The third cost significance test, at § 419.66(d)(3), requires that the difference between the estimated average reasonable cost of the devices in the category and the portion of the APC payment amount for the device must exceed 10 percent of the APC payment amount for the related service. The difference between the average reasonable cost of \$5,280 for X-WRAP® and the portion of the APC payment amount for the device of \$15.86 exceeds the APC payment amount for the related service of \$1,455 by 361 percent ($(\$5,280 - \$15.86)/\$1,455 \times 100 = 361$ percent). Therefore, we stated in the proposed rule that it appears that X-WRAP® meets the third cost significance test.

We invited public comments on whether X-WRAP® meets the device pass-through payment cost criteria discussed in this section.

We did not receive any public comments on this issue. We continue to believe that X-WRAP® meets the device pass-through payment cost criteria.

After consideration of the public comments we received, we are not approving device pass-through payment status for the X-WRAP® product for CY 2018.

B. Device-Intensive Procedures

1. Background

Under the OPPIs, prior to CY 2017, device-intensive APCs were defined as those APCs with a device offset greater than 40 percent (79 FR 66795). In assigning device-intensive status to an APC, the device costs of all of the procedures within the APC were calculated and the geometric mean device offset of all of the procedures had

to exceed 40 percent. Almost all of the procedures assigned to device-intensive APCs utilize devices, and the device costs for the associated HCPCS codes exceed the 40-percent threshold. The no cost/full credit and partial credit device policy (79 FR 66872 through 66873) applies to device-intensive APCs and is discussed in detail in section IV.B.4. of this final rule with comment period. A related device policy was the requirement that certain procedures assigned to device-intensive APCs require the reporting of a device code on the claim (80 FR 70422). For further background information on the device-intensive APC policy, we refer readers to the CY 2016 OPPIs/ASC final rule with comment period (80 FR 70421 through 70426).

2. HCPCS Code-Level Device-Intensive Determination

As stated above, prior to CY 2017, the device-intensive methodology assigned device-intensive status to all procedures requiring the implantation of a device, which were assigned to an APC with a device offset greater than 40 percent. Historically, the device-intensive designation was at the APC level and applied to the applicable procedures within that given APC. In the CY 2017 OPPIs/ASC final rule with comment period (81 FR 79658), we changed our methodology to assign device-intensive status to all procedures that require the implantation of a device and have an individual HCPCS code-level device offset of greater than 40 percent, regardless of the APC assignment. Under this policy, all procedures with significant device costs (defined as a device offset of more than 40 percent) are assigned device-intensive status, regardless of their APC placement. Also, we believe that a HCPCS code-level device offset is, in most cases, a better representation of a procedure's device cost than an APC-wide average device offset based on the average device offset of all of the procedures assigned to an APC. Unlike a device offset calculated at the APC level, which is a weighted average offset for all devices used in all of the procedures assigned to an APC, a HCPCS code-level device offset is calculated using only claims for a single HCPCS code. We believe that such a methodological change results in a more accurate representation of the cost attributable to implantation of a high-cost device, which ensures consistent device-intensive designation of procedures with a significant device cost. Further, we believe a HCPCS code-level device offset removes inappropriate device-intensive status to procedures without a significant device

cost but which are granted such status because of APC assignment.

Under our CY 2017 finalized policy, procedures that have an individual HCPCS code-level device offset of greater than 40 percent are identified as device-intensive procedures and are subject to all the policies applicable to procedures assigned device-intensive status under our established methodology, including our policies on device edits and device credits. Therefore, all procedures requiring the implantation of a medical device and that have an individual HCPCS code-level device offset of greater than 40 percent are subject to the device edit and no cost/full credit and partial credit device policies, discussed in sections IV.B.3. and IV.B.4. of this final rule with comment period, respectively.

In addition, for new HCPCS codes describing procedures requiring the implantation of medical devices that do not yet have associated claims data, in the CY 2017 OPPTS/ASC final rule with comment period (81 FR 79658), we finalized a policy for CY 2017 to apply device-intensive status with a default device offset set at 41 percent for new HCPCS codes describing procedures requiring the implantation of a medical device that do not yet have associated claims data until claims data are available to establish the HCPCS code-level device offset for the procedures. This default device offset amount of 41 percent is not calculated from claims data; instead, it is applied as a default until claims data are available upon which to calculate an actual device offset for the new code. The purpose of applying the 41-percent default device offset to new codes that describe procedures that implant medical devices is to ensure ASC access for new procedures until claims data become available. However, in certain rare instances, for example, in the case of a very expensive implantable device, we may temporarily assign a higher offset percentage if warranted by additional information such as pricing data from a device manufacturer (81 FR 79658). Once claims data are available for a new procedure requiring the implantation of a medical device, device-intensive status will be applied to the code if the HCPCS code-level device offset is greater than 40 percent, according to our finalized policy of determining device-intensive status by calculating the HCPCS code-level device offset.

The full listing of proposed CY 2018 device-intensive procedures was included in Addendum P to the proposed rule (which is available via the Internet on the CMS Web site). The full listing of the final CY 2018 device-

intensive procedures is included in Addendum P to this final rule with comment period.

In response to comments received in the CY 2017 OPPTS/ASC final rule with comment period, we specified that additional information for our consideration of an offset percentage higher than the default of 41 percent for new HCPCS codes describing procedures requiring the implantation (or in some cases the insertion) of a medical device that do not yet have associated claims data, such as pricing data or invoices from a device manufacturer, should be directed to the Division of Outpatient Care, Mail Stop C4-01-26, Centers for Medicare and Medicaid Services, 7500 Security Boulevard, Baltimore, MD 21244-1850, or electronically at outpatientpps@cms.hhs.gov. Additional information can be submitted prior to issuance of an OPPTS/ASC proposed rule or as a public comment in response to an issued OPPTS/ASC proposed rule. Device offset percentages will be set in each year's final rule.

We did not propose any changes to this policy for CY 2018.

Comment: Several commenters suggested that CMS use alternate device offset percentage thresholds for assigning device-intensive status. One of those commenters suggested that the device-intensive designation be given for any specified procedure with a HCPCS code level device offset percentage of greater than 30 percent. Another commenter suggested that CMS apply the device-intensive designation to any procedure for which the individual HCPCS code level device offset is greater than 40 percent of the procedure's unadjusted ASC payment rate. In addition, one commenter requested that CMS provide clarification on the criteria for device-intensive procedures, specifically with respect to temporarily inserted devices.

Response: We thank the commenters for their suggestions. However, we continue to believe that our current methodology to assign device-intensive status to all procedures that require the implantation of a device and have an individual HCPCS code-level device offset of greater than 40 percent is appropriate. With respect to the request for clarification about the criteria for device-intensive procedures pertaining to temporarily inserted devices, we would like to clarify that device-intensive procedures require the implantation of a device and additionally are subject to the following criteria: (1) All procedures must involve implantable devices that would be reported if device insertion procedures

were performed; (2) the required devices must be surgically inserted or implanted devices that remain in the patient's body after the conclusion of the procedure (at least temporarily); and (3) the device offset amount must be significant, which is defined as exceeding 40 percent of the procedure's mean cost.

Comment: One commenter supported the proposed designation of CPT code 28740 (Arthrodesis, midtarsal or tarsometatarsal, single joint) as a device-intensive procedure. A few commenters requested that the following HCPCS codes be assigned device-intensive status: HCPCS codes 55874 (placeholder code 55X87) (Transperineal placement of biodegradable material, peri-prostatic, single or multiple injection(s), including image guidance, when performed); 0275T (Percutaneous laminotomy/laminectomy (interlaminar approach) for decompression of neural elements, (with or without ligamentous resection, discectomy, facetectomy and/or foraminotomy), any method, under indirect image guidance (e.g., fluoroscopic, ct), single or multiple levels, unilateral or bilateral; lumbar); and 28297 (Correction, hallux valgus (bunionectomy), with sesamoidectomy, when performed; with first metatarsal and medial cuneiform joint arthrodesis, any method).

Response: We thank the commenter for its support for our proposed designation of CPT code 28740. With respect to the commenters' request that we assign the device-intensive designation to HCPCS codes 55874, 0275T, and 28297, we note that the device offset percentage for all three of these procedures (as identified by the above mentioned HCPCS codes or predecessor codes) is not above the 40 percent threshold, and therefore, these procedures are not eligible to be assigned device-intensive status.

Comment: Several commenters suggested that CMS develop a mechanism that prevents significant payment reductions for device-intensive procedures due to wage index adjustments.

Response: In response to the commenters' suggestion that CMS develop a mechanism that prevents significant payment reductions for device-intensive procedures due to wage index adjustments, we note that we did not include such a proposal in the CY 2018 proposed rule. However, we will take this comment into consideration for future rulemaking.

3. Device Edit Policy

In the CY 2015 OPPTS/ASC final rule with comment period (79 FR 66795), we

finalized a policy and implemented claims processing edits that require any of the device codes used in the previous device-to-procedure edits to be present on the claim whenever a procedure code assigned to any of the APCs listed in Table 5 of the CY 2015 OPPS/ASC final rule with comment period (the CY 2015 device-dependent APCs) is reported on the claim. In addition, in the CY 2016 OPPS/ASC final rule with comment period (80 FR 70422), we modified our previously existing policy and applied the device coding requirements exclusively to procedures that require the implantation of a device that are assigned to a device-intensive APC. In the CY 2016 OPPS/ASC final rule with comment period, we also finalized our policy that the claims processing edits are such that any device code, when reported on a claim with a procedure assigned to a device-intensive APC (listed in Table 42 of the CY 2016 OPPS/ASC final rule with comment period (80 FR 70422)) will satisfy the edit.

In the CY 2017 OPPS/ASC final rule with comment period (81 FR 79658 through 79659), we changed our policy for CY 2017 and subsequent years to apply the CY 2016 device coding requirements to the newly defined (individual HCPCS code-level device offset greater than 40 percent) device-intensive procedures. For CY 2017 and subsequent years, we also specified that any device code, when reported on a claim with a device-intensive procedure, will satisfy the edit. In addition, we created HCPCS code C1889 to recognize devices furnished during a device-intensive procedure that are not described by a specific Level II HCPCS Category C-code. Reporting HCPCS code C1889 with a device-intensive procedure will satisfy the edit requiring a device code to be reported on a claim with a device-intensive procedure.

We did not propose any changes to this policy for CY 2018.

Comment: One commenter requested that CMS restore the device-to-procedure and procedure-to-device edits. Another commenter requested that CMS adopt an additional policy for device-intensive procedures that have a device offset percentage above 75 percent, that would implement device-to-procedure and procedure-to-device edits for all such procedures (having a device offset percentage above 75 percent) and would only utilize claims that passed those edits for establishing the geometric mean cost and the HCPCS-level device offset for those procedures. Also, as part of this commenter's suggested new policy, the commenter requested that CMS only allow clinically similar, device-

intensive procedures with a device offset above 75 percent to be grouped into an APC together and that all other procedures be excluded (both nondevice-intensive procedures and device-intensive procedures that have a device offset percentage below 75 percent).

Response: As we stated in the CY 2015 OPPS/ASC final rule with comment period (79 FR 66794), we continue to believe that the elimination of device-to-procedure edits and procedure-to-device edits is appropriate due to the experience hospitals now have in coding and reporting these claims fully. More specifically, for the more costly devices, we believe the C-APCs will reliably reflect the cost of the device if charges for the device are included anywhere on the claim. We remind commenters that, under our current policy, hospitals are still expected to adhere to the guidelines of correct coding and append the correct device code to the claim when applicable. We also remind commenters that, as with all other items and services recognized under the OPPS, we expect hospitals to code and report their costs appropriately, regardless of whether there are claims processing edits in place. In addition, we remind commenters that, under our current policy, the APC assignment of a device-intensive procedure has no bearing on the procedure's device-intensive designation. With respect to the commenter's request for an additional policy specifically for device-intensive procedures that have a device offset percentage above 75 percent, for the reasons stated above in this comment response, we do not believe that such a policy is needed.

4. Adjustment to OPPS Payment for No Cost/Full Credit and Partial Credit Devices

a. Background

To ensure equitable OPPS payment when a hospital receives a device without cost or with full credit, in CY 2007, we implemented a policy to reduce the payment for specified device-dependent APCs by the estimated portion of the APC payment attributable to device costs (that is, the device offset) when the hospital receives a specified device at no cost or with full credit (71 FR 68071 through 68077). Hospitals were instructed to report no cost/full credit device cases on the claim using the "FB" modifier on the line with the procedure code in which the no cost/full credit device is used. In cases in which the device is furnished without cost or with full credit,

hospitals were instructed to report a token device charge of less than \$1.01. In cases in which the device being inserted is an upgrade (either of the same type of device or to a different type of device) with a full credit for the device being replaced, hospitals were instructed to report as the device charge the difference between the hospital's usual charge for the device being implanted and the hospital's usual charge for the device for which it received full credit. In CY 2008, we expanded this payment adjustment policy to include cases in which hospitals receive partial credit of 50 percent or more of the cost of a specified device. Hospitals were instructed to append the "FC" modifier to the procedure code that reports the service provided to furnish the device when they receive a partial credit of 50 percent or more of the cost of the new device. We refer readers to the CY 2008 OPPS/ASC final rule with comment period for more background information on the "FB" and "FC" modifiers payment adjustment policies (72 FR 66743 through 66749).

In the CY 2014 OPPS/ASC final rule with comment period (78 FR 75005 through 75007), beginning in CY 2014, we modified our policy of reducing OPPS payment for specified APCs when a hospital furnishes a specified device without cost or with a full or partial credit. For CY 2013 and prior years, our policy had been to reduce OPPS payment by 100 percent of the device offset amount when a hospital furnishes a specified device without cost or with a full credit and by 50 percent of the device offset amount when the hospital receives partial credit in the amount of 50 percent or more of the cost for the specified device. For CY 2014, we reduced OPPS payment, for the applicable APCs, by the full or partial credit a hospital receives for a replaced device. Specifically, under this modified policy, hospitals are required to report on the claim the amount of the credit in the amount portion for value code "FD" (Credit Received from the Manufacturer for a Replaced Medical Device) when the hospital receives a credit for a replaced device that is 50 percent or greater than the cost of the device. For CY 2014, we also limited the OPPS payment deduction for the applicable APCs to the total amount of the device offset when the "FD" value code appears on a claim. For CY 2015, we continued our existing policy of reducing OPPS payment for specified APCs when a hospital furnishes a specified device without cost or with a full or partial credit and to use the three

criteria established in the CY 2007 OPSS/ASC final rule with comment period (71 FR 68072 through 68077) for determining the APCs to which our CY 2015 policy will apply (79 FR 66872 through 66873). In the CY 2016 OPSS/ASC final rule with comment period (80 FR 70424), we finalized our policy to no longer specify a list of devices to which the OPSS payment adjustment for no cost/full credit and partial credit devices would apply and instead apply this APC payment adjustment to all replaced devices furnished in conjunction with a procedure assigned to a device-intensive APC when the hospital receives a credit for a replaced specified device that is 50 percent or greater than the cost of the device.

b. Policy for No Cost/Full Credit and Partial Credit Devices

In the CY 2017 OPSS/ASC final rule with comment period (81 FR 79659 through 79660), for CY 2017 and subsequent years, we finalized our policy to reduce OPSS payment for device-intensive procedures, by the full or partial credit a provider receives for a replaced device, when a hospital furnishes a specified device without cost or with a full or partial credit. Under our current policy, hospitals continue to be required to report on the claim the amount of the credit in the amount portion for value code "FD" when the hospital receives a credit for a replaced device that is 50 percent or greater than the cost of the device.

In addition, for CY 2017 and subsequent years, we finalized our policy to use the following three criteria for determining the procedures to which our final policy applies: (1) All procedures must involve implantable devices that would be reported if device insertion procedures were performed; (2) the required devices must be surgically inserted or implanted devices that remain in the patient's body after the conclusion of the procedure (at least temporarily); and (3) the procedure must be device intensive; that is, the device offset amount must be significant, which is defined as exceeding 40 percent of the procedure's mean cost.

We did not propose any changes to this policy for CY 2018 and did not receive any public comments on this policy.

5. Payment Policy for Low-Volume Device-Intensive Procedures

For CY 2016, we used our equitable adjustment authority under section 1833(t)(2)(E) of the Act and used the median cost (instead of the geometric mean cost per our standard

methodology) to calculate the payment rate for the implantable miniature telescope procedure described by CPT code 0308T (Insertion of ocular telescope prosthesis including removal of crystalline lens or intraocular lens prosthesis), which is the only code assigned to APC 5494 (Level 4 Intraocular Procedures) (80 FR 70388). We note that, as stated in the CY 2017 OPSS/ASC proposed rule (81 FR 45656), we proposed to reassign the procedure described by CPT code 0308T to APC 5495 (Level 5 Intraocular Procedures) for CY 2017, but it would be the only procedure code assigned to APC 5495. The payment rates for a procedure described by CPT code 0308T (including the predecessor HCPCS code C9732) were \$15,551 in CY 2014, \$23,084 in CY 2015, and \$17,551 in CY 2016. The procedure described by CPT code 0308T is a high-cost device-intensive surgical procedure that has a very low volume of claims (in part because most of the procedures described by CPT code 0308T are performed in ASCs), and we believe that the median cost is a more appropriate measure of the central tendency for purposes of calculating the cost and the payment rate for this procedure because the median cost is impacted to a lesser degree than the geometric mean cost by more extreme observations. We stated that, in future rulemaking, we would consider proposing a general policy for the payment rate calculation for very low-volume device-intensive APCs (80 FR 70389).

For CY 2017, we proposed and finalized a payment policy for low-volume device-intensive procedures that is similar to the policy applied to the procedure described by CPT code 0308T in CY 2016. In the CY 2017 OPSS/ASC final rule with comment period (81 FR 79660 through 79661), we established our current policy that the payment rate for any device-intensive procedure that is assigned to a clinical APC with fewer than 100 total claims for all procedures in the APC be calculated using the median cost instead of the geometric mean cost, for the reasons described above for the policy applied to the procedure described by CPT code 0308T in CY 2016. The CY 2017 final rule geometric mean cost for the procedure described by CPT code 0308T (based on 19 claims containing the device HCPCS C-code in accordance with the device-intensive edit policy) was approximately \$21,302, and the median cost was approximately \$19,521. The final CY 2017 payment rate (calculated using the median cost) is approximately \$18,984.

For CY 2018, in the CY 2018 OPSS/ASC proposed rule (82 FR 33620), we proposed to continue with our current policy of establishing the payment rate for any device-intensive procedure that is assigned to a clinical APC with fewer than 100 total claims for all procedures in the APC based on calculations using the median cost instead of the geometric mean cost. For CY 2018, this policy would continue to apply only to a procedure described by CPT code 0308T in APC 5495 because this APC is the only clinical APC containing a device-intensive procedure with fewer than 100 total claims in the APC. As we have stated before (81 FR 79660), we believe that this approach will help to mitigate significant year-to-year payment rate fluctuations while preserving accurate claims data-based payment rates for low-volume device-intensive procedures. The CY 2018 proposed rule median cost for the procedure described by CPT code 0308T was approximately \$17,643.75. The proposed CY 2018 payment rate (calculated using the median cost and the claims that reported the device consistent with our device edit policy for device intensive procedures) was approximately \$16,963.69.

Comment: Some commenters supported CMS' proposal to base payment on the median cost instead of the geometric mean cost for any device-intensive procedure that is assigned to an APC with fewer than 100 total claims. Other commenters requested that CMS limit the impact of geometric mean cost reductions on payment rates for low-volume procedures by a certain percentage to ensure payment stability for low-volume procedures.

Response: We thank commenters for their support. With respect to the commenters' request to limit the impact of the geometric mean cost reductions on payment rates for low volume procedures by a certain percentage, we disagree with commenters that such a percentage-based limitation is necessary. We continue to believe our current policy—establishing the payment rate for any device-intensive procedure that is assigned to a clinical APC with fewer than 100 total claims for all procedures in the APC based on calculations using the median cost instead of the geometric mean cost—will help to mitigate significant year-to-year payment rate fluctuations while preserving accurate claims data-based payment rates for low-volume device-intensive procedures.

After consideration of the public comments we received, we are finalizing our proposal, without modification, that the payment rate for

any device-intensive procedure that is assigned to a clinical APC with fewer than 100 total claims for all procedures in the APC be calculated using the median cost instead of the geometric mean cost. The CY 2018 final rule median cost for the procedure described by CPT code 0308T is \$17,550.18. The final CY 2018 payment rate (calculated using updated median cost and the claims that reported the device consistent with our device edit policy for device-intensive procedures) is \$17,560.07.

V. OPPTS Payment Changes for Drugs, Biologicals, and Radiopharmaceuticals

A. OPPTS Transitional Pass-Through Payment for Additional Costs of Drugs, Biologicals, and Radiopharmaceuticals

1. Background

Section 1833(t)(6) of the Act provides for temporary additional payments or “transitional pass-through payments” for certain drugs and biologicals. Throughout this final rule with comment period, the term “biological” is used because this is the term that appears in section 1861(t) of the Act. A “biological” as used in this final rule with comment period includes (but is not necessarily limited to) a “biological product” or a “biologic” as defined in the Public Health Service Act. As enacted by the Medicare, Medicaid, and SCHIP Balanced Budget Refinement Act of 1999 (BBRA) (Pub. L. 106–113), this pass-through payment provision requires the Secretary to make additional payments to hospitals for: Current orphan drugs, as designated under section 526 of the Federal Food, Drug, and Cosmetic Act; current drugs and biologicals and brachytherapy sources used in cancer therapy; and current radiopharmaceutical drugs and biologicals. “Current” refers to those types of drugs or biologicals mentioned above that are hospital outpatient services under Medicare Part B for which transitional pass-through payment was made on the first date the hospital OPPTS was implemented.

Transitional pass-through payments also are provided for certain “new” drugs and biologicals that were not being paid for as an HOPD service as of December 31, 1996 and whose cost is “not insignificant” in relation to the OPPTS payments for the procedures or services associated with the new drug or biological. For pass-through payment purposes, radiopharmaceuticals are included as “drugs.” As required by statute, transitional pass-through payments for a drug or biological described in section 1833(t)(6)(C)(i)(II) of the Act can be made for a period of

at least 2 years, but not more than 3 years, after the payment was first made for the product as a hospital outpatient service under Medicare Part B. CY 2018 pass-through drugs and biologicals and their designated APCs are assigned status indicator “G” in Addenda A and B to this final rule with comment period (which are available via the Internet on the CMS Web site).

Section 1833(t)(6)(D)(i) of the Act specifies that the pass-through payment amount, in the case of a drug or biological, is the amount by which the amount determined under section 1842(o) of the Act for the drug or biological exceeds the portion of the otherwise applicable Medicare OPD fee schedule that the Secretary determines is associated with the drug or biological. The methodology for determining the pass-through payment amount is set forth in regulations at 42 CFR 419.64. These regulations specify that the pass-through payment equals the amount determined under section 1842(o) of the Act minus the portion of the APC payment that CMS determines is associated with the drug or biological.

Section 1847A of the Act establishes the average sales price (ASP) methodology, which is used for payment for drugs and biologicals described in section 1842(o)(1)(C) of the Act furnished on or after January 1, 2005. The ASP methodology, as applied under the OPPTS, uses several sources of data as a basis for payment, including the ASP, the wholesale acquisition cost (WAC), and the average wholesale price (AWP). In this final rule with comment period, the term “ASP methodology” and “ASP-based” are inclusive of all data sources and methodologies described therein. Additional information on the ASP methodology can be found on the CMS Web site at: <http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Part-B-Drugs/McrPartBDrugAvgSalesPrice/index.html>.

The pass-through application and review process for drugs and biologicals is described on the CMS Web site at: http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/HospitalOutpatientPPS/passthrough_payment.html.

2. 3-Year Transitional Pass-Through Payment Period for All Pass-Through Drugs, Biologicals, and Radiopharmaceuticals and Quarterly Expiration of Pass-Through Status

As required by statute, transitional pass-through payments for a drug or biological described in section 1833(t)(6)(C)(i)(II) of the Act can be made for a period of at least 2 years, but

not more than 3 years, after the payment was first made for the product as a hospital outpatient service under Medicare Part B. Our current policy is to accept pass-through applications on a quarterly basis and to begin pass-through payments for newly approved pass-through drugs and biologicals on a quarterly basis through the next available OPPTS quarterly update after the approval of a product’s pass-through status. However, prior to CY 2017, we expired pass-through status for drugs and biologicals on an annual basis through notice-and-comment rulemaking (74 FR 60480). In the CY 2017 OPPTS/ASC final rule with comment period (81 FR 79662), we finalized a policy change, beginning with pass-through drugs and biologicals newly approved in CY 2017 and subsequent calendar years, to allow for a quarterly expiration of pass-through payment status for drugs and biologicals to afford a pass-through payment period that is as close to a full 3 years as possible for all pass-through drugs, biologicals, and radiopharmaceuticals.

This change eliminated the variability of the pass-through payment eligibility period, which previously varied based on when a particular application was initially received. We adopted this change for pass-through approvals beginning on or after CY 2017, to allow, on a prospective basis, for the maximum pass-through payment period for each pass-through drug without exceeding the statutory limit of 3 years.

3. Drugs and Biologicals With Expiring Pass-Through Payment Status in CY 2017

In the CY 2018 OPPTS/ASC proposed rule (82 FR 33621), we proposed that the pass-through payment status of 19 drugs and biologicals would expire on December 31, 2017, as listed in Table 21 of the proposed rule (82 FR 33622). All of these drugs and biologicals will have received OPPTS pass-through payment for at least 2 years and no more than 3 years by December 31, 2017. These drugs and biologicals were approved for pass-through payment status on or before January 1, 2016. In accordance with the policy finalized last year and described above, pass-through payment status for drugs and biologicals newly approved in CY 2017 and subsequent years will expire on a quarterly basis, with a pass-through payment period as close to 3 years as possible. With the exception of those groups of drugs and biologicals that are always packaged when they do not have pass-through payment status (specifically, anesthesia drugs; drugs, biologicals, and radiopharmaceuticals that function as

supplies when used in a diagnostic test or procedure (including diagnostic radiopharmaceuticals, contrast agents, and stress agents); and drugs and biologicals that function as supplies when used in a surgical procedure), our standard methodology for providing payment for drugs and biologicals with expiring pass-through payment status in an upcoming calendar year is to determine the product's estimated per day cost and compare it with the OPPS drug packaging threshold for that calendar year (which is \$120 for CY 2018), as discussed further in section V.B.2. of this final rule with comment period. In the CY 2018 OPPS/ASC proposed rule (82 FR 33622), we proposed that if the estimated per day cost for the drug or biological is less than or equal to the applicable OPPS drug packaging threshold, we would package payment for the drug or biological into the payment for the associated procedure in the upcoming calendar year. If the estimated per day cost of the drug or biological is greater than the OPPS drug packaging threshold, we proposed to provide separate payment at the applicable relative ASP-based payment amount (which was proposed at ASP+6 percent for CY 2018, and is finalized at ASP+6 percent for CY 2018, as discussed further in section V.B.3. of this final rule with comment period).

Comment: Several commenters responded to the proposed expiration of pass-through status for HCPCS code A9586 (Florbetapir f18) on December 31, 2017. (We note that the brand name for the radiopharmaceutical described by HCPCS code A9586 is Amyvid®. Amyvid is a FDA-approved radioactive diagnostic agent for Positron Emission Tomography (PET) imaging of the brain to estimate beta-amyloid neuritic plaque density in adult patients with cognitive impairment who are being evaluated for Alzheimer's Disease and other causes of cognitive decline. Amyvid was approved for drug pass-through payment status effective January 1, 2015.)

One commenter, the manufacturer of Amyvid, urged CMS to extend pass-through payment status for another year on the basis that CMS could not have paid a legitimately billed claim for Amyvid in CY 2015, given the manufacturer's assertion regarding CED trial sites' dates of approval and start dates for patient enrollment. In addition, while the commenter acknowledged that the period of drug and biological pass-through payment status starts on the first date on which payment is made for the drug or biological as an outpatient hospital

service (42 CFR 419.64(c)(2)), the commenter believed that an erroneous payment by Medicare should not have triggered the start of pass-through payment for Amyvid in 2015. In addition, the commenter asserted that expiration of pass-through payment status for Amyvid prior to completion of the CED trial will adversely affect the trial results. The commenter requested that, if CMS finalized expiration of pass-through payment status as proposed, CMS create a new APC for PET procedures with Amyvid to avoid violating the 2 times rule—which provides that items and services within an APC group cannot be considered comparable with respect to the use of resources if the highest median cost (or mean cost, if elected by the Secretary) for an item or service in the APC group is more than 2 times greater than the lowest median cost (or mean cost, if elected by the Secretary) for an item or service within the same APC group. The commenter stated that the median cost of Amyvid is approximately \$2,756, over two times the median cost of the PET scan procedure.

One commenter, a manufacturer of another radiopharmaceutical, recommended that CMS allow for those products whose pass-through payment status will expire after a period of at least 2 years and no more than 3 years to expire as proposed, as a matter of applying policy consistently.

Several commenters recommended that CMS allow products covered by Medicare in the context of coverage with evidence development (CED) clinical trial to retain their pass-through status for the duration of the CED trial.

Response: CMS issued a Medicare National Coverage Determination (NCD) on September 27, 2013, which allows conditional coverage of amyloid PET under CED. Currently, there are three Medicare-approved amyloid PET CED trials. The first CED trial was approved on April 2, 2014. The second CED trial was approved on March 3, 2015. The third CED trial was approved January 5, 2016. Information on these clinical trials is available on the CMS amyloid PET Web page available via the Internet at: <https://www.cms.gov/Medicare/Coverage/Coverage-with-Evidence-Development/Amyloid-PET.html>. The effective date of Medicare billing for CED trial sites is the CMS approval date. CMS has provided billing instructions for providers and practitioner that specify proper coding for clinical trial claims. For example, providers and practitioner must report certain diagnosis codes, procedure codes, modifiers, and a national clinical trial number. Therefore, providers enrolled

in one of these trials could have begun appropriate billing Medicare for the amyloid PET procedures and associated Amyloid PET tracers beginning April 2, 2014.

Based on our claims analysis, we found that HCPCS code A9586 was billed by hospital providers 14 times in CY 2015, with 1 claim being paid. Based on our review of provider enrollment in the CED trials, it appears that this paid Medicare claim from CY 2015 was submitted from a CED clinical trial participant and not paid in error as the commenter suggests. According to section 1833(t)(6)(C)(i)(II) of the Act and the regulations at 42 CFR 419.66(g), the pass-through payment eligibility period begins on the first date on which pass-through payment is made. Because there is a paid claim from CY 2015, the pass-through payment period for HCPCS code A9586 began in CY 2015. Therefore, based on the CY 2015 paid claim for HCPCS code A9586 as a hospital outpatient service, which triggered the start of the pass-through payment period, we are expiring pass-through payment status on December 31, 2017. From the start of the pass-through payment period through December 31, 2017, Medicare will have provided an OPPS pass-through payment for at least 2 years and no more than 3 years by December 31, 2017. Extending pass-through payment status into CY 2018 would cause pass-through payments for HCPCS code A9586 to extend into a fourth year, thereby exceeding the pass-through payment period authorized by section 1833(t)(6)(C)(i)(II) of the Act.

In addition, regarding the commenters' concern that expiration of pass-through payment status for Amyvid, and subsequent packaging of it as a "policy-packaged" drug, will skew trial results (presumably because providers will not receive an ASP-based payment), we disagree, given that analysis of CY 2016 claims data across different sites of care shows that the vast majority of billings for HCPCS code A9586 is concentrated in the physician office and the independent diagnostic testing facility (IDTF) setting. Further, we note that hospitals are not precluded from billing for HCPCS code A9586 in the context of a CED trial once its pass-through payment status expires. We also note that the payment for HCPCS A9586 would be reflected in the payment rate for the associated procedure.

With respect to the request that we create a new APC for PET procedures with Amyvid, we do not believe it is appropriate, prudent, or practicable to create unique APCs for specific drugs or biologicals or other individual items

that are furnished with a particular procedure or procedures. We disagree with the commenter's assertion that packaging of Amyvid with the associated PET procedure described by CPT code 78814 (Pet image w/ct lmt) creates a 2 times rule violation in APC 5594 (Level 4 Nuclear Medicine) (we refer readers to section III.B. of this final rule with comment period for discussion of 2 times rule) and believe that the commenter may have misunderstood the application of the 2 times rule. Specifically, we note that, in determining the APCs with a 2 times rule violation, we do not consider the cost of an individual packaged item that may be furnished with a procedure or service, but rather the geometric mean cost of the service (which includes aggregate cost of packaged items that may be furnished with a procedure). Moreover, we disagree with the commenter's statement that the median cost of Amyvid is approximately \$2,756. While it is correct that the CY 2017 pass-through payment for Amyvid is \$2,756, the pass-through payment rate of ASP+6 percent is not indicative of the cost incurred by hospitals to acquire, store, handle, and dispense Amyvid. Our analysis of the updated CY 2016 claims data used for CY 2018 ratesetting for this CY 2018 OPPTS/ASC final rule with comment period shows that the median cost of Amyvid is \$1,275.75, which when combined with the aggregate cost of packaged items that may be furnished with CPT code 78814, would not create a 2 times rule violation.

With respect to the commenters' request that we allow drug or biological pass-through payment status for products covered by CED for the duration of the CED trial, we reiterate that the statute limits the period of pass-through payment eligibility to at least 2 years, but no more than 3 years, after the product's first payment as a hospital outpatient service under Medicare Part B. As such, we are unable to extend pass-through payment status beyond 3 years.

Finally, with respect to the commenter's support of our proposal to finalize the expiration of pass-through payment status as proposed for consistent policy application, we agree with the commenter.

In summary, we are finalizing our proposal to expire pass-through payment status for HCPCS code A9586 on December 31, 2017. Because pass-through payment was effective in CY 2015, HCPCS code A9586 will have had pass-through payment status for at least 2 years but no more than 3 years in

accordance with section 1833(t)(6) of the Act.

Comment: Several commenters requested that CMS not package payment for Omidria® (described by HCPCS code C9447) upon expiration of pass-through payment status on December 31, 2017, and continue to pay separately for the drug at ASP+6 percent. One commenter, the manufacturer of Omidria, reiterated many previous arguments (81 FR 79667) for why CMS should dispense with classifying Omidria as drug that functions as a surgical supply when used in a surgical procedure. Specially, the commenter made the following arguments:

- The language used to construct the "packaging as a surgical supply" policy is overly broad and not consistent with Congressional intent that requires clinically comparable APC groups. CMS has not defined surgery or provided a rationale for applying different packaging policies to surgery than would be applied to other drugs with therapeutic indications;

- Mischaracterization of drugs used in surgery as "supplies", given regulatory requirements that apply to drugs. The FDA-approved label indicates its specific use in intraocular procedures;

- Packaging Omidria and other drugs as surgical supplies creates barriers to access, especially in ASC settings, low-volume HOPDs, and hospitals with low percentage of insured patients (presumably because providers may choose lower cost alternatives because separate payment would no longer be made);

- Packaging Omidria and other drugs as surgical supplies may affect quality of care improvements and patient outcomes; and

- Packaging drugs as "surgical supplies" interferes with physician discretion and is inconsistent with the principles that guide packaging under the OPPTS.

A few commenters requested that CMS consider a narrow exception to the "drug as a supply" packaging policy to enable separate payment for Omidria.

Response: We have addressed many of these comments in prior rulemaking. We refer readers to the CY 2017 OPPTS/ASC final rule with comment period for a detailed discussion on why we believe Omidria is a drug that functions as a surgical supply (81 FR 79668). We did not propose any policy changes to the criteria applied to a drug that functions as a surgical supply when used in a surgical procedure in the CY 2018 OPPTS/ASC proposed rule, nor do we believe the commenters provided any

new information that would cause us to change our position that Omidria is a drug that functions as a surgical supply. Therefore, we are not addressing these comments in this final rule with comment period. However, in the proposed rule, we did solicit comments on packaging policies generally, including drugs that function as a surgical supply, and will take responses to the comment solicitation, along with these commenters' recommendations and suggestions, into consideration in future rulemaking.

Comment: Commenters urged CMS to apply quarterly expiration of drug pass-through payment to drugs and biologicals first added to the pass-through payment list in CYs 2015 and 2016 that would otherwise transition off pass-through payment in less than 3 years. Commenters suggested CMS could apply the quarterly expiration of pass-through payment policy to devices approved for pass-through payment status in CY 2015 or 2016 because it would not cause harm to providers or beneficiaries. As stated earlier in this section, one commenter suggested that CMS allow for those products whose pass-through payment status will expire after a period of at least 2 years and no more than 3 years to expire as proposed, as a matter of applying policy consistently.

Response: As finalized in the CY 2017 OPPTS/ASC final rule with comment period (81 FR 79662), the quarterly expiration of pass-through payment policy applies to drugs and biologicals newly approved for pass-through payment in CY 2017. We note that, even prior to the policy change adopted in CY 2017 rulemaking, the Agency's prior policy practice of making drug pass-through payments for a minimum of 2 years, but not more than 3 years, was consistent with statutory authority. Further, once a drug's pass-through payment status period expires, its costs are packaged into the associated procedure(s) with which it is billed, and accordingly, reversing past expirations of pass-through payment would potentially cause payment rates established for a prior year for certain services to be incorrect.

We agree with the commenter who stated that we should expire the drug-pass-through payment status for drugs and biologicals as proposed, to allow for consistent application of our policy.

After consideration of the public comments we received, we are finalizing our proposal, without modification, to expire the pass-through payment status of the 19 drugs and biologicals listed in Table 69 below on December 31, 2017.

TABLE 69—DRUGS AND BIOLOGICALS FOR WHICH PASS-THROUGH PAYMENT STATUS EXPIRES DECEMBER 31, 2017

CY 2018 HCPCS code	CY 2018 long descriptor	Final CY 2018 status indicator	Final CY 2018 APC	Pass-through payment effective date
A9586	Florbetapir f18, diagnostic, per study dose, up to 10 millicuries	N	N/A	01/01/2015
C9447	Injection, phenylephrine and ketorolac, 4 ml vial	N	N/A	01/01/2015
J0596	Injection, c-1 esterase inhibitor (human), Ruconest, 10 units	K	9445	04/01/2015
J0695	Injection, ceftolozane 50 mg and tazobactam 25 mg	K	9452	04/01/2015
J0875	Injection, dalbavancin, 5 mg	K	1823	01/01/2015
J1833	Injection, isavuconazonium sulfate, 1 mg	K	9456	10/01/2015
J2407	Injection, oritavancin, 10 mg	K	1660	01/01/2015
J2502	Injection, pasireotide long acting, 1 mg	K	9454	07/01/2015
J2547	Injection, peramivir, 1 mg	K	9451	04/01/2015
J2860	Injection, siltuximab, 10 mg	K	9455	07/01/2015
J3090	Injection, tedizolid phosphate, 1 mg	K	1662	01/01/2015
J7313	Injection, fluocinolone acetonide intravitreal implant, 0.01 mg	K	9450	04/01/2015
J8655	Netupitant (300 mg) and palonosetron (0.5 mg)	K	9448	04/01/2015
J9032	Injection, belinostat, 10 mg	K	1658	01/01/2015
J9039	Injection, blinatumomab, 1 mcg	K	9449	04/01/2015
J9271	Injection, pembrolizumab, 1 mg	K	1490	01/01/2015
J9299	Injection, nivolumab, 1 mg	K	9453	07/01/2015
Q4172	PuraPly, and PuraPly Antimicrobial, any type, per square centimeter	N	N/A	01/01/2015
Q9950	Injection, sulfur hexafluoride lipid microsphere, per ml	N	N/A	10/01/2015

The final packaged or separately payable status of each of these drugs or biologicals is listed in Addendum B to this final rule with comment period (which is available via the Internet on the CMS Web site).

4. Drugs, Biologicals, and Radiopharmaceuticals With New or Continuing Pass-Through Payment Status in CY 2018

In the CY 2018 OPPS/ASC proposed rule (82 FR 33622), we proposed to continue pass-through payment status in CY 2018 for 38 drugs and biologicals. None of these drugs and biologicals will have received OPPS pass-through payment for at least 2 years and no more than 3 years by December 31, 2017. These drugs and biologicals, which were approved for pass-through payment status between January 1, 2016, and July 1, 2017, were listed in Table 22 of the proposed rule (82 FR 33623). The APCs and HCPCS codes for these drugs and biologicals approved for pass-through payment status through July 1, 2017 were assigned status indicator “G” in Addenda A and B to the proposed rule (which are available via the Internet on the CMS Web site).

Section 1833(t)(6)(D)(i) of the Act sets the amount of pass-through payment for pass-through drugs and biologicals (the pass-through payment amount) as the difference between the amount authorized under section 1842(o) of the Act and the portion of the otherwise applicable OPD fee schedule that the Secretary determines is associated with the drug or biological. For CY 2018, we proposed to continue to pay for pass-through drugs and biologicals at ASP+6

percent, equivalent to the payment rate these drugs and biologicals would receive in the physician’s office setting in CY 2018. We proposed that a \$0 pass-through payment amount would be paid for pass-through drugs and biologicals under the CY 2018 OPPS because the difference between the amount authorized under section 1842(o) of the Act, which was proposed at ASP+6 percent, and the portion of the otherwise applicable OPD fee schedule that the Secretary determines is appropriate, which was proposed at ASP+6 percent, is \$0.

In the case of policy-packaged drugs (which include the following: Anesthesia drugs; drugs, biologicals, and radiopharmaceuticals that function as supplies when used in a diagnostic test or procedure (including contrast agents, diagnostic radiopharmaceuticals, and stress agents); and drugs and biologicals that function as supplies when used in a surgical procedure), we proposed that their pass-through payment amount would be equal to ASP+6 percent for CY 2018 because, if not for their pass-through payment status, payment for these products would be packaged into the associated procedure.

In addition, we proposed to continue to update pass-through payment rates on a quarterly basis on the CMS Web site during CY 2018 if later quarter ASP submissions (or more recent WAC or AWP information, as applicable) indicate that adjustments to the payment rates for these pass-through drugs or biologicals are necessary. For a full description of this policy, we refer readers to the CY 2006 OPPS/ASC final

rule with comment period (70 FR 68632 through 68635).

For CY 2018, consistent with our CY 2017 policy for diagnostic and therapeutic radiopharmaceuticals, we proposed to provide payment for both diagnostic and therapeutic radiopharmaceuticals that are granted pass-through payment status based on the ASP methodology. As stated earlier, for purposes of pass-through payment, we consider radiopharmaceuticals to be drugs under the OPPS. Therefore, if a diagnostic or therapeutic radiopharmaceutical receives pass-through payment status during CY 2018, we proposed to follow the standard ASP methodology to determine the pass-through payment rate that drugs receive under section 1842(o) of the Act, which was proposed at ASP+6 percent. If ASP data are not available for a radiopharmaceutical, we proposed to provide pass-through payment at WAC+6 percent, the equivalent payment provided to pass-through payment drugs and biologicals without ASP information. If WAC information also is not available, we proposed to provide payment for the pass-through radiopharmaceutical at 95 percent of its most recent AWP.

Comment: Commenters supported CMS’ proposal to provide payment at ASP+6 percent for drugs, biologicals, contrast agents, and radiopharmaceuticals that are granted pass-through payment status.

Response: We appreciate the commenters’ support.

After consideration of the public comments we received, we are finalizing our proposal to provide

payment for drugs, biologicals, diagnostic and therapeutic radiopharmaceuticals, and contrast agents that are granted pass-through payment status based on the ASP methodology. If a diagnostic or therapeutic radiopharmaceutical receives pass-through payment status during CY 2018, we will follow the standard ASP methodology to determine

the pass-through payment rate that drugs receive under section 1842(o) of the Act, which is ASP+6 percent. If ASP data are not available for a radiopharmaceutical, we will provide pass-through payment at WAC+6 percent, the equivalent payment provided to pass-through payment drugs and biologicals without ASP information. If WAC information also is

not available, we will provide payment for the pass-through payment radiopharmaceutical at 95 percent of its most recent AWP.

The 50 drugs and biologicals that continue to have pass-through payment status for CY 2018 or have been granted pass-through payment status as of January 2018 are shown in Table 70 below.

TABLE 70—DRUGS AND BIOLOGICALS WITH PASS-THROUGH PAYMENT STATUS IN CY 2018

CY 2017 HCPCS code	CY 2018 HCPCS code	CY 2018 long descriptor	CY 2018 status indicator	CY 2018 APC	Pass-through payment effective date
A9515	A9515	Choline C 11, diagnostic, per study dose	G	9461	04/01/2016
A9587	A9587	Gallium ga-68, dotatate, diagnostic, 0.1 millicurie	G	9056	01/01/2017
A9588	A9588	Fluciclovine f-18, diagnostic, 1 millicurie	G	9052	01/01/2017
C9140	J7210	Injection, Factor VIII (antihemophilic factor, recombinant) (Afstyla), 1 I.U.	G	9043	01/01/2017
C9460	C9460	Injection, cangrelor, 1 mg	G	9460	01/01/2016
C9482	C9482	Injection, sotalol hydrochloride, 1 mg	G	9482	10/01/2016
C9483	J9022	Injection, atezolizumab, 10 mg	G	9483	10/01/2016
C9484	J1428	Injection, eteplirsen, 10 mg	G	9484	04/01/2017
C9485	J9285	Injection, olaratumab, 10 mg	G	9485	04/01/2017
C9486	J1627	Injection, granisetron extended release, 0.1 mg	G	9486	04/01/2017
C9488	C9488	Injection, conivaptan hydrochloride, 1 mg	G	9488	04/01/2017
C9489	J2326	Injection, nusinersen, 0.1 mg	G	9489	07/01/2017
C9490	J0565	Injection, bezlotoxumab, 10 mg	G	9490	07/01/2017
C9491	J9023	Injection, avelumab, 10 mg	G	9491	10/01/2017
C9492	C9492	Injection, durvalumab, 10 mg	G	9492	10/01/2017
C9493	C9493	Injection, edaravone, 1 mg	G	9493	10/01/2017
C9494	J2350	Injection, ocrelizumab, 1 mg	G	9494	10/01/2017
J0570	J0570	Buprenorphine implant, 74.2 mg	G	9058	01/01/2017
J1942	J1942	Injection, aripiprazole lauroxil, 1 mg	G	9470	04/01/2016
J2182	J2182	Injection, mepolizumab, 1 mg	G	9473	04/01/2016
J2786	J2786	Injection, reslizumab, 1 mg	G	9481	10/01/2016
J2840	J2840	Injection, sebelipase alfa, 1 mg	G	9478	07/01/2016
J7179	J7179	Injection, von willebrand factor (recombinant), (Vonvendi), 1 i.u. vwf:rho.	G	9059	01/01/2017
J7202	J7202	Injection, Factor IX, albumin fusion protein (recombinant), Idelvion, 1 i.u.	G	9171	10/01/2016
J7207	J7207	Injection, Factor VIII (antihemophilic factor, recombinant) PEGylated, 1 I.U.	G	1844	04/01/2016
J7209	J7209	Injection, Factor VIII (antihemophilic factor, recombinant) (Nuwiq), per i.u.	G	1846	04/01/2016
J7322	J7322	Hyaluronan or derivative, Hymovis, for intra-articular injection, 1 mg.	G	9471	04/01/2016
J7328	J7328	Hyaluronan or derivative, Gelsyn-3, for intra-articular injection, 0.1 mg.	G	1862	04/01/2017
J7342	J7342	Instillation, ciprofloxacin otic suspension, 6 mg	G	9479	07/01/2016
J7503	J7503	Tacrolimus, extended release, (envarsus xr), oral, 0.25 mg.	G	1845	04/01/2016
J9034	J9034	Injection, bendamustine hcl (Bendeke), 1 mg	G	1861	01/01/2017
J9145	J9145	Injection, daratumumab, 10 mg	G	9476	07/01/2016
J9176	J9176	Injection, elotuzumab, 1 mg	G	9477	07/01/2016
J9205	J9205	Injection, irinotecan liposome, 1 mg	G	9474	04/01/2016
J9295	J9295	Injection, necitumumab, 1 mg	G	9475	04/01/2016
J9325	J9325	Injection, talimogene laherparepvec, 1 million plaque forming units (PFU).	G	9472	04/01/2016
J9352	J9352	Injection, trabectedin, 0.1 mg	G	9480	07/01/2016
N/A	J9203	Injection, gemtuzumab ozogamicin, 0.1 mg	G	9495	01/01/2018
Q5101	Q5101	Injection, Filgrastim (G-CSF), Biosimilar, 1 microgram	G	1822	01/01/2016
Q5102	Q5102	Injection, Infliximab, Biosimilar, 10 mg	G	1847	04/01/2017
Q9982	Q9982	Flutemetamol F18, diagnostic, per study dose, up to 5 millicuries.	G	9459	01/01/2016
Q9983	Q9983	Florbetaben F18, diagnostic, per study dose, up to 8.1 millicuries.	G	9458	01/01/2016
Q9989	J3358	Ustekinumab, for Intravenous Injection, 1 mg	G	9487	04/01/2017
N/A	C9014	Injection, cerliponase alfa, 1 mg	G	9014	01/01/2018
N/A	C9015	Injection, c-1 esterase inhibitor (human), Haegarda, 10 units.	G	9015	01/01/2018

TABLE 70—DRUGS AND BIOLOGICALS WITH PASS-THROUGH PAYMENT STATUS IN CY 2018—Continued

CY 2017 HCPCS code	CY 2018 HCPCS code	CY 2018 long descriptor	CY 2018 status indicator	CY 2018 APC	Pass-through payment effective date
N/A	C9016	Injection, triptorelin extended release, 3.75 mg	G	9016	01/01/2018
N/A	C9024	Injection, liposomal, 1 mg daunorubicin and 2.27 mg cytarabine.	G	9302	01/01/2018
N/A	C9028	Injection, inotuzumab ozogamicin, 0.1 mg	G	9028	01/01/2018
N/A	C9029	Injection, guselkumab, 1 mg	G	9029	01/01/2018
N/A	J7345	Aminolevulinic acid hcl for topical administration, 10% gel, 10 mg.	G	9301	01/01/2018

5. Provisions for Reducing Transitional Pass-Through Payments for Policy-Packaged Drugs, Biologicals, and Radiopharmaceuticals To Offset Costs Packaged Into APC Groups

Under the regulations at 42 CFR 419.2(b), nonpass-through drugs, biologicals, and radiopharmaceuticals that function as supplies when used in a diagnostic test or procedure are packaged in the OPPS. This category includes diagnostic radiopharmaceuticals, contrast agents, stress agents, and other diagnostic drugs. Also under 42 CFR 419.2(b), nonpass-through drugs and biologicals that function as supplies in a surgical procedure are packaged in the OPPS. This category includes skin substitutes and other surgical-supply drugs and biologicals. As described earlier, section 1833(t)(6)(D)(i) of the Act specifies that the transitional pass-through payment amount for pass-through drugs and biologicals is the difference between the amount paid under section 1842(o) of the Act and the otherwise applicable OPD fee schedule amount. Because a payment offset is necessary in order to provide an appropriate transitional pass-through payment, we deduct from the pass-through payment for policy packaged drugs, biologicals, and radiopharmaceuticals an amount reflecting the portion of the APC payment associated with predecessor products in order to ensure no duplicate payment is made. This amount reflecting the portion of the APC payment associated with predecessor products is called the payment offset.

The payment offset policy applies to all policy packaged drugs, biologicals, and radiopharmaceuticals. For a full description of the payment offset policy as applied to diagnostic radiopharmaceuticals, contrast agents, stress agents, and skin substitutes, we refer readers to the discussion in the CY 2016 OPPS/ASC final rule with comment period (80 FR 70430 through 70432). In the CY 2018 OPPS/ASC proposed rule (82 FR 33624), for CY

2018, as we did in CY 2017, we proposed to continue to apply the same policy packaged offset policy to payment for pass-through diagnostic radiopharmaceuticals, pass-through contrast agents, pass-through stress agents, and pass-through skin substitutes. The proposed APCs to which a payment offset may be applicable for pass-through diagnostic radiopharmaceuticals, pass-through contrast agents, pass-through stress agents, and pass-through skin substitutes were identified in Table 23 of the proposed rule.

Comment: A few commenters requested that CMS separate the costs of diagnostic radiopharmaceuticals and stress agents from the “packaged drug cost” in the APC offset file published with the yearly proposed and final rules.

Response: We thank the commenter for this recommendation. However, we do not believe that the suggested change is necessary at this time. The offset amount is the portion of each APC payment rate that could reasonably be attributed to the cost of a predecessor contrast agent, diagnostic radiopharmaceutical, or stress agent when considering a new contrast agent, diagnostic radiopharmaceutical, or stress agent for pass-through payment and has no bearing on APC assignment. The exact data used to calculate all of the proposed and final payment rates, including the associated offset amounts, for this CY 2018 OPPS final rule with comment are available for purchase under a CMS data use agreement through the CMS Web site available via the Internet at: <https://www.cms.gov/Research-Statistics-Data-and-Systems/Files-for-Order/IdentifiableDataFiles/index.html>.

After consideration of the public comments we received, we are finalizing our proposal, without modification, for CY 2018, to continue to apply the same policy-packaged offset policy to payment for pass-through diagnostic radiopharmaceuticals, pass-through contrast agents, pass-through

stress agents, and pass-through skin substitutes as we did in CY 2017.

TABLE 71—APCS TO WHICH A POLICY-PACKAGED DRUG OR RADIO-PHARMACEUTICAL OFFSET ARE APPLICABLE IN CY 2018

CY 2018 APC	CY 2018 APC title
Diagnostic Radiopharmaceutical	
5591	Level 1 Nuclear Medicine and Related Services.
5592	Level 2 Nuclear Medicine and Related Services.
5593	Level 3 Nuclear Medicine and Related Services.
5594	Level 4 Nuclear Medicine and Related Services.
Contrast Agent	
5571	Level 1 Imaging with Contrast.
5572	Level 2 Imaging with Contrast.
5573	Level 3 Imaging with Contrast.
Stress Agent	
5722	Level 2 Diagnostic Tests and Related Services.
5593	Level 3 Nuclear Medicine and Related Services.
Skin Substitute	
5054	Level 4 Skin Procedures.
5055	Level 5 Skin Procedures.

We also are finalizing our proposal to continue to post annually on the CMS Web site at: <https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/HospitalOutpatientPPS/Annual-Policy-Files.html> a file that contains the APC offset amounts that will be used for that year for purposes of both evaluating cost significance for candidate pass-through payment device categories and drugs and biologicals and establishing any appropriate APC offset amounts. Specifically, the file will continue to provide the amounts and percentages of APC payment associated with packaged implantable devices, policy-packaged drugs, and threshold

packaged drugs and biologicals for every OPPS clinical APC.

B. OPPS Payment for Drugs, Biologicals, and Radiopharmaceuticals Without Pass-Through Payment Status

1. Criteria for Packaging Payment for Drugs, Biologicals, and Radiopharmaceuticals

a. Packaging Threshold

In accordance with section 1833(t)(16)(B) of the Act, the threshold for establishing separate APCs for payment of drugs and biologicals was set to \$50 per administration during CYs 2005 and 2006. In CY 2007, we used the four quarter moving average Producer Price Index (PPI) levels for Pharmaceutical Preparations (Prescription) to trend the \$50 threshold forward from the third quarter of CY 2005 (when the Pub. L. 108–173 mandated threshold became effective) to the third quarter of CY 2007. We then rounded the resulting dollar amount to the nearest \$5 increment in order to determine the CY 2007 threshold amount of \$55. Using the same methodology as that used in CY 2007 (which is discussed in more detail in the CY 2007 OPPS/ASC final rule with comment period (71 FR 68085 through 68086)), we set the packaging threshold for establishing separate APCs for drugs and biologicals at \$110 for CY 2017 (81 FR 79665).

Following the CY 2007 methodology, for this CY 2018 OPPS/ASC final rule with comment period, we used the most recently available four quarter moving average PPI levels to trend the \$50 threshold forward from the third quarter of CY 2005 to the third quarter of CY 2018 and rounded the resulting dollar amount (\$118.52) to the nearest \$5 increment, which yielded a figure of \$120. In performing this calculation, we used the most recent forecast of the quarterly index levels for the PPI for Pharmaceuticals for Human Use (Prescription) (Bureau of Labor Statistics series code WPUSI07003) from CMS' Office of the Actuary.

Therefore, for this CY 2018 OPPS/ASC final rule with comment period, using the CY 2007 OPPS methodology, we are finalizing a packaging threshold for CY 2018 of \$120.

b. Packaging of Payment for HCPCS Codes That Describe Certain Drugs, Certain Biologicals, and Therapeutic Radiopharmaceuticals Under the Cost Threshold ("Threshold-Packaged Drugs")

In the CY 2018 OPPS/ASC proposed rule (82 FR 33625), to determine the proposed CY 2018 packaging status for

all nonpass-through drugs and biologicals that are not policy packaged, we calculated, on a HCPCS code-specific basis, the per day cost of all drugs, biologicals, and therapeutic radiopharmaceuticals (collectively called "threshold-packaged" drugs) that had a HCPCS code in CY 2016 and were paid (via packaged or separate payment) under the OPPS. We used data from CY 2016 claims processed before January 1, 2017 for this calculation. However, we did not perform this calculation for those drugs and biologicals with multiple HCPCS codes that include different dosages, as described in section V.B.1.d. of the proposed rule, or for the following policy-packaged items that we proposed to continue to package in CY 2018: anesthesia drugs; drugs, biologicals, and radiopharmaceuticals that function as supplies when used in a diagnostic test or procedure; and drugs and biologicals that function as supplies when used in a surgical procedure.

In order to calculate the per day costs for drugs, biologicals, and therapeutic radiopharmaceuticals to determine their proposed packaging status in CY 2018, we used the methodology that was described in detail in the CY 2006 OPPS proposed rule (70 FR 42723 through 42724) and finalized in the CY 2006 OPPS final rule with comment period (70 FR 68636 through 68638). For each drug and biological HCPCS code, we used an estimated payment rate of ASP+6 percent (which is the payment rate we proposed for separately payable drugs and biologicals for CY 2018, as discussed in more detail in section V.B.2.b. of the proposed rule) to calculate the CY 2018 proposed rule per day costs. We used the manufacturer submitted ASP data from the fourth quarter of CY 2016 (data that were used for payment purposes in the physician's office setting, effective April 1, 2017) to determine the proposed rule per day cost.

As is our standard methodology, for CY 2018, we proposed to use payment rates based on the ASP data from the first quarter of CY 2017 for budget neutrality estimates, packaging determinations, impact analyses, and completion of Addenda A and B to the proposed rule (which are available via the Internet on the CMS Web site) because these were the most recent data available for use at the time of development of the proposed rule. These data also were the basis for drug payments in the physician's office setting, effective April 1, 2017. For items that did not have an ASP-based payment rate, such as some therapeutic radiopharmaceuticals, we used their mean unit cost derived from the CY

2016 hospital claims data to determine their per day cost.

We proposed to package items with a per day cost less than or equal to \$120, and identify items with a per day cost greater than \$120 as separately payable. Consistent with our past practice, we cross-walked historical OPPS claims data from the CY 2016 HCPCS codes that were reported to the CY 2017 HCPCS codes that we displayed in Addendum B to the proposed rule (which is available via the Internet on the CMS Web site) for proposed payment in CY 2018.

Comment: Many commenters requested that CMS eliminate the threshold packaging policy and pay separately for all drugs and biologicals described by a unique HCPCS code. Several commenters expressed concern with the annual increases in the drug packaging threshold, citing that yearly increases have outpaced conversion factor updates and place a financial burden on hospitals. A few commenters recommended that CMS delay the proposed increase in the packaging threshold for drugs or freeze the packaging threshold at the current level (\$110).

Response: We have received and addressed similar comments in prior rules and most recently in CY 2017 OPPS/ASC final rule with comment (81 FR 79666). As we stated in the CY 2007 OPPS/ASC final rule with comment period (71 FR 68086), we believe that packaging certain items is a fundamental component of a prospective payment system, that updating the packaging threshold of \$50 for the CY 2005 OPPS is consistent with industry and government practices, and that the PPI for Prescription Drugs is an appropriate mechanism to gauge Part B drug inflation. Therefore, because packaging is a fundamental component of a prospective payment system that continues to provide important flexibility and efficiency in the delivery of high quality hospital outpatient services, we are not adopting the commenters' recommendations to pay separately for all drugs, biologicals, and radiopharmaceuticals for CY 2018, eliminate the packaging threshold, and delay updating the packaging threshold or freeze the packaging threshold at \$110.

After consideration of the public comments we received, and consistent with our methodology for establishing the packaging threshold using the most recent PPI forecast data, we are adopting a CY 2018 packaging threshold of \$120.

Our policy during previous cycles of the OPPS has been to use updated ASP and claims data to make final

determinations of the packaging status of HCPCS codes for drugs, biologicals, and therapeutic radiopharmaceuticals for the OPPTS/ASC final rule with comment period. We note that it is also our policy to make an annual packaging determination for a HCPCS code only when we develop the OPPTS/ASC final rule with comment period for the update year. Only HCPCS codes that are identified as separately payable in the final rule with comment period are subject to quarterly updates. For our calculation of per day costs of HCPCS codes for drugs and biologicals in this CY 2018 OPPTS/ASC final rule with comment period, we used ASP data from the first quarter of CY 2017, which is the basis for calculating payment rates for drugs and biologicals in the physician's office setting using the ASP methodology, effective July 1, 2017, along with updated hospital claims data from CY 2016. We note that we also used these data for budget neutrality estimates and impact analyses for this CY 2018 OPPTS/ASC final rule with comment period.

Payment rates for HCPCS codes for separately payable drugs and biologicals included in Addenda A and B for this final rule with comment period are based on ASP data from the third quarter of CY 2017. These data are the basis for calculating payment rates for drugs and biologicals in the physician's office setting using the ASP methodology, effective October 1, 2017. These payment rates will be updated in the January 2018 OPPTS update, based on the most recent ASP data to be used for physician's office and OPPTS payment as of January 1, 2018. For items that do not currently have an ASP-based payment rate, we proposed to recalculate their mean unit cost from all of the CY 2016 claims data and updated cost report information available for this CY 2018 final rule with comment period to determine their final per day cost.

Consequently, as stated in the CY 2018 OPPTS/ASC proposed rule (82 FR 33625), the packaging status of some HCPCS codes for drugs, biologicals, and therapeutic radiopharmaceuticals in the proposed rule may be different from the same drug HCPCS code's packaging status determined based on the data used for this final rule with comment period. Under such circumstances, in the CY 2018 OPPTS/ASC proposed rule, we proposed to continue to follow the established policies initially adopted for the CY 2005 OPPTS (69 FR 65780) in order to more equitably pay for those drugs whose cost fluctuates relative to the proposed CY 2018 OPPTS drug packaging threshold and the drug's payment status (packaged or separately

payable) in CY 2017. These established policies have not changed for many years and are the same as described in the CY 2016 OPPTS/ASC final rule with comment period (80 FR 70434). Specifically, for CY 2018, consistent with our historical practice, we proposed to apply the following policies to these HCPCS codes for drugs, biologicals, and therapeutic radiopharmaceuticals whose relationship to the drug packaging threshold changes based on the updated drug packaging threshold and on the final updated data:

- HCPCS codes for drugs and biologicals that were paid separately in CY 2017 and that were proposed for separate payment in CY 2018, and that then have per day costs equal to or less than the CY 2018 final rule drug packaging threshold, based on the updated ASPs and hospital claims data used for this CY 2018 final rule, would continue to receive separate payment in CY 2018.
- HCPCS codes for drugs and biologicals that were packaged in CY 2017 and that were proposed for separate payment in CY 2018, and that then have per day costs equal to or less than the CY 2018 final rule drug packaging threshold, based on the updated ASPs and hospital claims data used for this CY 2018 final rule, would remain packaged in CY 2018.
- HCPCS codes for drugs and biologicals for which we proposed packaged payment in CY 2018 but then have per day costs greater than the CY 2018 final rule drug packaging threshold, based on the updated ASPs and hospital claims data used for this CY 2018 final rule, would receive separate payment in CY 2018.

We did not receive any public comments on our proposal to recalculate the mean unit cost for items that do not currently have an ASP-based payment rate from all of the CY 2016 claims data and updated cost report information available for this CY 2018 final rule with comment period to determine their final per day cost. We also did not receive any public comments on our proposal to continue to follow the established policies initially adopted for the CY 2005 OPPTS (69 FR 65780), when the packaging status of some HCPCS codes for drugs, biologicals, and therapeutic radiopharmaceuticals in the proposed rule may be different from the same drug HCPCS code's packaging status determined based on the data used for the final rule with comment period. Therefore, for CY 2018, we are finalizing these two CY 2018 proposals without modification.

c. Policy Packaged Drugs, Biologicals, and Radiopharmaceuticals

As mentioned briefly earlier, in the OPPTS, we package several categories of drugs, biologicals, and radiopharmaceuticals, regardless of the cost of the products. Because the products are packaged according to the policies in 42 CFR 419.2(b), we refer to these packaged drugs, biologicals, and radiopharmaceuticals as "policy-packaged" drugs, biologicals, and radiopharmaceuticals. These policies are either longstanding or based on longstanding principles and inherent to the OPPTS and are as follows:

- Anesthesia, certain drugs, biologicals, and other pharmaceuticals; medical and surgical supplies and equipment; surgical dressings; and devices used for external reduction of fractures and dislocations (§ 419.2(b)(4));
- Intraoperative items and services (§ 419.2(b)(14));
- Drugs, biologicals, and radiopharmaceuticals that function as supplies when used in a diagnostic test or procedure (including but not limited to, diagnostic radiopharmaceuticals, contrast agents, and pharmacologic stress agents (§ 419.2(b)(15)); and
- Drugs and biologicals that function as supplies when used in a surgical procedure (including, but not limited to, skin substitutes and similar products that aid wound healing and implantable biologicals) (§ 419.2(b)(16)).

The policy at § 419.2(b)(16) is broader than that at § 419.2(b)(14). As we stated in the CY 2015 OPPTS/ASC final rule with comment period: "We consider all items related to the surgical outcome and provided during the hospital stay in which the surgery is performed, including postsurgical pain management drugs, to be part of the surgery for purposes of our drug and biological surgical supply packaging policy" (79 FR 66875). The category described by § 419.2(b)(15) is large and includes diagnostic radiopharmaceuticals, contrast agents, stress agents, and some other products. The category described by § 419.2(b)(16) includes skin substitutes and some other products. We believe it is important to reiterate that cost consideration is not a factor when determining whether an item is a surgical supply (79 FR 66875).

We did not make any proposals to revise our policy-packaged drug policy. We solicited public comment on the general OPPTS packaging policies as discussed in section II.A.3.d. of this final rule with comment period.

Comment: Several commenters requested that CMS revise its packaging

policies to allow for separate payment for Cysview® (hexaminolevulinate HCl), which is described by HCPCS code C9275, according to the ASP methodology. The commenters also provided recommendations in response to the general comment solicitation on packaging under the OPSS.

Response: We appreciate the comments in response to the packaging solicitation, including feedback on the “packaging as a supply” policy and will consider these recommendations in future rulemaking. However, because we did not propose to modify our policy-packaged drug policy for drugs that function as a supply when used in a diagnostic test or procedure, or receive information from commenters that caused us to believe that Cysview® is not a drug that functions as a supply when used in a diagnostic test or procedure and, accordingly, should be paid separately, payment for HCPCS code C9275 will continue to be packaged with the primary procedure in CY 2018.

Comment: Numerous commenters requested that CMS pay separately for Exparel®, an FDA approved post-surgical analgesia drug. Several commenters, including many commenters who received care from the same provider, shared their experience with receiving Exparel® after their knee replacement surgery and urged CMS to pay hospitals and/or physicians for the use of Exparel®.

Response: We refer readers to the CY 2015 OPSS/ASC final rule with comment (79 FR 66874 and 66875) for a detailed discussion on our decision to package Exparel® (bupivacaine liposome injectable suspension) described by HCPCS code C9290 (Injection, bupivacaine liposome, 1 mg) as a drug that functions as a supply in a surgical procedure. Because we did not propose to modify our packaged drug policy for drugs that function as a surgical supply when used in a surgical procedure, and believe payment for HCPCS code C9290 is appropriately packaged with the primary surgical procedure, payment for HCPCS code C9290 will remain packaged in CY 2018.

Comment: A few commenters recommended that CMS continue to apply the nuclear medicine procedure to radiolabeled product edits to ensure that all packaged costs are included on nuclear medicine claims in order to establish appropriate payment rates in the future.

Response: We do not agree with commenters that we should reinstate the nuclear medicine procedure to radiolabeled product edits, which

required a diagnostic radiopharmaceutical to be present on the same claim as a nuclear medicine procedure for payment under the OPSS to be made. The edits were in place between CY 2008 and CY 2014 (78 FR 75033). We believe the period of time in which the edits were in place was sufficient for hospitals to gain experience reporting procedures involving radiolabeled products and to grow accustomed to ensuring that they code and report charges so that their claims fully and appropriately reflect the costs of those radiolabeled products. As with all other items and services recognized under the OPSS, we expect hospitals to code and report their costs appropriately, regardless of whether there are claims processing edits in place.

Comment: One commenter recommended that CMS use ASP information, when voluntarily reported by the manufacturer, as a better price input to account for the packaged costs of the diagnostic radiopharmaceuticals and more appropriately reflect hospitals’ actual acquisition costs. This commenter also requested that CMS provide an additional payment for radiopharmaceuticals that are granted pass-through payment status.

Response: We disagree with commenter’s recommendation that we use voluntarily-reported ASP information for nonpass-through payment for radiopharmaceuticals as an approximation of their acquisition cost. Packaging hospital costs based on hospital claims data is how all the costs of all packaged items are factored into payment rates for associated procedures under the OPSS, and we do not believe it is appropriate to depart from that policy for radiopharmaceuticals.

Radiopharmaceuticals for which we have not established a separate APC will receive packaged payment under the OPSS. We provide payment for diagnostic radiopharmaceuticals based on a proxy for average acquisition cost. We continue to believe that the line-item estimated cost for a diagnostic radiopharmaceutical in our claims data is a reasonable approximation of average acquisition and preparation and handling costs for diagnostic radiopharmaceuticals.

In addition, we note that not all manufacturers would be able to submit ASP data through the established ASP reporting methodology. Therefore, if we were to use ASP data to package the costs of some diagnostic radiopharmaceuticals, but use hospital claims data for others, our methodologies for packaging the costs of diagnostic radiopharmaceuticals into

their associated nuclear medicine procedures would be inconsistent among nuclear medicine procedures. The foundation of a system of relative weights is the relativity of the costs of all services to one another, as derived from a standardized system that uses standardized inputs and a consistent methodology. Adoption of a ratesetting methodology for certain APCs containing nuclear medicine procedures that is different from the standard APC ratesetting methodology would undermine this relativity. For this reason, we do not believe it would be appropriate to use external pricing information in place of the costs derived from the claims and Medicare cost report data because to do so would distort the relativity that is fundamental to the integrity of the OPSS.

With respect to the request to provide an additional payment for radiopharmaceuticals that are granted pass-through payment status, the commenter did not provide information on what expenses or costs incurred by providers would be covered by an additional payment. We continue to believe that a single payment is appropriate for radiopharmaceuticals with pass-through payment status in CY 2018 and that the payment rate of ASP+6 percent is appropriate to provide payment for both the radiopharmaceutical’s acquisition cost and any associated nuclear medicine handling and compounding costs.

d. High Cost/Low Cost Threshold for Packaged Skin Substitutes

In the CY 2014 OPSS/ASC final rule with comment period (78 FR 74938), we unconditionally packaged skin substitute products into their associated surgical procedures as part of a broader policy to package all drugs and biologicals that function as supplies when used in a surgical procedure. As part of the policy to finalize the packaging of skin substitutes, we also finalized a methodology that divides the skin substitutes into a high cost group and a low cost group, in order to ensure adequate resource homogeneity among APC assignments for the skin substitute application procedures (78 FR 74933).

Skin substitutes assigned to the high cost group are described by HCPCS codes 15271 through 15278. Skin substitutes assigned to the low cost group are described by HCPCS codes C5271 through C5278. Geometric mean costs for the various procedures are calculated using only claims for the skin substitutes that are assigned to each group. Specifically, claims billed with HCPCS code 15271, 15273, 15275, or 15277 are used to calculate the

geometric mean costs for procedures assigned to the high cost group, and claims billed with HCPCS code C5271, C5273, C5275, or C5277 are used to calculate the geometric mean costs for procedures assigned to the low cost group (78 FR 74935).

Each of the HCPCS codes described above are assigned to one of the following three skin procedure APCs according to the geometric mean cost for the code: APC 5053 (Level 3 Skin Procedures) (HCPCS codes C5271, C5275, and C5277); APC 5054 (Level 4 Skin Procedures) (HCPCS codes C5273, 15271, 15275, and 15277); or APC 5055 (Level 5 Skin Procedures) (HCPCS code 15273). In CY 2017, the payment rate for APC 5053 (Level 3 Skin Procedures) was \$466, the payment rate for APC 5054 (Level 4 Skin Procedures) was \$1,468, and the payment rate for APC 5055 (Level 5 Skin Procedures) was \$2,575. This information also is available in Addenda A and B of the CY 2017 OPPTS/ASC final rule with comment period (which is available via the Internet on the CMS Web site).

We have continued the high cost/low cost categories policy since CY 2014, and in the CY 2018 OPPTS/ASC proposed rule (82 FR 33626 through 33627), we proposed to continue it for CY 2018 with the modification discussed below. Under this current policy, skin substitutes in the high cost category are reported with the skin substitute application CPT codes, and skin substitutes in the low cost category are reported with the analogous skin substitute HCPCS C-codes. For a discussion of the CY 2014 and CY 2015 methodologies for assigning skin substitutes to either the high cost group or the low cost group, we refer readers to the CY 2014 OPPTS/ASC final rule with comment period (78 FR 74932 through 74935) and the CY 2015 OPPTS/ASC final rule with comment period (79 FR 66882 through 66885).

For a discussion of the high cost/low cost methodology that was adopted in CY 2016 and has been in effect since then, we refer readers to the CY 2016 OPPTS/ASC final rule with comment period (80 FR 70434 through 70435). For CY 2018, as in CY 2016 and CY 2017, we proposed to continue to determine the high/low cost status for each skin substitute product based on either a product's geometric mean unit cost (MUC) exceeding the geometric MUC threshold or the product's per day cost (PDC) (the total units of a skin substitute multiplied by the mean unit cost and divided by the total number of days) exceeding the PDC threshold. For CY 2018, as for CY 2017, we proposed to assign each skin substitute that

exceeds either the MUC threshold or the PDC threshold to the high cost group. In addition, as described in more detail later in this section, for CY 2018, as for CY 2017, we proposed to assign any skin substitute with an MUC or a PDC that does not exceed either the MUC threshold or the PDC threshold to the low cost group. For CY 2018, we proposed that any skin substitute product that was assigned to the high cost group in CY 2017 would be assigned to the high cost group for CY 2018, regardless of whether it exceeds or falls below the CY 2018 MUC or PDC threshold.

For this CY 2018 OPPTS/ASC final rule with comment period, consistent with the methodology as established in the CY 2014 through CY 2017 final rules with comment period, we analyzed updated CY 2016 claims data to calculate the MUC threshold (a weighted average of all skin substitutes' MUCs) and the PDC threshold (a weighted average of all skin substitutes' PDCs). The final CY 2018 MUC threshold is \$46 per cm² (rounded to the nearest \$1) (proposed at \$47 per cm²) and the final CY 2018 PDC threshold is \$861 (rounded to the nearest \$1) (proposed at \$755).

For CY 2018, we proposed to continue to assign skin substitutes with pass-through payment status to the high cost category. However, there are no skin substitutes that are proposed to have pass-through payment status for CY 2018. We proposed to assign skin substitutes with pricing information but without claims data to calculate a geometric MUC or PDC to either the high cost or low cost category based on the product's ASP+6 percent payment rate as compared to the MUC threshold. If ASP is not available, we stated in the proposed rule that we would use WAC+6 percent or 95 percent of AWP to assign a product to either the high cost or low cost category. We also stated in the proposed rule that new skin substitutes without pricing information would be assigned to the low cost category until pricing information is available to compare to the CY 2018 MUC threshold. For a discussion of our existing policy under which we assign skin substitutes without pricing information to the low cost category until pricing information is available, we refer readers to the CY 2016 OPPTS/ASC final rule with comment period (80 FR 70436).

Some skin substitute manufacturers have raised concerns about significant fluctuation in both the MUC threshold and the PDC threshold from year to year. The fluctuation in the thresholds may result in the reassignment of

several skin substitutes from the high cost group to the low cost group which, under current payment rates, can be a difference of approximately \$1,000 in the payment amount for the same procedure. In addition, these stakeholders were concerned that the inclusion of cost data from skin substitutes with pass-through payment status in the MUC and PDC calculations would artificially inflate the thresholds. Skin substitute stakeholders requested that CMS consider alternatives to the current methodology used to calculate the MUC and PDC thresholds and also requested that CMS consider whether it might be appropriate to establish a new cost group in between the low cost group and the high cost group to allow for assignment of moderately priced skin substitutes to a newly created middle group.

We share the goal of promoting payment stability for skin substitute products and their related procedures as price stability allows hospitals using such products to more easily anticipate future payments associated with these products. We have attempted to limit year to year shifts for skin substitute products between the high cost and low cost groups through multiple initiatives implemented since CY 2014, including: establishing separate skin substitute application procedure codes for low-cost skin substitutes (78 FR 74935); using a skin substitute's MUC calculated from outpatient hospital claims data instead of an average of ASP+6 percent as the primary methodology to assign products to the high cost or low cost group (79 FR 66883); and establishing the PDC threshold as an alternate methodology to assign a skin substitute to the high cost group (80 FR 70434 through 70435).

In order to allow additional time to evaluate concerns and suggestions from stakeholders about the volatility of the MUC and PDC thresholds, for CY 2018, we proposed that a skin substitute that was assigned to the high cost group for CY 2017 would be assigned to the high cost group for CY 2018, even if it does not exceed the CY 2018 MUC or PDC thresholds. Our analysis has found that seven skin substitute products that would have otherwise been assigned to the low cost group for CY 2018 would instead be assigned to the high cost group under this proposed policy. The skin substitute products affected by this proposed policy were identified with an "*" in Table 24 of the proposed rule (82 FR 33627 through 33628). For CY 2019 and subsequent years, we requested public comments on how we should calculate data for products in determining the MUC and PDC

thresholds that are included in the high cost group solely based on assignment to the high cost group in CY 2017.

We stated in the proposed rule that the goal of our proposal to retain the same skin substitute cost group assignments in CY 2018 as in CY 2017 is to maintain similar levels of payment for skin substitute products for CY 2018 while we study our current skin substitute payment methodology to determine whether refinement to the existing policies is consistent with our policy goal of providing payment stability for skin substitutes. We requested public comments on the methodologies that are used to calculate pricing thresholds as well as the payment groupings that recognize a low cost group and a high cost group. We stated that we are especially interested in suggestions that are based on analysis of Medicare claims data from hospital outpatient departments that might better promote improved payment stability for skin substitute products under the OPPS. This proposal was intended to apply for CY 2018 to allow time for the public to submit other ideas that could be evaluated for the CY 2019 rulemaking.

In summary, we proposed to assign skin substitutes with a MUC or a PDC that does not exceed either the MUC threshold or the PDC threshold to the low cost group, unless the product was assigned to the high cost group in CY 2017, in which case we proposed to assign the product to the high cost group for CY 2018, regardless of whether it exceeds the CY 2018 MUC or PDC threshold. We also proposed to assign to the high cost group skin substitute products that exceed the CY 2018 MUC or PDC threshold and assign to the low cost group skin substitute products that did not exceed either the CY 2017 or CY 2018 MUC or PDC thresholds and were not assigned to the high cost group in CY 2017. We proposed to continue to use payment methodologies including ASP+6 percent, WAC+6 percent, or 95 percent of AWP for skin substitute products that have pricing information but do not have claims data to determine if their costs exceed the CY 2018 MUC threshold. Finally, we proposed to continue to assign new skin substitute products without pricing information to the low cost group.

Comment: Several commenters responded to CMS' request for public comments on the methodologies that are used to calculate pricing thresholds as well as the payment groupings that recognize a low cost group and a high cost group with the goal of improving payment stability for skin substitute

products in the OPPS. The commenters covered such issues as: Improving the quality of claims data CMS uses to determine the MUC and PDC thresholds; using ASP pricing data for the skin substitutes either in addition to or in place of claims data to determine the MUC and PDC thresholds; limiting annual changes to the MUC and PDC thresholds to the change in the consumer price index; adding more cost groups where skin substitutes may be assigned; ending the packaging of skin substitute products in general and ending packaging costs for add-on codes into the primary service codes for skin substitute procedures; establishing device offsets when the cost of a skin substitute used in a procedure is more than 40 percent of total cost of the procedure; and reducing incentives that favor the use of more expensive skin substitutes or products that require an excessive number of applications.

Response: We appreciate the feedback we received from the commenters. We will continue to study issues related to the payment of skin substitutes and take these comments into consideration for future rulemaking.

Comment: One commenter requested that PuraPly and PuraPly antimic reported with HCPCS code Q4172 retain its pass-through status in CY 2018. The commenter believed that giving PuraPly and PuraPly antimic an additional year of pass-through payment status would be consistent with CMS' policy proposal to assign all skin substitute products that were in the high cost skin substitute group in CY 2017 to the high cost skin substitute group in CY 2018. The commenter believed that, consistent with the spirit of this proposal, PuraPly and PuraPly antimic should receive the same payment treatment in CY 2017 as it did in CY 2018; that is, continued pass-through payment status.

Response: PuraPly and PuraPly antimic (HCPCS code Q4172) became eligible for drug and biological pass-through payments effective January 1, 2015. Therefore, 2017 is the third year of pass-through payment status for these skin substitutes. Section 1833(t)(6)(B)(iii) provides for temporary pass-through payments for devices for a period of at least 2 years but not more than 3 years. Extending PuraPly and PuraPly antimic for a fourth year of pass-through payment status would be contrary to the statute. Therefore, PuraPly and PuraPly antimic will be assigned to the high-cost skin substitute group for CY 2018 and the product will receive payment in the same manner as other skin substitute products assigned to the high cost group.

Comment: One commenter opposed CMS' proposal to assign all skin substitutes that qualified for the high cost group in CY 2017 to the high cost group in CY 2018, including those skin substitutes that would have not met either the MUC or PDC threshold in CY 2018 and would have instead been assigned to the low-cost group. The commenter stated that the products included in the high cost group that otherwise would have been assigned to the low cost group have generated enough payment data for CMS to estimate their costs. The commenter believed the proposal would encourage excessive use of the skin substitute products that should have been assigned to the low cost group.

Response: We appreciate the concerns of the commenter. However, as we stated in the proposed rule, we aim to encourage the goal of payment stability for all skin substitute products to help hospitals anticipate future costs related to skin substitute procedures. The MUC has nearly doubled since CY 2016, with an increase from \$25 per cm² to the proposed CY 2018 threshold of \$47 per cm². Likewise, the PDC has fluctuated over \$300, between \$715 and \$1,050, since it was established in CY 2016. We requested suggestions from the public to help address these stability issues in future rulemaking. We believe allowing all skin substitute products assigned to the high cost group in CY 2017 to remain in the high cost group for CY 2018 gives us time to consider revisions to the payment of skin substitute procedures and products while avoiding substantial payment reductions to hospitals during our review period.

Comment: Several commenters supported the proposal to assign all skin substitutes that qualified for the high cost group in CY 2017 to the high cost group in CY 2018, including those skin substitutes that would have not met either the MUC or PDC threshold in CY 2018 and would have instead been assigned to the low cost group.

Response: We appreciate the commenters' support.

Comment: One commenter supported the proposed assignment of HCPCS code Q4150 (Allowrap DS or Dry 1 sq cm) to the high cost group.

Response: We appreciate the commenter's support.

After consideration of the public comments we received, we are finalizing our proposals without modification for CY 2018. Table 72 below displays the CY 2018 cost category assignment for each skin substitute product.

For this final rule with comment period, we have identified 10 skin

substitute products that would otherwise have been assigned to the low cost group for CY 2018, but will instead be assigned to the high cost group under our policy to include in the high cost group for CY 2018 any skin substitute that was in the high cost group for CY 2017. The skin substitute products affected by this policy are identified with an asterisk “*” in Table 72 below.

TABLE 72—SKIN SUBSTITUTE ASSIGNMENTS TO HIGH COST AND LOW COST GROUPS FOR CY 2018

CY 2018 HCPCS code	CY 2018 short descriptor	CY 2017 high/low assignment	CY 2018 high/low assignment
Q9363	Integra Meshed Bil Wound Mat	High	High.
Q4100	Skin Substitute, NOS	Low	Low.
Q4101	Apligraf	High	High.
Q4102	Oasis Wound Matrix	Low	Low.
Q4103	Oasis Burn Matrix	High	High.*
Q4104	Integra BMWWD	High	High.
Q4105	Integra DRT	High	High.*
Q4106	Dermagraft	High	High.
Q4107	GraftJacket	High	High.
Q4108	Integra Matrix	High	High.*
Q4110	Primatrix	High	High.*
Q4111	Gammagraft	Low	Low.
Q4115	Alloskin	Low	Low.
Q4116	Alloderm	High	High.
Q4117	Hyalomatrix	Low	Low.
Q4121	Theraskin	High	High.
Q4122	Dermacell	High	High.
Q4123	Alloskin	High	High.*
Q4124	Oasis Tri-layer Wound Matrix	Low	Low.
Q4126	Memoderm/derma/tranz/integup	High	High.
Q4127	Talymed	High	High.*
Q4128	Flexhd/Allopatchhd/Matrixhd	High	High.
Q4131	Epifix	High	High.
Q4132	Grafix core and grafixpl core, per square centimeter	High	High.
Q4133	Grafix prime and grafixpl prime, per square centimeter	High	High.
Q4134	hMatrix	Low	Low.
Q4135	Mediskin	Low	Low.
Q4136	Ezderm	Low	Low.
Q4137	Amnioexcel or Biodexcel, 1cm	High	High.
Q4138	Biodfence DryFlex, 1cm	High	High.
Q4140	Biodfence 1cm	High	High.
Q4141	Alloskin ac, 1cm	High	High.*
Q4143	Repriza, 1cm	High	High.
Q4146	Tensix, 1CM	High	High.
Q4147	Architect ecm, 1cm	High	High.*
Q4148	Neox cord 1k, neox cord rt, or clarix cord 1k, per square centimeter	High	High.
Q4150	Allowrap DS or Dry 1 sq cm	High	High.
Q4151	AmnioBand, Guardian 1 sq cm	High	High.
Q4152	Dermasure 1 square cm	High	High.
Q4153	Dermavest 1 square cm	High	High.
Q4154	Bioavance 1 square cm	High	High.
Q4156	Neox 100 or clarix 100, per square centimeter	High	High.
Q4157	Revitalon 1 square cm	High	High.
Q4158	Kerecis omega3, per square centimeter	High	High.*
Q4159	Affinity 1 square cm	High	High.
Q4160	NuShield 1 square cm	High	High.
Q4161	Bio-Connekt per square cm	High	High.*
Q4163	Woundex, bioskin, per square centimeter	High	High.
Q4164	Helicoll, per square cm	High	High.
Q4165	Keramatrix, per square cm	Low	Low.
Q4166	Cytal, per square cm	Low	Low.
Q4167	Truskin, per square cm	Low	Low.
Q4169	Artacent wound, per square cm	High	High.
Q4170	Cygnus, per square cm	Low	Low.
Q4172	PuraPly, PuraPly antimic	High	High.
Q4173	Palingen or palingen xplus, per sq cm	High	High.
Q4175	Miroderm, per square cm	High	High.
Q4176	Neopatch, per square centimeter	Low	Low.
Q4178	Floweramniopatch, per square centimeter	Low	Low.
Q4179	Flowerderm, per square centimeter	Low	Low.
Q4180	Revita, per square centimeter	Low	Low.
Q4181	Amnio wound, per square centimeter	Low	Low.
Q4182	Transcyte, per square centimeter	Low	Low.

* These products do not exceed either the MUC or PDC threshold for CY 2018, but are assigned to the high cost group because they were assigned to the high cost group in CY 2017.

e. Packaging Determination for HCPCS Codes That Describe the Same Drug or Biological but Different Dosages

In the CY 2010 OPPS/ASC final rule with comment period (74 FR 60490 through 60491), we finalized a policy to make a single packaging determination for a drug, rather than an individual HCPCS code, when a drug has multiple HCPCS codes describing different dosages because we believed that adopting the standard HCPCS code-specific packaging determinations for these codes could lead to inappropriate payment incentives for hospitals to report certain HCPCS codes instead of others. We continue to believe that making packaging determinations on a drug-specific basis eliminates payment incentives for hospitals to report certain HCPCS codes for drugs and allows hospitals flexibility in choosing to report all HCPCS codes for different dosages of the same drug or only the lowest dosage HCPCS code. Therefore, in the CY 2018 OPPS/ASC proposed rule (82 FR 33628), we proposed to continue our policy to make packaging determinations on a drug-specific basis, rather than a HCPCS code-specific basis, for those HCPCS codes that describe the same drug or biological but different dosages in CY 2018.

For CY 2018, in order to propose a packaging determination that is consistent across all HCPCS codes that describe different dosages of the same drug or biological, we aggregated both our CY 2016 claims data and our pricing information at ASP+6 percent across all of the HCPCS codes that describe each distinct drug or biological in order to determine the mean units per day of the drug or biological in terms of the HCPCS code with the lowest dosage descriptor. The following drugs did not have pricing information available for the ASP methodology for the CY 2018 OPPS/ASC proposed rule, and as is our current policy for determining the packaging status of other drugs, we used the mean unit cost available from the CY 2016 claims data to make the proposed packaging determinations for these drugs: HCPCS code J7100 (infusion, dextran 40,500 ml) and HCPCS code J7110 (infusion, dextran 75,500 ml).

For all other drugs and biologicals that have HCPCS codes describing different doses, we then multiplied the proposed weighted average ASP+6 percent per unit payment amount across all dosage levels of a specific drug or biological by the estimated units per day for all HCPCS codes that describe each

drug or biological from our claims data to determine the estimated per day cost of each drug or biological at less than or equal to the proposed CY 2018 drug packaging threshold of \$120 (so that all HCPCS codes for the same drug or biological would be packaged) or greater than the proposed CY 2018 drug packaging threshold of \$120 (so that all HCPCS codes for the same drug or biological would be separately payable). The proposed packaging status of each drug and biological HCPCS code to which this methodology would apply in CY 2018 was displayed in Table 25 of the CY 2018 OPPS/ASC proposed rule (82 FR 33629).

We did not receive any public comments on this proposal. Therefore, for CY 2018, we are finalizing our CY 2018 proposal, without modification, to continue our policy to make packaging determinations on a drug-specific basis, rather than a HCPCS code-specific basis, for those HCPCS codes that describe the same drug or biological but different dosages. Table 73 below displays the final packaging status of each drug and biological HCPCS code to which the finalized methodology applies for CY 2018.

TABLE 73—HCPCS CODES TO WHICH THE CY 2018 DRUG-SPECIFIC PACKAGING DETERMINATION METHODOLOGY APPLIES

CY 2018 HCPCS code	CY 2018 long descriptor	CY 2018 SI
C9257	Injection, bevacizumab, 0.25 mg	K
J9035	Injection, bevacizumab, 10 mg	K
J1020	Injection, methylprednisolone acetate, 20 mg	N
J1030	Injection, methylprednisolone acetate, 40 mg	N
J1040	Injection, methylprednisolone acetate, 80 mg	N
J1460	Injection, gamma globulin, intramuscular, 1 cc	K
J1560	Injection, gamma globulin, intramuscular over 10 cc	K
J1642	Injection, heparin sodium, (heparin lock flush), per 10 units	N
J1644	Injection, heparin sodium, per 1000 units	N
J1840	Injection, kanamycin sulfate, up to 500 mg	N
J1850	Injection, kanamycin sulfate, up to 75 mg	N
J2788	Injection, rho d immune globulin, human, minidose, 50 micrograms (250 i.u.)	N
J2790	Injection, rho d immune globulin, human, full dose, 300 micrograms (1500 i.u.)	N
J2920	Injection, methylprednisolone sodium succinate, up to 40 mg	N
J2930	Injection, methylprednisolone sodium succinate, up to 125 mg	N
J3471	Injection, hyaluronidase, ovine, preservative free, per 1 usp unit (up to 999 usp units)	N
J3472	Injection, hyaluronidase, ovine, preservative free, per 1000 usp units	N
J7030	Infusion, normal saline solution, 1000 cc	N
J7040	Infusion, normal saline solution, sterile (500 ml = 1 unit)	N
J7050	Infusion, normal saline solution, 250 cc	N
J7100	Infusion, dextran 40, 500 ml	N
J7110	Infusion, dextran 75, 500 ml	N
J7515	Cyclosporine, oral, 25 mg	N
J7502	Cyclosporine, oral, 100 mg	N
J8520	Capecitabine, oral, 150 mg	N
J8521	Capecitabine, oral, 500 mg	N
J9250	Methotrexate sodium, 5 mg	N
J9260	Methotrexate sodium, 50 mg	N

2. Payment for Drugs and Biologicals Without Pass-Through Status That Are Not Packaged

a. Payment for Specified Covered Outpatient Drugs (SCODs) and Other Separately Payable and Packaged Drugs and Biologicals

Section 1833(t)(14) of the Act defines certain separately payable radiopharmaceuticals, drugs, and biologicals and mandates specific payments for these items. Under section 1833(t)(14)(B)(i) of the Act, a “specified covered outpatient drug” (known as a SCOD) is defined as a covered outpatient drug, as defined in section 1927(k)(2) of the Act, for which a separate APC has been established and that either is a radiopharmaceutical agent or is a drug or biological for which payment was made on a pass-through basis on or before December 31, 2002.

Under section 1833(t)(14)(B)(ii) of the Act, certain drugs and biologicals are designated as exceptions and are not included in the definition of SCODs. These exceptions are—

- A drug or biological for which payment is first made on or after January 1, 2003, under the transitional pass-through payment provision in section 1833(t)(6) of the Act.
- A drug or biological for which a temporary HCPCS code has not been assigned.
- During CYs 2004 and 2005, an orphan drug (as designated by the Secretary).

Section 1833(t)(14)(A)(iii) of the Act requires that payment for SCODs in CY 2006 and subsequent years be equal to the average acquisition cost for the drug for that year as determined by the Secretary, subject to any adjustment for overhead costs and taking into account the hospital acquisition cost survey data collected by the Government Accountability Office (GAO) in CYs 2004 and 2005, and later periodic surveys conducted by the Secretary as set forth in the statute. If hospital acquisition cost data are not available, the law requires that payment be equal to payment rates established under the methodology described in section 1842(o), section 1847A, or section 1847B of the Act, as calculated and adjusted by the Secretary as necessary. We refer to this alternative methodology as the “statutory default.” Most physician Part B drugs are paid at ASP+6 percent in accordance with section 1842(o) and section 1847A of the Act.

Section 1833(t)(14)(E)(ii) of the Act provides for an adjustment in OPSS payment rates for SCODs to take into account overhead and related expenses,

such as pharmacy services and handling costs. Section 1833(t)(14)(E)(i) of the Act required MedPAC to study pharmacy overhead and related expenses and to make recommendations to the Secretary regarding whether, and if so how, a payment adjustment should be made to compensate hospitals for overhead and related expenses. Section 1833(t)(14)(E)(ii) of the Act authorizes the Secretary to adjust the weights for ambulatory procedure classifications for SCODs to take into account the findings of the MedPAC study.¹⁷

It has been our policy since CY 2006 to apply the same treatment to all separately payable drugs and biologicals, which include SCODs, and drugs and biologicals that are not SCODs. Therefore, we apply the payment methodology in section 1833(t)(14)(A)(iii) of the Act to SCODs, as required by statute, but we also apply it to separately payable drugs and biologicals that are not SCODs, which is a policy determination rather than a statutory requirement. In the CY 2018 OPSS/ASC proposed rule (82 FR 33630), we proposed to apply section 1833(t)(14)(A)(iii)(II) of the Act to all separately payable drugs and biologicals, including SCODs. Although we do not distinguish SCODs in this discussion, we note that we are required to apply section 1833(t)(14)(A)(iii)(II) of the Act to SCODs, but we also are applying this provision to other separately payable drugs and biologicals, consistent with our history of using the same payment methodology for all separately payable drugs and biologicals.

For a detailed discussion of our OPSS drug payment policies from CY 2006 to CY 2012, we refer readers to the CY 2013 OPSS/ASC final rule with comment period (77 FR 68383 through 68385). In the CY 2013 OPSS/ASC final rule with comment period (77 FR 68386 through 68389), we first adopted the statutory default policy to pay for separately payable drugs and biologicals at ASP+6 percent based on section 1833(t)(14)(A)(iii)(II) of the Act. We continued this policy of paying for separately payable drugs and biologicals at the statutory default for CY 2014, CY 2015, CY 2016, and CY 2017 (81 FR 79673).

b. CY 2018 Payment Policy

In the CY 2018 OPSS/ASC proposed rule (82 FR 33630), for CY 2018, we

proposed to continue our payment policy that has been in effect from CY 2013 to present and pay for separately payable drugs and biologicals at ASP+6 percent in accordance with section 1833(t)(14)(A)(iii)(II) of the Act (the statutory default). We proposed that the ASP+6 percent payment amount for separately payable drugs and biologicals requires no further adjustment and represents the combined acquisition and pharmacy overhead payment for drugs and biologicals. We also proposed that payments for separately payable drugs and biologicals are included in the budget neutrality adjustments, under the requirements in section 1833(t)(9)(B) of the Act, and that the budget neutral weight scalar is not applied in determining payments for these separately paid drugs and biologicals.

We note that we proposed, as specified below, to pay for separately payable, nonpass-through drugs acquired with a 340B discount at a rate of ASP minus 22.5 percent. We refer readers to the full discussion of this proposal in section V.B.7. of the proposed rule and this final rule with comment period.

Comment: Numerous commenters supported CMS’ proposal to continue to pay for separately payable drugs and biologicals based on the statutory default rate of ASP+6 percent.

Response: We thank commenters for their support.

After consideration of the public comments we received, we are finalizing our proposal, without modification, to pay for separately payable drugs and biologicals at ASP+6 percent based on section 1833(t)(14)(A)(iii)(II) of the Act (the statutory default). The ASP+6 percent payment amount for separately payable drugs and biologicals requires no further adjustment and represents the combined acquisition and pharmacy overhead payment for drugs and biologicals for CY 2018. In addition, we are finalizing our proposal that payment for separately payable drugs and biologicals be included in the budget neutrality adjustments, under the requirements of section 1833(t)(9)(B) of the Act, and that the budget neutral weight scalar is not applied in determining payment of these separately paid drugs and biologicals. We refer readers to section V.B.7. of the final rule with comment period for the final payment policy for drugs acquired with a 340B discount.

We note that separately payable drug and biological payment rates listed in Addenda A and B to this final rule with comment period (available via the Internet on the CMS Web site), which illustrate the final CY 2018 payment of

¹⁷ Medicare Payment Advisory Committee. June 2005 Report to the Congress. Chapter 6: Payment for pharmacy handling costs in hospital outpatient departments. Available at: http://www.medpac.gov/docs/default-source/reports/June05_ch6.pdf?sfvrsn=0.

ASP+6 percent for separately payable nonpass-through drugs and biologicals and ASP+6 percent for pass-through drugs and biologicals, reflect either ASP information that is the basis for calculating payment rates for drugs and biologicals in the physician's office setting effective October 1, 2017, or WAC, AWP, or mean unit cost from CY 2016 claims data and updated cost report information available for this final rule with comment period. In general, these published payment rates are not the same as the actual January 2018 payment rates. This is because payment rates for drugs and biologicals with ASP information for January 2018 will be determined through the standard quarterly process where ASP data submitted by manufacturers for the third quarter of 2017 (July 1, 2017 through September 30, 2017) will be used to set the payment rates that are released for the quarter beginning in January 2018 near the end of December 2017. In addition, payment rates for drugs and biologicals in Addenda A and B to this final rule with comment period for which there was no ASP information available for October 2017 are based on mean unit cost in the available CY 2016 claims data. If ASP information becomes available for payment for the quarter beginning in January 2018, we will price payment for these drugs and biologicals based on their newly available ASP information. Finally, there may be drugs and biologicals that have ASP information available for this final rule with comment period (reflecting October 2017 ASP data) that do not have ASP information available for the quarter beginning in January 2018. As stated in the CY 2018 OPPS/ASC proposed rule (82 FR 33630), these drugs and biologicals will then be paid based on mean unit cost data derived from CY 2016 hospital claims. Therefore, the payment rates listed in Addenda A and B to this final rule with comment period are not for January 2018 payment purposes and are only illustrative of the CY 2018 OPPS payment methodology using the most recently available information at the time of issuance of this final rule with comment period.

c. Biosimilar Biological Products

For CY 2016 and CY 2017, we finalized a policy to pay for biosimilar biological products based on the payment allowance of the product as determined under section 1847A of the Act and to subject nonpass-through biosimilar biological products to our annual threshold-packaged policy (for CY 2016, 80 FR 70445 through 70446; and for CY 2017, 81 FR 79674). In the

CY 2018 OPPS/ASC proposed rule (82 FR 33630), for CY 2018, we proposed to continue this same payment policy for biosimilar biological products.

We noted in the proposed rule that public comments on the Medicare Part B biosimilar biological product payment policy should be submitted in response to the biosimilar biological product payment policy comment solicitation in the CY 2018 MPFS proposed rule.

Comment: Several comments urged CMS to assign separate HCPCS codes for each biosimilar biological product rather than combining biosimilar biological products of the same reference product into one HCPCS code. Some commenters who addressed the biosimilar payment policy as it relates to the 340B proposal stated that current policy (adopted in the CY 2016 OPPS/ASC final rule with comment period (80 FR 70445)) for pass-through payment for biosimilar biological products is restricted to the first biosimilar biological product of a reference product. The commenters believed that, if the 340B proposal is finalized as proposed, the preclusion on pass-through payment eligibility for second and subsequent biosimilar biological products of the same reference product would be significantly disadvantaged by the reduced payment if purchased with a 340B discount. These commenters urged CMS to reevaluate pass-through payment eligibility for biosimilar biological products and their payment under the 340B payment proposal in the proposed rule.

Response: Comments related to policy for coding for biosimilar biological products are outside of the scope of the CY 2018 OPPS/ASC proposed rule. As we indicated in the CY 2018 OPPS/ASC proposed rule, commenters should refer to the CY 2018 MPFS final rule for discussion of the biosimilar biological product coding policy. With respect to comments regarding OPPS payment for biosimilar biological products, in the CY 2018 MPFS final rule, CMS finalized a policy to implement separate HCPCS codes for biosimilar biological products. Therefore, consistent with our established OPPS drug, biological, and radiopharmaceutical payment policy, HCPCS coding for biosimilar biological products will be based on policy established under the CY 2018 MPFS rule.

Comments related to 340B and biosimilar biological products are discussed in section V.B.7. of this final rule with comment period.

After consideration of the public comments we received, we are finalizing our proposed payment policy for biosimilar biological products, with

the following technical correction: All biosimilar biological products will be eligible for pass-through payment and not just the first biosimilar biological product for a reference product.

3. Payment Policy for Therapeutic Radiopharmaceuticals

In the CY 2018 OPPS/ASC proposed rule (82 FR 33630), for CY 2018, we proposed to continue the payment policy for therapeutic radiopharmaceuticals that began in CY 2010. We pay for separately paid therapeutic radiopharmaceuticals under the ASP methodology adopted for separately payable drugs and biologicals. If ASP information is unavailable for a therapeutic radiopharmaceutical, we base therapeutic radiopharmaceutical payment on mean unit cost data derived from hospital claims. We believe that the rationale outlined in the CY 2010 OPPS/ASC final rule with comment period (74 FR 60524 through 60525) for applying the principles of separately payable drug pricing to therapeutic radiopharmaceuticals continues to be appropriate for nonpass-through, separately payable therapeutic radiopharmaceuticals in CY 2018. Therefore, we proposed for CY 2018 to pay all nonpass-through, separately payable therapeutic radiopharmaceuticals at ASP+6 percent, based on the statutory default described in section 1833(t)(14)(A)(iii)(II) of the Act. For a full discussion of ASP-based payment for therapeutic radiopharmaceuticals, we refer readers to the CY 2010 OPPS/ASC final rule with comment period (74 FR 60520 through 60521). We also proposed to rely on CY 2016 mean unit cost data derived from hospital claims data for payment rates for therapeutic radiopharmaceuticals for which ASP data are unavailable and to update the payment rates for separately payable therapeutic radiopharmaceuticals according to our usual process for updating the payment rates for separately payable drugs and biologicals on a quarterly basis if updated ASP information is unavailable. For a complete history of the OPPS payment policy for therapeutic radiopharmaceuticals, we refer readers to the CY 2005 OPPS final rule with comment period (69 FR 65811), the CY 2006 OPPS final rule with comment period (70 FR 68655), and the CY 2010 OPPS/ASC final rule with comment period (74 FR 60524). The proposed CY 2018 payment rates for nonpass-through, separately payable therapeutic radiopharmaceuticals were in Addenda A and B to the proposed rule (which are

available via the Internet on the CMS Web site).

Comment: Commenters supported continuation of the policy to pay ASP+6 percent for therapeutic radiopharmaceuticals, if available, and to base payment on the mean unit cost derived from hospital claims data when not available. Commenters also requested that CMS examine ways to compensate hospitals for their documented higher overhead and handling costs associated with radiopharmaceuticals.

Response: We appreciate the commenters' support. However, as we stated earlier in section V.B.1.c. of this final rule with comment period in response to a similar request for additional radiopharmaceutical payment, we continue to believe that a single payment is appropriate for radiopharmaceuticals with pass-through payment status in CY 2018 and that the payment rate of ASP+6 percent is appropriate to provide payment for both the radiopharmaceutical's acquisition cost and any associated nuclear medicine handling and compounding costs incurred by the hospital pharmacy. Payment for the radiopharmaceutical and radiopharmaceutical processing services is made through the single ASP-based payment. We refer readers to the CMS guidance document available via the Internet at <https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/HospitalOutpatientPPS/Archives.html> for details on submission of ASP data for therapeutic radiopharmaceuticals.

After consideration of the public comments we received, we are finalizing our proposal, without modification, to continue to pay all nonpass-through, separately payable therapeutic radiopharmaceuticals at ASP+6 percent. We also are finalizing our proposal to continue to rely on CY 2016 mean unit cost data derived from hospital claims data for payment rates for therapeutic radiopharmaceuticals for which ASP data are unavailable. The CY 2018 final rule payment rates for nonpass-through separately payable therapeutic radiopharmaceuticals are included in Addenda A and B to this final rule with comment period (which are available via the Internet on the CMS Web site).

4. Payment Adjustment Policy for Radioisotopes Derived From Non-Highly Enriched Uranium Sources

Radioisotopes are widely used in modern medical imaging, particularly for cardiac imaging and predominantly for the Medicare population. Some of

the Technetium-99 (Tc-99m), the radioisotope used in the majority of such diagnostic imaging services, is produced in legacy reactors outside of the United States using highly enriched uranium (HEU).

The United States would like to eliminate domestic reliance on these reactors, and is promoting the conversion of all medical radioisotope production to non-HEU sources. Alternative methods for producing Tc-99m without HEU are technologically and economically viable, and conversion to such production has begun. We expect that this change in the supply source for the radioisotope used for modern medical imaging will introduce new costs into the payment system that are not accounted for in the historical claims data.

Therefore, beginning in CY 2013, we finalized a policy to provide an additional payment of \$10 for the marginal cost for radioisotopes produced by non-HEU sources (77 FR 68323). Under this policy, hospitals report HCPCS code Q9969 (Tc-99m from non-highly enriched uranium source, full cost recovery add-on per study dose) once per dose along with any diagnostic scan or scans furnished using Tc-99m as long as the Tc-99m doses used can be certified by the hospital to be at least 95 percent derived from non-HEU sources (77 FR 68321).

We stated in the CY 2013 OPPS/ASC final rule with comment period (77 FR 68321) that our expectation is that this additional payment will be needed for the duration of the industry's conversion to alternative methods to producing Tc-99m without HEU. We also stated that we would reassess, and propose if necessary, on an annual basis whether such an adjustment continued to be necessary and whether any changes to the adjustment were warranted (77 FR 68316). We have reassessed this payment for CY 2018 and did not identify any new information that would cause us to modify payment. Therefore, in the CY 2018 OPPS/ASC proposed rule (82 FR 33631), for CY 2018, we proposed to continue to provide an additional \$10 payment for radioisotopes produced by non-HEU sources.

Comment: Commenters supported CMS' proposal to provide an additional \$10 payment for the marginal cost of radioisotopes produced by non-HEU sources and supported continuation of the policy. However, the commenters requested that CMS update the payment amount using the hospital market basket update or hospital cost data. The commenters also requested that CMS assess whether the collection of a

beneficiary copayment could discourage hospital adoption.

Response: We appreciate the commenters' support. As discussed in the CY 2013 OPPS/ASC final rule with comment period, we did not finalize a policy to use the usual OPPS methodologies to update the non-HEU add-on payment (77 FR 68317). The purpose for the additional payment is limited to mitigating any adverse impact of transitioning to non-HEU sources and is based on the authority set forth at section 1833(t)(2)(E) of the Act. Accordingly, because we do not have authority to waive beneficiary copayment for this incentive payment, we believe it is unnecessary to assess whether a beneficiary copayment liability would deter a hospital from reporting HCPCS code Q9969. Furthermore, reporting of HCPCS code Q9969 is optional. Hospitals that are not experiencing high volumes of significantly increased costs are not obligated to request this additional payment (77 FR 68323).

Comment: One commenter requested that CMS publish HCPCS code volume and cost data in the proposed and final rule "Drug Blood Brachy Cost Statistics" files yearly.

Response: We appreciate the request and will consider revising the content of the "Drug Blood Brachy Cost statistics" file to include data on HCPCS code Q9969 for future rulemaking. In the interim, claims data on HCPCS code Q9969 are available for purchase in the claims data sets released with publication of this final rule with comment period.

After consideration of the public comments we received, we are finalizing our proposal, without modification, to continue the policy of providing an additional \$10 payment for radioisotopes produced by non-HEU sources for CY 2018, which will be the sixth year in which this policy is in effect in the OPPS. We will continue to reassess this policy annually, consistent with the original policy in the CY 2013 OPPS/ASC final rule with comment period (77 FR 68319).

5. Payment for Blood Clotting Factors

For CY 2017, we provided payment for blood clotting factors under the same methodology as other nonpass-through separately payable drugs and biologicals under the OPPS and continued paying an updated furnishing fee (81 FR 79676). That is, for CY 2017, we provided payment for blood clotting factors under the OPPS at ASP+6 percent, plus an additional payment for the furnishing fee. We note that when blood clotting factors are provided in

physicians' offices under Medicare Part B and in other Medicare settings, a furnishing fee is also applied to the payment. The CY 2017 updated furnishing fee was \$0.209 per unit.

In the CY 2018 OPSS/ASC proposed rule (82 FR 33631), for CY 2018, we proposed to pay for blood clotting factors at ASP+6 percent, consistent with our proposed payment policy for other nonpass-through, separately payable drugs and biologicals, and to continue our policy for payment of the furnishing fee using an updated amount. Our policy to pay for a furnishing fee for blood clotting factors under the OPSS is consistent with the methodology applied in the physician's office and in the inpatient hospital setting. These methodologies were first articulated in the CY 2006 OPSS final rule with comment period (70 FR 68661) and later discussed in the CY 2008 OPSS/ASC final rule with comment period (72 FR 66765). The proposed furnishing fee update was based on the percentage increase in the Consumer Price Index (CPI) for medical care for the 12-month period ending with June of the previous year. Because the Bureau of Labor Statistics releases the applicable CPI data after the MPFS and OPSS/ASC proposed rules are published, we were not able to include the actual updated furnishing fee in the proposed rules. Therefore, in accordance with our policy, as finalized in the CY 2008 OPSS/ASC final rule with comment period (72 FR 66765), we proposed to announce the actual figure for the percent change in the applicable CPI and the updated furnishing fee calculated based on that figure through applicable program instructions and posting on the CMS Web site at: <http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Part-B-Drugs/McrPartBDrugAvgSalesPrice/index.html>.

Comment: Commenters' supported CMS' proposal to continue to pay for a blood clotting factor furnishing fee in the hospital outpatient department.

Response: We appreciate the commenters' support.

After consideration of the public comments we received, we are finalizing our proposal, without modification, to provide payment for blood clotting factors under the same methodology as other separately payable drugs and biologicals under the OPSS and to continue payment of an updated furnishing fee. We will announce the actual figure of the percent change in the applicable CPI and the updated furnishing fee calculation based on that figure through the applicable program instructions and posting on the CMS Web site.

6. Payment for Nonpass-Through Drugs, Biologicals, and Radiopharmaceuticals With HCPCS Codes but Without OPSS Hospital Claims Data

In the CY 2018 OPSS/ASC proposed rule (82 FR 33631), for CY 2018, we proposed to continue to use the same payment policy as in CY 2017 for nonpass-through drugs, biologicals, and radiopharmaceuticals with HCPCS codes but without OPSS hospital claims data, which describes how we determine the payment rate for drugs, biologicals, or radiopharmaceuticals without an ASP. For a detailed discussion of the payment policy and methodology, we refer readers to the CY 2016 OPSS/ASC final rule with comment period (80 FR 70442 through 70443). The proposed CY 2018 payment status of each of the nonpass-through drugs, biologicals, and radiopharmaceuticals with HCPCS codes but without OPSS hospital claims data was listed in Addendum B to the proposed rule, which is available via the Internet on the CMS Web site.

Comment: One commenter, the manufacturer of Mylotarg[®], requested that CMS change the dose descriptor for HCPCS code J9300 from "Injection, gemtuzumab ozogamicin, 5 mg" to "Injection, gemtuzumab ozogamicin, 0.1 mg," to accommodate the new 4.5 mg vial size for Mylotarg[®]. The commenter noted that HCPCS code J9300 was inactive for a period of time because the prior version of gemtuzumab ozogamicin was removed from the market. As such, HCPCS code J9300 is assigned status indicator "E2 (items and services for which pricing information and claims data are not available)." The commenter also requested that CMS change the status indicator from "E2" to a payable status indicator.

Response: This comment is outside of the scope of the proposed rule. Requests for changes to Level II Alphanumeric HCPCS codes should be submitted to the CMS HCPCS Workgroup using CMS' standard procedures. Information on the Level II HCPCS code process is available via the Internet on the CMS Web site, which is publicly available at: <https://www.cms.gov/Medicare/Coding/MedHCPCSGenInfo/HCPCSCODINGPROCESS.html>.

After consideration of the public comments we received, we are finalizing our CY 2018 proposal without modification, including our proposal to assign drug or biological products status indicator "K" and pay for them separately for the remainder of CY 2018 if pricing information becomes available. The CY 2018 payment status of each of the nonpass-through drugs,

biologicals, and radiopharmaceuticals with HCPCS codes but without OPSS hospital claims data is listed in Addendum B to this final rule with comment period, which is available via the Internet on the CMS Web site.

7. Alternative Payment Methodology for Drugs Purchased Under the 340B Program

a. Background

The 340B Program, which was established by section 340B of the Public Health Service Act by the Veterans Health Care Act of 1992, is administered by the Health Resources and Services Administration (HRSA) within HHS. The 340B Program allows participating hospitals and other health care providers to purchase certain "covered outpatient drugs" (as defined under section 1927(k) of the Act and interpreted by HRSA through various guidance documents) at discounted prices from drug manufacturers. The statutory intent of the 340B Program is to maximize scarce Federal resources as much as possible, reaching more eligible patients, and providing care that is more comprehensive.¹⁸

The 340B statute defines which health care providers are eligible to participate in the program ("covered entities"). In addition to Federal health care grant recipients, covered entities include hospitals with a Medicare disproportionate share hospital (DSH) percentage above 11.75 percent. However, under Public Law 111-148, section 7101 expanded eligibility to critical access hospitals (CAHs), children's hospitals with a DSH adjustment greater than 11.75 percent, sole community hospitals (SCHs) with a DSH adjustment percentage of 8.0 percent or higher, rural referral centers (RRCs) with a DSH adjustment percentage of 8.0 percent or higher, and freestanding cancer hospitals with a DSH adjustment percentage above 11.75 percent. In accordance with section 340B(a)(4)(L)(i) of the Public Health Service Act, all participating hospital types must also meet other criteria.

HRSA calculates the ceiling price for each covered outpatient drug. The ceiling price is the drug's average manufacturer price (AMP) minus the unit rebate amount (URA), which is a statutory formula that varies depending on whether the drug is an innovator

¹⁸The House report that accompanied the authorizing legislation for the 340B Program stated: "In giving these 'covered entities' access to price reductions the Committee intends to enable these entities to stretch scarce Federal resources as far as possible, reaching more eligible patients and providing more comprehensive services." (H.R. Rept. No. 102-384(II), at 12 (1992)).

single source drug (no generic available), an innovator multiple source drug (a brand drug with available generic(s)), or a non-innovator multiple source (generic) drug.¹⁹ The ceiling price represents the maximum price a participating drug manufacturer can charge a covered entity for the drug. However, covered entities also have the option to participate in HRSA's Prime Vendor Program (PVP), under which the prime vendor can negotiate even deeper discounts (known as "subceiling prices") on some covered outpatient drugs. By the end of FY 2015, the PVP had nearly 7,600 products available to participating entities below the 340B ceiling price, including 3,557 covered outpatient drugs with an estimated average savings of 10 percent below the 340B ceiling price.²⁰

As we discussed in the CY 2018 OPPS/ASC proposed rule (82 FR 33632 and 33633), several recent studies and reports on Medicare Part B payments for 340B purchased drugs highlight a difference in Medicare Part B drug spending between 340B hospitals and non-340B hospitals as well as varying differences in the amount by which the Part B payment exceeds the drug acquisition cost.^{21 22 23} Links to the full reports referenced in this section can be found in the cited footnotes.

In its May 2015 Report to Congress, MedPAC analyzed Medicare hospital outpatient claims (excluding CAHs) along with information from HRSA on which hospitals participate in the 340B Program. MedPAC included data on all separately payable drugs under the OPPS except for vaccines and orphan drugs provided by freestanding cancer hospitals, RRCs, and SCHs. To estimate costs that 340B hospitals incur to acquire drugs covered under the OPPS,

¹⁹ 42 U.S.C. 256b(a)(1–2). Occasionally, a drug's URA is equal to its AMP, resulting in a 340B ceiling price of \$0. In these instances, HRSA has advised manufacturers to charge covered entities \$0.01 per unit.

²⁰ Department of Health and Human Services. 2017. Fiscal Year 2018 Health Resources and Services Administration justification of estimates for appropriations committees. Washington, DC: HHS. Available at: <https://www.hrsa.gov/sites/default/files/hrsa/about/budget/budget-justification-2018.pdf>.

²¹ Office of Inspector General. "Part B Payment for 340B Purchased Drugs. OEI-12-14-00030". November 2015. Available at: <https://oig.hhs.gov/oei/reports/oei-12-14-00030.pdf>.

²² Medicare Payment Advisory Commission. Report to the Congress: Overview of the 340B Drug Pricing Program. May 2015. Available at: <http://www.medpac.gov/docs/default-source/reports/may-2015-report-to-the-congress-overview-of-the-340b-drug-pricing-program.pdf?sfvrsn=0>.

²³ Government Accountability Office. "Medicare Part B Drugs: Action Needed to Reduce Financial Incentives to Prescribe 340B Drugs at Participating Hospitals GAO-15-442". June 2015. Available at: <https://www.gao.gov/assets/680/670676.pdf>.

MedPAC generally used the formula for calculating the 340B ceiling price: (AMP)—unit rebate amount (URA) × drug package size. The URA is determined by law and depends upon whether a drug is classified as single source, innovator multiple source, non-innovator multiple source, a clotting factor drug, or an exclusively pediatric drug. CMS provides this URA information to States as a courtesy. However, drug manufacturers remain responsible for correctly calculating the URA for their covered outpatient drugs. More information on the URA calculation and the Medicaid Drug Rebate Program may be found on the Web site at: <https://www.medicaid.gov/medicaid/prescription-drugs/medicaid-drug-rebate-program/index.html>.

Because MedPAC did not have access to AMP data, it used each drug's ASP as a proxy for AMP. MedPAC noted that ASP is typically slightly lower than AMP. The AMP is defined under section 1927(k)(1) of the Act as the average price paid to the manufacturer by wholesalers in the United States for drugs distributed to the retail pharmacy class of trade, minus customary prompt pay discounts. Manufacturers participating in Medicaid are required to report AMP data quarterly to the Secretary, and these prices are confidential. As described under section 1847A of the Act, the ASP is a manufacturer's unit sales of a drug to all purchasers in the United States in a calendar quarter divided by the total number of units of the drug sold by the manufacturer in that same quarter. The ASP is net of any price concessions such as volume, prompt pay, and cash discounts. Certain sales are exempt from the calculation of ASP, including sales at a nominal charge and 340B discounts.

In addition, MedPAC noted that, due to data limitations, its estimates of ceiling prices are conservative and likely higher (possibly much higher) than actual ceiling prices. Further details on the methodology used to calculate the average minimum discount for separately payable drugs can be found in Appendix A of MedPAC's May 2015 Report to Congress. In this report, MedPAC estimated that, on average, hospitals in the 340B Program "receive a minimum discount of 22.5 percent of the [ASP] for drugs paid under the [OPPS]."

In its March 2016 Report to Congress (page 79), MedPAC noted that another report, which MedPAC attributed to the Office of the Inspector General (OIG), recently estimated that discounts across all 340B providers (hospitals and certain clinics) average 33.6 percent of ASP, allowing these providers to generate

significant profits when they administer Part B drugs. According to the U.S. Government Accountability Office (GAO) report, the amount of the 340B discount ranges from an estimated 20 to 50 percent discount, compared to what the entity would have otherwise paid to purchase the drug. In addition, participation in the PVP often results in a covered entity paying a subceiling price on some covered outpatient drugs (estimated to be approximately 10 percent below the ceiling price) (U.S. Department of Health and Human Services, HRSA FY 2018 Budget Justification). Participation in the PVP is voluntary and free.

As noted in the CY 2018 OPPS/ASC proposed rule, with respect to chemotherapy drugs and drug administration services, MedPAC examined Medicare Part B spending for 340B and non-340B hospitals for a 5-year period from 2008 to 2012 and found that "Medicare spending grew faster among hospitals that participated in the 340B Program for all five years than among hospitals that did not participate in the 340B Program at any time during [the study] period" (MedPAC May 2015 Report to Congress, page 14). This is just one example of drug spending increases that are correlated with participation in the 340B Program and calls into question whether Medicare's current policy to pay for separately payable drugs at ASP+6 percent is appropriate in light of the discounted rates at which 340B hospitals acquire such drugs.

Further, GAO found that "in both 2008 and 2012, per beneficiary Medicare Part B drug spending, including oncology drug spending, was substantially higher at 340B DSH hospitals than at non-340B hospitals." According to the GAO report, this indicates that, on average, beneficiaries at 340B DSH hospitals were either prescribed more drugs or more expensive drugs than beneficiaries at the other non-340B hospitals in GAO's analysis. For example, in 2012, average per beneficiary spending at 340B DSH hospitals was \$144, compared to approximately \$60 at non-340B hospitals. The differences did not appear to be explained by the hospital characteristics GAO examined or patients' health status (GAO Report 15-442, page 20).

Under the OPPS, all hospitals (other than CAHs, which are paid based on 101 percent of reasonable costs as required by section 1834(g) of the Act) are currently paid the same rate for separately payable drugs (ASP+6 percent), regardless of whether the hospital purchased the drug at a

discount through the 340B Program. Medicare beneficiaries are liable for a copayment that is equal to 20 percent of the OPPI payment rate, which is currently ASP+6 percent (regardless of the 340B purchase price for the drug). Based on an analysis of almost 500 drugs billed in the hospital outpatient setting in 2013, the OIG found that, for 35 drugs, the “difference between the Part B [payment] amount and the 340B ceiling price was so large that, in at least one quarter of 2013, the beneficiary’s coinsurance alone . . . was greater than the amount a covered entity spent to acquire the drug” (OIG November 2015, Report OEI-12-14-00030, page 9).

In the CY 2009 OPPI/ASC final rule with comment period (73 FR 68655), we requested comments regarding the drug costs of hospitals that participate in the 340B Program and whether we should consider an alternative drug payment methodology for participating 340B hospitals. As noted above, in the time since that comment solicitation, access to the 340B Program was expanded under section 7101 of Public Law 111-148, which amended section 340B(a)(4) of the Public Health Service Act to expand the types of covered entities eligible to participate in the 340B Program. It is estimated that covered entities saved \$3.8 billion on outpatient drugs purchased through the 340B Program in 2013.²⁴ In addition, the number of hospitals participating in the program has grown from 583 in 2005 to 1,365 in 2010 and 2,140 in 2014 (MedPAC May 2015 Report to Congress). In its November 2015 report entitled “Part B Payments for 340B-Purchased Drugs,” the OIG found that Part B payments were 58 percent more than 340B ceiling prices, which allowed covered entities to retain approximately \$1.3 billion in 2013 (OEI-12-14-00030, page 8). Given the growth in the number of providers participating in the 340B Program and recent trends in high and growing prices of several separately payable drugs administered under Medicare Part B to hospital outpatients, we stated in the CY 2018 OPPI/ASC proposed rule that we believe it is timely to reexamine the appropriateness of continuing to apply the current OPPI methodology of ASP+6 percent to hospitals that have acquired those drugs under the 340B Program at significantly discounted rates.

MedPAC and OIG have recommended alternative drug payment methodologies for hospitals that participate in the 340B Program. In its March 2016 Report to

Congress, MedPAC recommended a legislative proposal related to payment for Part B drugs furnished by 340B hospitals under which Medicare would reduce payment rates for 340B hospitals’ separately payable 340B drugs by 10 percent of the ASP and direct the program savings from reducing Part B drug payment rates to the Medicare funded uncompensated care pool.²⁵ In its November 2015 report, the OIG described three options under which both the Medicare program and Medicare beneficiaries would be able to share in the program savings realized by hospitals and other covered entities that participate in the 340B Program (OEI-12-14-00030, pages 11-12). These options included: (1) Paying ASP with no additional add-on percentage; (2) paying ASP minus 14.4 percent; and (3) making payment based on the 340B ceiling price plus 6 percent of ASP for each 340B purchased drug (OEI-12-14-00030, page 11). Analysis in several of these reports notes limitations in estimating 340B-purchased drugs’ acquisition costs; the inability to identify which drugs were purchased through the 340B Program within Medicare claims data was one of those limitations.

b. OPPI Payment Rate for 340B Purchased Drugs

In the CY 2018 OPPI/ASC proposed rule (82 FR 33633 through 33634), we proposed changes to our current Medicare Part B drug payment methodology for 340B hospitals that we believe would better, and more appropriately, reflect the resources and acquisition costs that these hospitals incur. Such changes would allow the Medicare program and Medicare beneficiaries to pay less for drugs when hospitals participating in the 340B Program furnish drugs to Medicare beneficiaries that are purchased under the 340B Program.

Our goal is to make Medicare payment for separately payable drugs more aligned with the resources expended by hospitals to acquire such drugs while recognizing the intent of the 340B Program to allow covered entities, including eligible hospitals, to stretch scarce resources in ways that enable hospitals to continue providing access to care for Medicare beneficiaries and other patients. Medicare expenditures on Part B drugs have been rising and are projected to continue to rise faster than

overall health spending, thereby increasing this sector’s share of health care spending due to a number of underlying factors such as new higher price drugs and price increases for existing drugs.^{26,27} While we recognize the intent of the 340B Program, we believe it is inappropriate for Medicare to subsidize other activities through Medicare payments for separately payable drugs. We believe that any payment changes we adopt should be limited to separately payable drugs under the OPPI, with some additional exclusions. As a point of further clarity, CAHs are not included in this 340B policy change because they are paid under section 1834(g) of the Act. As stated in the CY 2018 OPPI/ASC proposed rule, these exclusions are for: (1) Drugs on pass-through payment status, which are required to be paid based on the ASP methodology, and (2) vaccines, which are excluded from the 340B Program. In addition, we solicited public comments on whether other types of drugs, such as blood clotting factors, should also be excluded from the reduced payment.

Data limitations inhibit our ability to identify which drugs were acquired under the 340B Program in the Medicare OPPI claims data. This lack of information within the claims data has limited researchers’ and our ability to precisely analyze differences in acquisition cost of 340B and non-340B acquired drugs with Medicare claims data. Accordingly, in the CY 2018 OPPI/ASC proposed rule (82 FR 33633), we stated our intent to establish a modifier, to be effective January 1, 2018, for hospitals to report with separately payable drugs that were not acquired under the 340B Program. Because a significant portion of hospitals paid under the OPPI participate in the 340B Program, we stated our belief that it is appropriate to presume that a separately payable drug reported on an OPPI claim was purchased under the 340B Program, unless the hospital identifies that the drug was not purchased under the 340B Program. We stated in the proposed rule that we intended to provide further details about this modifier in this CY 2018 OPPI/ASC final rule with comment period and/or through

²⁶ Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, Issue Brief: Medicare Part B Drugs: Pricing and Incentives, 2016. Available at: <https://aspe.hhs.gov/system/files/pdf/187581/PartBDrug.pdf>.

²⁷ Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, Issue Brief: Observations on Trends in Prescription Drug Spending, March 8, 2016. Available at: <https://aspe.hhs.gov/system/files/pdf/187586/Drugspending.pdf>.

²⁴ U.S. Department of Health and Human Services, HRSA FY 2015 Budget Justification, p. 342.

²⁵ Medicare Payment Advisory Commission, March 2016 Report to the Congress: Medicare Payment Policy, March 2016. Available at: <http://www.medpac.gov/docs/default-source/reports/chapter-3-hospital-inpatient-and-outpatient-services-march-2016-report.pdf?sfvrsn=0>.

subregulatory guidance, including guidance related to billing for dually eligible beneficiaries (that is, beneficiaries covered under Medicare and Medicaid) for whom covered entities do not receive a discount under the 340B Program.

A summary of public comments received and our responses pertaining to the modifier are included later in this section. As described in detail later in this section, we are implementing the modifier such that it is required for drugs that were acquired under the 340B Program instead of requiring its use on drugs that were *not* acquired under the 340B Program. In addition, we are establishing an informational modifier for use by certain providers who will be excepted from the 340B payment reduction.

Further, we note that the confidentiality of ceiling and subceiling prices limits our ability to precisely calculate the price paid by 340B hospitals for a particular covered outpatient drug. We recognize that each separately payable OPSS drug will have a different ceiling price (or subceiling price when applicable). Accordingly, we stated in the proposed rule that we believe using an average discounted price was appropriate for our proposal. Therefore, for CY 2018, we proposed to apply an average discounted price of 22.5 percent of the ASP for nonpass-through separately payable drugs purchased under the 340B Program, as estimated by MedPAC (MedPAC's May 2015 Report to Congress, page 7).

In the near-term, we believe that the estimated average minimum discount MedPAC calculated—22.5 percent of the ASP—adequately represents the average minimum discount that a 340B participating hospital receives for separately payable drugs under the OPSS. Given the limitations in calculating a precise discount for each OPSS separately payable drug, we did not attempt to do so for the proposed rule. Instead, we stated that we believed that using the analysis from the MedPAC report is appropriate and noted that the analysis is spelled out in detail and can be replicated by interested parties. As MedPAC noted, its estimate was conservative and the actual average discount experienced by 340B hospitals is likely much higher than 22.5 percent of the ASP. As GAO mentioned, discounts under the 340B Program range from 20 to 50 percent of the ASP (GAO-11-836, page 2). We believe that such reduced payment would meet the requirements under section 1833(t)(14)(A)(iii)(II) of the Act, which states that if hospital acquisition cost data are not available, the payment

for an applicable drug shall be the average price for the drug in the year established under section 1842(o), section 1847A, or section 1847B of the Act, as the case may be, as calculated and adjusted by the Secretary as necessary. We do not have hospital acquisition cost data for 340B drugs and, therefore, proposed to continue to pay for these drugs under our authority at section 1833(t)(14)(A)(iii)(II) of the Act at ASP, and then to adjust that amount by applying a reduction of 22.5 percent, which, as explained throughout this section, is the adjustment we believe is necessary for drugs acquired under the 340B Program.

Specifically, in the CY 2018 OPSS/ASC proposed rule, we proposed to apply section 1833(t)(14)(A)(iii)(II) of the Act to all separately payable drugs and biologicals, including SCODs. However, we proposed to exercise the Secretary's authority to adjust the applicable payment rate as necessary and, for separately payable drugs and biologicals (other than drugs with pass-through payment status and vaccines) acquired under the 340B Program, we proposed to adjust the rate to ASP minus 22.5 percent, which we believe better represents the average acquisition cost for these drugs and biologicals.

As indicated earlier, because ceiling prices are confidential, we are unable to publicly disclose those prices or set payment rates in a way that would allow the public to determine the ceiling price for a particular drug. We believe that the MedPAC analysis that found the average minimum discount of 22.5 percent of ASP adequately reflects the average minimum discount that 340B hospitals paid under the OPSS receive. In addition, we believe that using an average discount to set payment rates for OPSS separately payable drugs would achieve the dual goals of (1) adjusting payments to better reflect resources expended to acquire such drugs, and (2) protecting the confidential nature of discounts applied to a specific drug. Moreover, we do not believe that Medicare beneficiaries should be liable for a copayment rate that is tied to the current methodology of ASP+6 percent when the actual cost to the hospital to purchase the drug under the 340B Program is much lower than the ASP for the drug.

We note that MedPAC excluded vaccines from its analysis because vaccines are not covered under the 340B Program, but it did not exclude drugs with pass-through payment status. Further, because data used to calculate ceiling prices are not publicly available, MedPAC instead estimated “the lower bound of the average discount received

by 340B hospitals for drugs paid under the [OPSS]” (MedPAC May 2015 Report to Congress, page 6). Accordingly, it is likely that the average discount is higher, potentially significantly higher, than the average minimum of 22.5 percent that MedPAC found through its analysis. In the proposed rule, we encouraged the public to analyze the analysis presented in Appendix A of MedPAC's May 2015 Report to Congress.

As noted earlier, we believe that the discount amount of 22.5 percent below the ASP reflects the average minimum discount that 340B participating hospitals receive for drugs acquired under the 340B Program, and in many cases, the average discount may be higher for some covered outpatient drugs due to hospital participation in the PVP, substitution of ASP (which includes additional rebates) for AMP, and that drugs with pass-through payment status were included rather than excluded from the MedPAC analysis. We believe that a payment rate of ASP+6 percent does not sufficiently recognize the significantly lower acquisition costs of such drugs incurred by a 340B-participating hospital. Accordingly, as noted earlier, we proposed to reduce payment for separately payable drugs, excluding drugs on pass-through payment status and vaccines, that were acquired under the 340B Program by 22.5 percent of ASP for all drugs for which a hospital does not append on the claim the modifier mentioned in the proposed rule and discussed further in this final rule with comment period. (As detailed later in this section, we are instead requiring hospitals to append the applicable modifier on the claim line with any drugs that were acquired under the 340B Program.)

Finally, as detailed in the impact analysis section (section XIX.A.5.a.2) of the proposed rule, we also proposed that the reduced payments for separately payable drugs and biologicals purchased under the 340B Program are included in the budget neutrality adjustments, under the requirements in section 1833(t)(9)(B) of the Act, and that the budget neutral weight scalar is not applied in determining payments for these separately paid drugs and biologicals purchased under the 340B Program. In that section, we also solicited public comments on whether we should apply all or part of the savings generated by this payment reduction to increase payments for specific services paid under the OPSS, or under Part B generally, in CY 2018, rather than simply increasing the conversion factor. In particular, we

requested public comments on whether and how the offsetting increase could be targeted to hospitals that treat a large share of indigent patients, especially those patients who are uninsured. In addition, we requested public comments on whether savings associated with this proposal would result in unnecessary increases in the volume of covered services paid under the OPPIs that should be adjusted in accordance with section 1833(t)(2)(F) of the Act. More information on the impact estimate associated with this proposal was included in section XIX.A.5.a.2. of the proposed rule. A summary of the public comments received on the impact estimate, along with our responses to those comments and our estimate of this provision for this final rule with comment period, are included in section XVIII.A.5. of this final rule with comment period.

c. Summaries of Public Comments Received and Our Responses

(1) Overall Comments

Comment: Several commenters, including organizations representing physician oncology practices, pharmaceutical research and manufacturing companies, a large network of community-based oncology practices, and several individual Medicare beneficiaries, supported the proposal. Some of these commenters commended CMS for its proposal, which they believed would help address the growth of the 340B Program, stem physician practice consolidation with hospitals, and preserve patient access to community-based care.

One of these commenters stated that the proposals would reduce drug costs for seniors by an estimated \$180 million a year; help to stop hospital “abuses” of the 340B program; and help reverse the “perverse incentives” that have driven the closure and consolidation of the nation’s community cancer care system.

Another commenter, representing a large network of community-based oncology practices, noted that since 2008, 609 community cancer practices have been acquired or become affiliated with hospitals, with 75 percent of those community cancer practices acquired by 340B-participating hospitals. The commenter stated that the consolidation in oncology care has resulted in a 30 percent shift in the site of service for chemotherapy administration from the physician office setting to the more costly hospital outpatient setting.

One commenter, an organization representing community oncology practices, cited several issues that the proposal would help address, including

that only a small minority of 340B participating hospitals are using the program to benefit patients in need; cancer patients in need are being denied care at 340B participating hospitals or placed on wait lists; and hospitals are making extreme profits on expensive cancer drugs and are consolidating the nation’s cancer care system, reducing patient choice and access and shifting care away from the private, physician-owned community oncology clinics into the more expensive 340B hospital setting, which is increasing costs for Medicare and its beneficiaries. In addition, this commenter stated that the increasing scope and magnitude of required 340B discounts are increasing drug prices to record-breaking levels as manufacturers factor these discounts into pricing decisions. The commenter also cited a report that it recently released that suggests, and provides anecdotal evidence supporting, that some 340B hospitals offered little charity care and turned away some patients in need because those patients were uninsured.²⁸

With respect to the magnitude of the proposed payment reduction of ASP minus 22.5 percent, one commenter noted that although the proposed decrease in payment may seem “severe,” ASP minus 22.5 percent is the minimum discount that hospitals in the 340B Program receive. The commenter further noted that, with 340B discounts on brand drugs approaching, and even exceeding, 50 percent, there is still substantial savings—on the order of 50 percent drug margins—for hospitals to use to provide direct and indirect patient benefits. The commenter also noted that this proposal would result in cost-sharing savings to Medicare beneficiaries, for whom drug cost is an important component of overall outpatient cancer care costs.

Some commenters urged HHS, specifically CMS and HRSA, to work with Congress to reform the 340B Program. One commenter requested greater transparency and accountability on how 340B savings are being used, as well as a specific definition of the “340B patient,” which the commenter noted would require a legislative change.

Response: We thank the commenters for their support. As mentioned in the proposed rule, we share the commenters’ concern that current Medicare payments for drugs acquired under the 340B Program are well in

excess of the overhead and acquisition costs for drugs purchased under the 340B Program. We continue to believe that our proposal would better align Medicare payment for separately payable drugs acquired under the 340B Program with the actual resources expended to acquire such drugs. Importantly, we continue to believe that Medicare beneficiaries should be able to share in the savings on drugs acquired through the 340B Program at a significant discount. We also appreciate the comments supporting the proposed payment amount for drugs acquired under the 340B Program of ASP minus 22.5 percent, which we believe, like several commenters, is an amount that allows hospitals to retain a profit on these drugs for use in the care of low-income and uninsured patients. As detailed later in this section, we are finalizing our proposal, with modifications, in response to public comments.

As previously stated, CMS does not administer the 340B Program. Accordingly, feedback related to eligibility for the 340B Program as well as 340B Program policies are outside the scope of the proposed rule and are not addressed in this final rule with comment period.

Comment: Several commenters expressed concern with the rising cost of drugs and the impact on beneficiaries and taxpayers. These commenters offered varied opinions on whether the proposal would achieve CMS’ goal of lowering drug prices and reducing beneficiary out-of-pocket costs. Some commenters stated that the proposal has the potential to alleviate the financial burden that high-cost drugs place on patients. Other commenters stated that, because the proposal does not address the issue of expansion of 340B entities, the volume of 340B discounted drugs, and the affordability of drugs, especially oncology drugs, CMS should not finalize the proposal.

One commenter, an individual who supported the proposal, stated that although the majority of patients with Medicare Part B coverage have supplemental coverage to pay their coinsurance, significant numbers do not have this additional protection. The commenter noted that, for a drug that is paid at \$10,000 per month, the price reduction would save a beneficiary approximately \$500 a month, which may be the difference between getting treatment and foregoing treatment due to financial reasons.

Another commenter, a large organization with many members who are Medicare beneficiaries, stated that the proposal would provide a measure

²⁸ Community Oncology Alliance. Report: “How Abuse of the 340B Program is Hurting Patients” September 2017. Available at: https://www.communityoncology.org/wp-content/uploads/2017/09/COA_340B-PatientStories_FINAL.pdf.

of price relief to the 16 percent of Medicare beneficiaries without supplemental coverage. The commenter also expressed concern that the proposal would have serious health implications for beneficiaries in safety-net hospitals. The commenter urged HHS to develop proposals that will lower underlying drug prices, but did not provide any specific examples of such proposals. Another commenter stated that the cost of drugs is becoming unsustainable and applying the proposed policy is a decent “baby step” in controlling a situation that is “grossly” unfair to American taxpayers, especially when the development of new drugs is frequently funded to a large extent by taxpayers through Federal grants.

In addition, one commenter, a large organization representing its physician and medical student members, commented that it shares the Administration’s interest in addressing the rising costs of drugs and biologicals. The commenter appreciated that the proposal would address a longstanding concern: That the current payment policy for Part B drugs creates strong incentives to move Medicare beneficiary care from lower cost sites of care (such as physician offices) to higher cost sites of care (such as hospital outpatient departments). The commenter noted that many smaller physician practices have had to refer cancer and other patients who need chemotherapy and other expensive drugs to the hospital outpatient setting because the ASP+6 percent payment does not always cover a physician’s acquisition cost, thereby undermining continuity of care and creating burdens for frail and medically compromised patients.

This commenter also stated that, given the 340B Program’s focus on low-income patients, it is imperative to ensure that an across-the-board reduction actually reflects the size of the 340B discount to avoid creating barriers to access, should both physician practices and the hospital outpatient departments be unable to cover actual acquisition costs. Further, the commenter noted that it is essential that “a bright line policy does not inadvertently deleteriously impact patient access in all sites of care.” Finally, the commenter stated that, while the proposed policy alters the relative disparity between payments for some hospital outpatient departments and physician practices, it still does not address the persistent challenges physician practices face in obtaining payment that covers acquisition costs.

Response: We thank the commenters’ for their feedback and share their concern about the high cost of drugs and

their effect on Medicare beneficiaries. As discussed in detail later in this section, we are finalizing a change to the payment rate for certain Medicare Part B drugs purchased by hospitals through the 340B Program in order to lower the cost of drugs for seniors and ensure that they benefit from the discounts provided through the program. We look forward to working with Congress to provide HHS additional 340B programmatic flexibility, which could include tools to provide additional considerations for safety net hospitals, which play a critical role in serving our most vulnerable populations.

As a general matter, we note that, even though many beneficiaries have supplemental coverage, beneficiaries often pay a premium for such supplemental coverage and those plans make coinsurance payments for the beneficiary. Thus, to the extent Medicare would be lessening the coinsurance amount such supplemental plans would have to make, we would expect the price of such plans to decrease or otherwise reflect these lower costs in the future, thereby lowering the amount that beneficiaries pay for supplemental plan coverage. Further, for those Medicare beneficiaries who do not have supplemental coverage at all or who have a supplemental plan that does not cover all of a beneficiary’s cost-sharing obligation, the proposed policy would directly lower out-of-pocket spending for 340B-acquired drugs for those beneficiaries.

In addition, we note that in the hospital setting, not only are beneficiaries liable for cost-sharing for drugs they receive, but they also incur a “facility fee” solely because the drug was furnished in the hospital setting. As described in section II.A.3.b. of this final rule with comment period, for CY 2018, we are adopting a policy to conditionally package Level 1 and Level 2 Drug Administration services and believe that these steps, taken together, may help encourage site-neutral care in that beneficiaries may receive the same drugs and drug administration services at the physician office setting without a significant difference in their financial liability between settings.

As previously stated, we believe that ASP minus 22.5 percent is a lower bound estimate of the average discount given to hospitals participating in the 340B Program. Accordingly, we disagree that this proposal represents a “bright-line” policy that would hinder safety-net hospitals’ ability to treat patients.

While the commenter’s request that HHS develop proposals to lower underlying drug prices is outside the scope of the proposals made in the

proposed rule, we note that lowering the price of pharmaceuticals is a top priority, and we are committed to finding ways for Medicare payment policy not to incentivize use of overpriced drugs. With respect to Medicare Part B drug payment under the OPSS, we believe that reducing payments on 340B purchased drugs to better align with hospital acquisition costs directly lowers drug costs for those beneficiaries who receive a covered outpatient drug from a 340B participating hospital by reducing their copayments. Further, to the extent that studies have found that 340B participating hospitals tend to use more high cost drugs, we believe that this proposal helps address the incentive for hospitals to utilize these drugs in this manner solely for financial reasons.

The expansion of 340B entities, the volume of 340B discounted drugs, and the affordability of drugs are outside the authority conferred by section 1833(t) of the Act (and, thus, are outside the scope of the proposed rule), and we see no reason to withdraw the proposal solely on account of these issues not being addressed by the proposal. Likewise, we note that the public comments on Medicare Part B drug payment in the physician office setting are also outside the scope of the proposed rule, and, therefore, are not addressed in this final rule with comment period.

Comment: Several commenters, including organizations representing 340B-eligible safety-net hospitals in urban and rural areas and teaching hospitals, were generally opposed to the proposed changes and urged CMS to withdraw the proposal from consideration. As detailed further below, these commenters believed that the Secretary lacks statutory authority to impose such a large reduction in the payment rate for 340B drugs, and contended that such change would effectively eviscerate the 340B Program. The commenters further noted that Medicare payment cuts of this magnitude would greatly “undermine 340B hospitals’ ability to continue programs designed to improve access to services—the very goal of the 340B Program.”

These commenters urged that, rather than “punitively targeting” 340B safety-net hospitals serving vulnerable patients, including those in rural areas, CMS instead redirect its efforts to halt the “unchecked, unsustainable increases” in the price of drugs.

Response: We do not believe that our proposed policy “punitively” targets safety-net hospitals. The current OPSS payment rate of ASP+6 percent significantly exceeds the discounts

received for covered outpatient drugs by hospitals enrolled in the 340B Program, which can be as much as 50 percent below ASP (or higher through the PVP). As stated throughout this section, ASP minus 22.5 percent represents the average minimum discount that 340B enrolled hospitals paid under the OPPS receive. We also have noted that 340B participation does not appear to be well-aligned with the provision of uncompensated care, as some commenters suggested. As stated earlier in this section, while the commenter's request that HHS develop proposals to lower underlying drug prices is outside the scope of the proposals made in the proposed rule, we note that lowering the price of pharmaceuticals is a top priority.

(2) Comments on the Statutory Authority for the 340B Payment Proposal

Many commenters challenged the statutory authority of various aspects of the proposal. These comments are summarized into the broad categories below. For the reasons stated below, we disagree with these comments and believe that our proposal is within our statutory authority to promulgate.

• Secretary's Authority to Calculate and Adjust 340B-Acquired Drug Payment Rates

Comment: Commenters asserted that section 1833(t)(14)(A)(iii)(II) of the Act does not authorize CMS to "calculate and adjust" the payment rate in a manner that would "eviscerate" the 340B Program as it applies to 340B hospitals. Some commenters asserted that the plain and ordinary meaning of the terms "calculate" and "adjust" express a limited and circumscribed authority to set the payment rate. The commenters noted that the Oxford Dictionaries define "calculate" as "determine (the amount or number of something) mathematically;" likewise, to "adjust" is to "alter or move (something) slightly in order to achieve the desired fit, appearance, or result." Consequently, the commenters asserted that section 1833(t)(14)(A)(iii)(II) of the Act restricts the agency to mathematically determining "an appropriate, slight alteration." Further, they posited that the law does not convey the power to adopt what they referred to as a novel, sweeping change to the payment rate that is a significant numerical departure from the previous rate and that would result in a reduction in payment to 340B hospitals of at least \$900 million, according to the agency's own estimates, or \$1.65 billion, according to the commenter's estimates.

Another commenter stated that the Secretary's limited adjustment authority under section 1833(t)(14)(A)(iii)(II) of the Act does not "extend so far as to gut" what it referred to as an "explicit statutory directive". For example, the commenter referred the agency to *Pettibone Corp. v. United States*, 34 F.3d 536, 541 (7th Cir. 1994) (an agency's authority to interpret a statute "must not be confused with a power to rewrite").

Some commenters, including an organization representing over 1,300 providers enrolled in the 340B Program, argued that the proposal would take away almost the entire 340B discount for many 340B drugs, especially brand name drugs (which they asserted were many of the drugs affected by the proposal). These commenters asserted that the Secretary does not have the authority to calculate and adjust 340B-acquired drug rates in this manner and noted that the standard 340B ceiling price for a brand name drug is AMP minus 23.1 percent, although the price can be lower if the drug's best price is lower or if the manufacturer increases the price of the drug more quickly than the rate of inflation. In addition, the commenters asserted that if a brand name drug's 340B ceiling price was based on the standard formula, the proposal would strip the hospital of nearly all its 340B savings because "AMP has been found to be close to ASP." Thus, the commenters asserted, the proposed payment rate of ASP minus 22.5 percent is nearly identical to AMP minus 23.1 percent, leaving the hospital with "virtually no 340B savings."

Some commenters stated that the proposal mistakenly assumes that 340B hospitals purchase most 340B drugs at subceiling prices negotiated by the PVP. These commenters noted that some hospitals estimate that less than 10 percent of the drugs affected by the proposal are available at a subceiling price.

In addition, some commenters contended that subclause (I) of section 1833(t)(14)(A)(iii) establishes that the payment rate for subsequent years be set to the average acquisition cost of the drug taking into account hospital acquisition costs survey data collected through surveys meeting precise statutory requirements, and that such subclause does not provide adjustment authority for the agency. They stated that subclause (II) of section 1833(t)(14)(A)(iii) of the Act directs CMS, where acquisition cost data are not available, to set payment rates by reference to ASP provisions. Considered in context, the commenters stated that the statute reflects Congress's intent to

limit CMS' authority to set payment rates and, consequently, is consistent with adjustment authority under subclause (II)—to convey only limited authority for any agency to adjust the payment rate. The commenters referred to *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012) (Statutory provisions ". . . cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme") to support their conclusions, although the commenters did not elaborate on the particular relevance of this case.

Finally, some commenters raised concern over the Secretary's use of the May 2015 MedPAC estimate as support for the 340B payment proposal. These commenters stated that the Secretary did not conduct his own independent analysis to support the payment proposal nor did he provide justification for use of MedPAC's analysis. One commenter stated that the Secretary cannot implement a payment cut of the magnitude proposed without providing a sufficient and replicable methodology that supports the proposal and that relying on a MedPAC analysis does not suffice for this "important fiduciary, and legal, requirement."

Response: We believe our authority under section 1833(t)(14)(A)(iii)(II) of the Act to "calculate and adjust" drug payments "as necessary for purposes of this paragraph" gives the Secretary broad discretion to adjust payments for drugs, which we believe includes an ability to adjust Medicare payment rates according to whether or not certain drugs are acquired at a significant discount. We disagree that this Medicare payment policy would effectively eviscerate the 340B Program and note that this proposal solely applies to applicable drug payments under the Medicare program; it does not change a hospital's eligibility for the 340B program. Further, under our proposal, we anticipate that the Medicare payment rate would continue to exceed the discounted 340B price the hospital received under the 340B program.

As previously stated, MedPAC's estimate of ASP minus 22.5 percent represents a lower bound estimate of the average minimum discount and the actual discount is likely much higher—up to 50 percent higher, according to some estimates, for certain drugs. In some cases, beneficiary coinsurance alone exceeds the amount the hospital paid to acquire the drug under the 340B Program (OIG November 2015, Report OEI-12-14-00030, page 9). We did not

receive public comments suggesting an alternative minimum discount off the ASP that would better reflect the hospital acquisition costs for 340B-acquired drugs. We believe this is notable because hospitals have their own data regarding their own acquisition costs, as well as data regarding OPPS payment rates for drugs. The fact that hospitals did not submit comments suggesting an alternative minimum discount that would be a better, more accurate reflection of the discount at issue is instructive for two reasons. One, it gives us confidence that our suggested payment of ASP minus 22.5 percent is, in fact, the low bound of the estimate and keeps Medicare payment within the range where hospitals will not be underpaid for their acquisition costs of such drugs. Two, it gives us confidence that the affected hospital community does not believe there is some other number, such as ASP minus 24 percent or ASP minus 17 percent, that would be a better, more accurate measure of what Medicare Part B should pay for drugs acquired at a discount through the 340B Program. Given the limitations in calculating a precise discount for each OPPS separately payable drug, we did not attempt to do so for the proposed rule. Instead, we stated that we believed that using the analysis from the MedPAC report is appropriate because MedPAC's estimate is based on all drugs separately paid under the OPPS except for vaccines, which are not eligible for 340B prices. Furthermore, the analysis is publicly available and can be replicated by interested parties.

With respect to the comments about the PVP, as previously stated, by the end of FY 2015, the PVP had nearly 7,600 products available to participating entities below the 340B ceiling price, including 3,557 covered outpatient drugs with an estimated average savings of 10 percent below the 340B ceiling price. Participation in the PVP is voluntary and free, and we are aware of no reason that an eligible entity would not participate.

Furthermore, we disagree that the Secretary's authority under section 1834(t)(14)(A)(iii)(II) of the Act to calculate and adjust drugs rates as necessary is limited to what some might consider minor changes and find no evidence in the statute to support that position. As previously stated, we believe that ASP minus 22.5 percent represents the average minimum discount that hospitals paid under the OPPS received for drugs acquired under the 340B Program and reiterate that, in many instances, the discount is much higher. Thus, we are using this authority

to apply a downward adjustment that is necessary to better reflect acquisition costs of those drugs.

- Authority To Vary Payment by Hospital Group

Comment: Some commenters asserted that only subparagraph (I), and not subparagraph (II), of section 1833(t)(14)(A)(iii) of the Act permits CMS to vary payment "by hospital group." These commenters suggested that, by including "by hospital group" in subparagraph (I) and omitting it in subparagraph (II), Congress expressed its intent that CMS may not vary prices by hospital group under subparagraph (II). They further commented that the subparagraph (II) methodology must apply to "the drug," and CMS may not vary payment for the same drug based upon the type of hospital.

Response: We disagree with the commenters who argue that the proposed policy would exceed the Secretary's authority under the statute by inappropriately varying payments for drugs by "hospital group" because we rely on section 1833(t)(14)(A)(iii)(II) of the Act, even though the explicit authority to vary payment rates by hospital group is in subclause (I) of section 1833(t)(14)(A)(iii) of the Act, not subclause (II). As noted above, we believe our authority under section 1833(t)(14)(A)(iii)(II) of the Act to "calculate and adjust" drug payments "as necessary for purposes of this paragraph" gives the Secretary broad discretion to adjust payments for drugs, which we believe includes an ability to adjust payment rates according to whether or not certain drugs are acquired at a significant discount for Medicare beneficiaries. Although we acknowledge that hospitals are eligible to receive drugs at discounted rates under the 340B Program if they qualify as a "covered entity" for purposes of the 340B Program, not all drugs for which a covered entity submits a claim for payment under the OPPS are necessarily acquired under the 340B Program. The OPPS payment for those drugs not acquired under the 340B Program would continue to be paid at ASP+6 percent.

We also note generally that the OPPS statute authorized the Secretary to establish appropriate Medicare OPPS payment rates for covered outpatient drugs. After specifically setting forth the payment methodology for 2004 and 2005, Congress provided that the Secretary could set OPPS drug prices in one of two ways: Using the average acquisition cost for the drug for that year, or using the average price for that drug in the year. However, in either case, prices set using either benchmark

may be adjusted by the Secretary. Such adjustments may occur under section 1833(t)(14)(A)(iii)(II) of the Act if the Secretary determines they are "necessary for purposes of" section 1833(t)(14) of the Act, and this paragraph of the Medicare OPPS statute repeatedly discusses terms like "hospital acquisition cost" and "variation in hospital acquisition costs", and specifically notes in one section that it is within the Secretary's authority to determine that the payment rate for one drug "may vary by hospital group." It would be odd for Congress to have a significant delegation of authority to the Secretary, use these specific terms and considerations throughout section 1833(t)(14) of the Act, and then assume the Secretary is foreclosed from taking into account those considerations in adjusting ASP "as necessary for purposes" of section 1833(t)(14) of the Act. The Secretary is generally empowered to adjust drug prices "as necessary" for the overall purposes of section 1833(t)(14) of the Act, and there is nothing in section 1833(t)(14) of the Act to indicate the Secretary is foreclosed from varying Medicare OPPS payment for a drug, depending on whether a 340B hospital acquired that drug at such a substantially lower acquisition cost.

- Authority To Establish Payment Rates in the Absence of Acquisition Cost Survey Data and Authority to Base Payment on an Average Discount

Comment: Some commenters, including a commenter representing teaching hospitals, stated that the Secretary ignored the statutory directive in section 1833(t)(14) of the Act to set payment rates at the average acquisition cost for specific drugs and not to use averages for all drugs. In addition, the commenters stated that section 1833(t)(14) of the Act requires the Secretary to rely on an average of acquisition cost data and sales prices for a given drug, not an average discount that is applied to all drugs acquired under the 340B Program.

One commenter stated that the Secretary impermissibly conflates the two alternative methods for setting payment rates, "essentially discarding Congress' requirement that any survey data used in setting payment rates must be derived from statistically rigorous surveys." This commenter asserted that the Secretary is using MedPAC's estimate of average discounts as a proxy or replacement for the surveys required under subsection (iii)(I).

Response: We disagree that section 1833(t)(14)(A)(iii)(II) of the Act requires use of survey data and note that, unlike

subclause (I) of this section, subclause (II) does not require taking survey data into account for determining average price for the drug in the year. We continue to believe that section 1833(t)(14)(A)(iii)(II) of the Act grants the Secretary the authority to calculate and adjust rates as necessary in the absence of acquisition cost. Moreover, under section 1833(t)(14)(A) of the Act, there still will be one starting, baseline price for an applicable drug, that is, the rate that applies under 1842(o), 1847A, or section 1847B, as the case may be, as calculated and adjusted by the Secretary. For drugs not acquired under the 340B Program, we will continue to utilize that price (ASP+6 percent), which as we have explained “requires no further adjustment” because it “represents the combined acquisition and pharmacy overhead payment for drugs and biologicals.” However, for drugs acquired through the 340B Program, we are adjusting that price downward (ASP minus 22.5 percent) to more closely align with the hospital acquisition cost for a drug when purchased at a discounted price under the 340B Program. In the absence of acquisition costs from hospitals that purchase drugs through the 340B Program, we believe it is appropriate to exercise our authority to adjust the average price for 340B-acquired drugs, which are estimated to be acquired at an average minimum discount of ASP minus 22.5 percent. Importantly, because we are not using authority under section 1833(t)(14)(A)(iii)(I) of the Act (as the commenter suggested), we disagree with the commenter’s suggestion that the Secretary is using the MedPAC analysis to stand in the place of the survey requirement under subclause (I).

- Current Agency View Contrasts With Longstanding Practice

Comment: Some commenters contended that the proposal contrasts sharply with the agency’s previous view and longstanding practice of applying the statutory scheme of section 1833(t)(14) of the Act. These commenters noted that since CMS began relying on subclause (II) in 2012 to set the payment rate, the agency has never invoked the discretionary authority. The commenters stated that, instead, CMS stated that the statutory default of ASP+6 percent “requires no further adjustment” because it “represents the combined acquisition and pharmacy overhead payment for drugs and biologicals.” Moreover, the commenters added, CMS has applied the statutory default rate without further adjustment in each subsequent year. They asserted

that the CY 2018 proposal, in contrast, departs dramatically from longstanding prior practice and adopts a substantially reduced payment rate of ASP minus 22.5 percent for drugs acquired under a 340B Program.

Response: As discussed in the earlier background section, section 1833(t)(14)(A)(iii)(II) of the Act grants the Secretary authority to adjust, as necessary for purposes of paragraph (14) of section 1833(t) of the Act, the applicable payment rate for separately payable covered outpatient drugs under the OPSS. Specifically, we believe that the proposed reduced payment for 340B-acquired drugs would meet the requirements under section 1833(t)(14)(A)(iii)(II) of the Act, which states that if hospital acquisition cost data are not available, the payment for an applicable drug shall be the average price for the drug in the year established under section 1842(o), section 1847A, or section 1847B of the Act, as the case may be, *as calculated and adjusted by the Secretary as necessary for purposes of this paragraph* (paragraph (14) of section 1833(t) of the Act) (emphasis added). We do not have hospital acquisition cost data for 340B drugs and, therefore, we proposed to continue to pay for these drugs under the methodology in our authority at section 1833(t)(14)(A)(iii)(II) of the Act which we determined to be ASP, and then to adjust that amount by applying a reduction of 22.5 percent to that payment methodology, which, as explained throughout this section, is the adjustment we believe is necessary to more closely align with the acquisition costs for drugs acquired under the 340B Program.

As previously stated, we believe that using an average discount to set payment rates for separately payable 340B-acquired drugs will achieve the dual goals of (1) adjusting payments to better reflect resources expended to acquire such drugs and (2) protecting the confidential nature of discounts applied to a specific drug. Furthermore, our proposed and finalized policy will lower OPSS payment rates for Medicare beneficiaries who receive drugs at hospitals subject to the 340B payment reduction.

In addition, we do not believe that the fact that we have not historically utilized our adjustment authority under section 1833(t)(14)(A)(iii)(II) of the Act to adjust payment amounts for separately payable 340B-acquired drugs means we are permanently barred from adjusting these payments where, as here, we have provided a reasoned explanation for doing so. We continue to believe, as the commenter noted, that

ASP+6 percent requires no further adjustment for drugs that are not acquired under the 340B Program because, at this time, we have not found similar evidence of the difference between the statutory benchmark (ASP+6 percent) and average hospital acquisition costs for such drugs. However, that is not the case for 340B-acquired drugs. As explained in detail throughout this section, we believe that a payment amount of ASP minus 22.5 percent for drugs acquired under the 340B Program is better aligned to hospitals’ acquisition costs and thus this adjustment, for drugs acquired under the 340B Program, is necessary for Medicare OPSS payment policy.

- Violation of Section 340B of the Public Health Service Act

Comment: Some commenters stated that the proposed payment reduction would violate the 340B statute, which expressly defines the types of hospitals that may receive the benefits of 340B discounts. One commenter asserted that the payment proposal would “hijack Congress’ carefully crafted statutory scheme by seizing 340B discounts from hospitals and transferring the funds to providers that Congress excluded from the 340B Program,” thereby violating section 340B of the Public Health Service Act. The commenter further noted that discounts under the 340B Program are only available to “covered entities” that are defined by law and that Congress thus intended the benefits of the program to accrue to these providers only. The commenter contended that Congress’ reference to Medicare definitions when describing covered entities demonstrates that it considered the Medicare program when it adopted the 340B Program and decided not to grant discounts to all Medicare hospitals. Rather, the commenter believed that Congress made a deliberate decision to limit the benefits of the 340B Program only to Medicare hospitals that serve large numbers of low-income or other underprivileged patients. In addition, the commenter stated that when Congress has intended Federal health care programs to intrude upon the 340B Program, it has been crystal clear.

In contrast, commenters asserted that Congress has been wholly silent on the relationship between 340B and Medicare Part B, which indicates Congress’s intent that Medicare should not “encroach” upon the 340B Program by “redistributing [340B] discounts to non-340B providers.” The commenters noted that the 340B statute and Medicare have coexisted for several years and that Congress has had ample

opportunity to amend the Medicare statute governing Part B payments and/or the 340B statute to expressly permit CMS to reduce Medicare payments to 340B hospitals, but has not done so. As an example, the commenters cited legislation enacted in 2010, in which Congress amended both the 340B and the Medicare statutes, but did not authorize CMS to redistribute 340B savings to non-340B hospitals or to Part B generally.

Commenters further asserted that the proposed cut to 340B hospitals is also contrary to Congress's intent for the 340B Program to enable safety-net providers to reach more patients and furnish more comprehensive services and would undermine this purpose by preventing the operation of the 340B statute. These commenters suggested that, although manufacturers would still have to give 340B discounts, 340B participating hospitals would receive no benefit from those discounts; thus, the statutory purpose of 340B would be fatally undermined.

Response: We do not believe that this proposal under section 1833(t) of the Act is in conflict with section 340B of the Public Health Service Act. Section 1833(t) of the Act governs Medicare payment policies for covered hospital outpatient department services paid under the OPSS, while section 340B of the Public Health Service Act governs eligibility and program rules for participation in the 340B Program. There are no references in either section of law to each other. In fact, the failure of either statute to reference the other proves the opposite—that each statute stands on its own and neither is hindered or rendered null and void by the other. There is no requirement in the Public Health Service Act that the 340B Program “guarantee” or provide a certain profit from the Medicare program. Likewise, there is no requirement in section 1833(t) of the Act to pay a particular rate for a hospital enrolled in the 340B Program. We agree with the commenters that Congress was aware of both the 340B Program and the OPSS and of the programs' relationships to one another. However, we believe that the silence of each statute with respect to the other should not be viewed as a constraint on the broad authority conferred to the Secretary under section 1833(t) of the Act to establish payment rates under the OPSS.

Furthermore, we are unaware of legislative history or other evidence to corroborate the commenters' belief that Congress' silence on the relationship between 340B and Medicare Part B OPSS payments should be viewed as constraining the Secretary's ability

under section 1833(t)(14) of the Act as to how to calculate payment rates for drugs acquired under the 340B Program under the OPSS. While legislative silence can be difficult to interpret, we note that Congress' silence regarding the 340B Program in enacting Medicare OPSS payment for certain drugs would create the opposite inference. The 340B Program existed well before Congress enacted the Medicare OPSS and payment for certain drugs. If Congress wanted to exempt 340B drugs or entities with a 340B agreement from Medicare OPSS payment for drugs generally, it easily could have done so. Instead, Congress provided for Medicare OPSS drug payments “as calculated and adjusted by the Secretary as necessary,” without any mention of, or restriction regarding, the already existent 340B Program.

We also disagree with commenters who believe that implementing the OPSS payment methodology for 340B-acquired drugs as proposed will “eviscerate” or “gut” the 340B Program. As discussed earlier in the background section, the findings from several 340B studies conducted by the GAO, OIG, and MedPAC show a wide range of discounts that are afforded to 340B hospitals, with some reports finding discounts of up to 50 percent. As stated in the proposed rule, we believe ASP minus 22.5 percent is a conservative estimate of the discount for 340B-acquired drugs and that even with the reduced payment, hospitals will continue to receive savings that can be directed at programs and services to carry out the intent of the 340B Program.

With respect to the comment that the proposal would frustrate the intent of the 340B Program and redirect Medicare payments to other hospitals that do not participate in the 340B Program, we reiterate that we proposed to redistribute the savings in an equal and offsetting manner to all hospitals paid under the OPSS, including those in the 340B Program, in accordance with the budget neutrality requirements under section 1833(t)(9)(B) of the Act. However, we remain interested in exploring ways to better target the offsetting amount to those hospitals that serve low-income and uninsured patients, as measured by uncompensated care. Details on the redistribution of funds are included in section XVIII. of this final rule with comment period.

• Proposal is Procedurally Defective and Inconsistent With Advisory Panel Recommendations

Comment: Some commenters contended that the proposal is procedurally defective under the OPSS statute. The commenters asserted that the Secretary's justification for the proposed reduced rate rests, in part, on intertwined issues related to clinical use and hospital cost of drugs. The commenters objected to CMS' reference to studies suggesting that 340B hospitals may be unnecessarily prescribing more drugs and/or more expensive drugs relative to non-340B hospitals as support for proposing a payment rate that eliminates the differential between acquisition cost and Medicare payment. These commenters cited other studies in an effort to refute the evidence presented in the proposed rule.^{29 30} The commenters believed that CMS should have asked the HOP Panel to consider the intertwined issues of drug cost and clinical use prior to making a proposal to reduce payment for 340B-acquired drugs, and the Secretary should have consulted with the HOP Panel in accordance with section 1833(t)(9)(A) of the Act, as part of the process of review and revision of the payment groups for covered outpatient department services and the relative payment weights for the groups. The commenters argued that, because the Secretary did not consult with the HOP Panel before publishing its 340B payment proposal, the Secretary acted contrary to the statute. The commenters noted that at the August 21, 2017 meeting of the HOP Panel that occurred after publication of the proposed rule, the Panel urged that CMS not finalize the proposed payment reduction.

At the August 21, 2017 meeting of the HOP Panel, the Panel made the following recommendations with respect to the proposed policy for OPSS payment for drugs acquired under the 340B Program:

- The Panel recommended that CMS:
- Not finalize its proposal to revise the payment rate for drugs purchased under the 340B Program;
 - Collect data from public comments and other sources, such as State

²⁹ Dobson Davanzo & Associates, Update to a 2012 Analysis of 340B Disproportionate Share Hospital Services Delivered to Vulnerable Patient Populations Eligibility Criteria for 340B DSH Hospitals Continue to Appropriately Target Safety Net Hospitals (Nov. 15, 2016). Available at: http://www.340bhealth.org/files/Update_Report_FINAL_11.15.16.pdf.

³⁰ Dobson DaVanzo, Analysis of the Proportion of 340B DSH Hospital Services Delivered to Low-Income Oncology Drug Recipients Compared to Non-340B Provider (2017). Available at: <http://www.340bhealth.org/files/LowIncomeOncology.pdf>;

Medicaid programs in Texas and New York, on the potential impact of revising the payment rate, implementing a modifier code, and the effects of possible mechanisms for redistributing the savings that result from changing the payment rate; and

- Assess the regulatory burden of changing the payment rate and the potential impact on 340B hospitals of redistributing dollars saved.

In addition, one commenter suggested that the proposal was “procedurally defective” because the proposal was solely articulated through preamble and did not propose to amend the Code of Federal Regulations (CFR). The commenter asserted that the proposal cannot be implemented without a change to the Medicare regulations and stated that the Medicare statute requires CMS to issue regulations when altering the substantive standards for payment.³¹ The commenter stated that the proposal falls squarely within this requirement because it would change the substantive legal standard governing payments to 340B hospitals for separately payable drugs.

Another commenter stated that CMS’ proposal also violates section 1833(t)(2)(E) of the Act because the agency is not authorized and did not offer a reasoned basis for applying savings achieved as a result of its proposal to reduce significantly payments to 340B hospitals to Part B services generally. Likewise, a few commenters stated that the Administrative Procedure Act (APA) requires the Secretary to offer a “reasoned basis” for proposing to take an unprecedented action. The commenters suggested that, as a matter of longstanding policy and practice, the Secretary has never applied such a sweeping change to drug rates nor has it ever applied savings from OPPS outside of the OPPS.

Response: We remind the commenters that our proposal was based on findings that ASP minus 22.5 percent reflects the minimum average discount that hospitals in the 340B Program receive. We are familiar with the reports the commenters referenced in their comments. However, we continue to believe, based on numerous studies and reports, that 340B participation is not well correlated to the provision of

uncompensated care and is associated with differences in prescribing patterns and drug costs. For example, as noted earlier in this section, GAO found that “in both 2008 and 2012, per beneficiary Medicare Part B drug spending, including oncology drug spending, was substantially higher at 340B DSH hospitals than at non-340B hospitals,” thus indicating that, on average, beneficiaries at 340B DSH hospitals were either prescribed more drugs or more expensive drugs than beneficiaries at the other non-340B hospitals in GAO’s analysis.

With respect to the HOP Panel, we believe that this comment reflects a misunderstanding of the Panel’s role in advising the Secretary. Section 1833(t)(9)(A) of the Act provides that the Secretary shall consult with an expert outside advisory panel composed of an appropriate selection of representatives of providers to review (and advise the Secretary concerning) the clinical integrity of the groups and weights. Such panel may use data collected or developed by entities and organizations (other than the Department of Health and Human Services) in conducting such review.

The provisions described under section 1833(t)(9)(A) of the Act do not impose an obligation on the Secretary to consult with the HOP Panel *prior* to issuing a notice of proposed rulemaking nor do they require the Secretary to adopt the Panel’s recommendation(s). Rather, the statute provides that the Secretary shall consult with the Panel on policies affecting the clinical integrity of the ambulatory payment classifications and their associated weights under the OPPS. The Secretary met the requirement of section 1833(t)(9)(A) of the Act at the HOP Panel August 21, 2017 meeting in which the Panel made recommendations on this very proposed policy. The HOP Panel’s recommendations, along with public comments to the proposed rule, have all been taken into consideration in the development of this final rule with comment period.

While we are not accepting the HOP Panel’s recommendation not to finalize the payment reduction for drugs purchased under the 340B Program, as discussed later in this section, we are modifying our position on the modifier in an effort to ease administrative burden on providers, taking into account the way in which the modifier is used in several State Medicaid programs, as the Panel recommended. In addition, we have collected data from public comments on the potential impact of revising the payment rate, implementing a modifier, and the effects

of possible mechanisms for redistributing the “savings” (or the dollars that result) from changing the payment rate and have assessed the regulatory burden of changing the payment rate and the potential impact on 340B hospitals of redistributing dollars saved, all of which were steps the HOP Panel recommended we take.

Regarding the comments asserting that the Secretary is out of compliance with procedures used to promulgate regulations as described under section 1871 of the Act (42 U.S.C. 1395hh), we note that we have received public comments on our interpretation of the Medicare statute, and we respond to those comments above. We further note that we did not establish in the Code of Federal Regulations the rates for separately payable, nonpass-through drugs and biologicals in past rulemakings. Because we have not adopted regulation text that prescribes the specific payment amounts for separately payable, nonpass-through drugs and biologicals, there was no regulation text to amend to include our proposed payment methodology for drugs acquired under the 340B Program. However, this does not mean that payment rates for separately payable drugs were not available to the public. That information is available in Addendum B to this final rule with comment period, which lists the national payment rates for services paid under the OPPS, including the payment rates for separately payable drugs and biologicals based on ASP+6 percent. We note that we have not provided the reduced payment rates for separately payable drugs and biologicals acquired under the 340B Program in Addendum B, but hospitals can arrive at those rates using the ASP+6 percent rate that is included in Addendum B. Finally, with respect to comments on redistribution of the dollars that result from the 340B payment policy, we are finalizing our proposal to achieve budget neutrality for the payment reduction for 340B-acquired drugs through an increase in the conversion factor. We disagree that our proposal to apply budget neutrality in accordance with section 1833(t)(9)(B) of the Act violates the APA or statutory authority. Further, we note that if we decide to take a different approach with respect to the redistribution of funds for budget neutrality in the future, we will consider such approach in future rulemaking.

- Impact on Medicare Beneficiary Cost-Sharing

Comment: Some commenters noted that Medicare beneficiaries, including dual-eligible Medicare beneficiaries,

³¹ “No rule, requirement, or other statement of policy (other than a national coverage determination) that establishes or changes a substantive legal standard governing the scope of benefits, the payment for services, or the eligibility of individuals, entities, or organizations to furnish or receive services or benefits under this subchapter shall take effect unless it is promulgated by the Secretary by regulation. . . .” Section 1871 of the Social Security Act (42 U.S.C. 1395hh).

would not directly benefit from a lowered drug copayment amount. The commenters noted that many beneficiaries have supplemental insurance that covers their out-of-pocket drug costs, in whole or in part. These commenters asserted that the proposal would actually increase their out-of-pocket costs for other Part B benefits.

Response: The cost-sharing obligation for Medicare beneficiaries is generally 20 percent of the Medicare payment rate. While many Medicare beneficiaries may have supplemental coverage that covers some or all of their out-of-pocket expenses, not all beneficiaries have such coverage. This policy will lower both the amount that a beneficiary is responsible to pay as well as the amount that any supplemental insurance, including the Medicaid program, will pay on behalf of the beneficiary. While we are implementing this policy in a budget neutral manner equally across the OPSS for CY 2018 for non-drug items and services, we may revisit how any savings from the lowered drug payment rate for 340B drugs may be allocated in the future and continue to be interested in ways to better target the savings to hospitals that serve the uninsured and low-income populations or that provide a disproportionate share of uncompensated care.

In addition, as noted earlier in this section, in the hospital setting, not only are beneficiaries liable for cost-sharing for drugs they receive, but they also incur a “facility fee” solely because the drug was furnished in the hospital setting. As described in section II.A.3.b. of this final rule with comment period, for CY 2018, we are adopting a policy to conditionally package Level 1 and Level 2 drug administration services and believe that these steps taken together may help encourage site-neutral care in that beneficiaries may receive the same drugs and drug administration services at the physician office setting without a significant difference in their financial liability between settings.

- Calculation of Savings

Comment: Commenters disagreed with CMS’ impact estimate and a few commenters provided their own analysis of the 340B drug payment proposal. One commenter believed that even if CMS implements the policy as proposed, in a budget neutral manner within the OPSS through an offsetting increase in the conversion factor, payments for non-drug APCs would increase across hospitals by approximately 3.7 percent (in contrast to CMS’ estimate of 1.4 percent). According to the commenter, this

redistribution would result in a net decrease in payments to 340B hospitals of approximately 2.6 percent, or approximately \$800 million. The commenter asserted that CMS’ proposal would remove \$800 million intended to support what it referred to as the congressionally mandated mission of 340B hospitals from these already vulnerable facilities and redistribute these dollars to other hospitals that do not participate in the 340B Program. Likewise, the commenter challenged CMS’ suggested alternative approaches to achieving budget neutrality, such as applying offsetting savings to specific services within the OPSS or outside of the OPSS to Part B generally (such as to physician services under the Medicare Physician Fee Schedule), which the commenter believed would similarly penalize these most vulnerable hospitals and inhibit their efforts to carry out the purpose of the 340B Program. Finally, other commenters noted that implementing the proposed policy in a non-budget neutral manner would effectively “gut” the 340B Program.

Response: With respect to comments on the proposed distribution of savings, we refer readers to section XVIII. of this 2018 OPSS/ASC final rule with comment for discussion on the redistribution of savings that result from the estimated impact of the 340B policy as well as calculation of budget neutrality. Briefly, for CY 2018, we are implementing the alternative payment methodology for drugs purchased under the 340B Program in a budget neutral manner within the OPSS through an offsetting increase in the conversion factor for non-drug services. Therefore, the resulting savings from the 340B payment policy will be redistributed pro rata through an increase in rates for non-drug items and services under the OPSS. We have already addressed comments relating to the assertion that our proposal would “gut” or “eviscerate” the 340B Program. Likewise, we have addressed the interaction between our authority under section 1833(t)(14)(A) of the Act relative to section 340B of the Public Health Service Act in our responses above.

(3) Other Areas

Comment: MedPAC commented reiterating its recommendations to Congress in its March 2016 Report to the Congress. Specifically, MedPAC commented that it recommended that payment rates for all separately payable drugs provided in a 340B hospital should be reduced to 10 percent of the ASP rate (resulting in ASP minus 5.3 percent after taking application of the sequester into account). MedPAC noted

that its March 2016 report also included a recommendation to the Congress that savings from the reduced payment rates be directed to the Medicare-funded uncompensated care pool, which would target hospitals providing the most care to the uninsured, and in that way benefit indigent patients, and that payments be distributed in proportion to the amount of uncompensated care that hospitals provide. MedPAC believed that legislation would be needed to direct drug payment savings to the uncompensated care pool and noted that current law requires the savings to be retained with the OPSS to make the payment system budget neutral. MedPAC encouraged the Secretary to work with Congress to enact legislation necessary to allow MedPAC’s recommendation to be implemented, if such recommendation could not be implemented administratively. MedPAC further noted that legislation would also allow Medicare to apply the policy to all OPSS separately payable drugs, including those on pass-through payment status.

Response: We thank MedPAC for its comments and for its clarification that its recommendation that “[t]he Congress should direct the Secretary of the Department of Health and Human Services to reduce Medicare payment rates for 340B hospitals’ separately payable 340B drugs by 10 percent of the average sales price (ASP)” was intended to be 10 percent lower than the current Medicare rate of ASP+6 percent and would result in a final OPSS payment of ASP minus 5.3 percent when taking the sequester into account. However, we do not believe that reducing the Medicare payment rate by only 10 percentage points below the current payment rate of ASP+6 percent (that is, ASP minus 4 percent) would better reflect the acquisition costs incurred by 340B participating hospitals. In its May 2015 Report to the Congress, MedPAC estimated that the average minimum discount for a 340B hospital paid under the OPSS was ASP minus 22.5 percent, which it noted was a conservative, “lower bound” estimate. Further, in its March 2016 Report to the Congress, MedPAC stated that, “[i]n aggregate, the Office of Inspector General (OIG) estimates that discounts across all 340B providers (hospitals and certain clinics) average 34 percent of ASP, allowing these providers to generate significant profits when they administer Part B drugs (MedPAC March 2016 Report to Congress, page 76). MedPAC further noted the estimate of the aggregate discount was based on all covered

entities (hospitals and certain clinics). Because 340B hospitals accounted for 91 percent of Part B drug spending for all covered entities in 2013, it is reasonable to assume that 340B hospitals received a discount similar to 33.6 percent of ASP (MedPAC March 2016 Report to Congress, page 79).

Further, as we stated in the proposed rule, the GAO reported that the amount of the 340B discount ranges from an estimated 20 to 50 percent discount, compared to what the entity would have otherwise paid to purchase the drug. In addition, voluntary participation in the PVP results in a covered entity paying a subceiling price on certain covered outpatient drugs (estimated to be approximately 10 percent below the ceiling price). (U.S. Department of Health and Human Services, HRSA FY 2018 Budget Justification)

Accordingly, we continue to believe that ASP minus 22.5 percent represents a conservative estimate of the average minimum discount that 340B-enrolled hospitals paid under the OPPI receive for drugs purchased with a 340B Program discount and that hospitals likely receive an even steeper discount on many drugs, especially brand name drugs. We also continue to believe that section 1833(t)(14)(A)(iii)(II) of the Act allows the Secretary to make adjustments, if hospital acquisition cost data is not available, as necessary, so that the Medicare payment rate better represents the acquisition cost for drugs and biologicals that have been acquired with a 340B discount.

With respect to MedPAC's comment regarding targeting the savings to uncompensated care, we refer readers to section XVIII.A.5. of this final rule with comment period.

- Comments Regarding Rural Hospitals

Comment: Commenters representing rural hospitals, particularly RRCs and SCHs, expressed opposition to the proposal, noting that it could be especially harmful to rural hospitals in light of the "hospital closure crisis." One commenter cited a report from a health analytics company and noted that since 2010, 80 rural hospitals have closed and that one-third of remaining rural hospitals are vulnerable to closure, with 41 percent of rural hospitals operating at a financial loss.

Commenters noted that rural hospitals enrolled in the 340B Program depend on the drug discounts to provide access to expensive, necessary care such as labor and delivery and oncology infusions. The commenters stated that rural Americans are more likely to be older, sicker, and poorer than their urban counterparts. The commenter gave

examples of rural hospitals that have used profit margins on 340B-acquired drugs to offset uncompensated care and staff emergency departments. In addition, the commenters stated that a portion of rural hospitals are excluded from purchasing orphan drugs through the 340B Program. Therefore, the commenters stated, these hospitals often use their 340B savings to offset the expense of purchasing orphan drugs, which they note comprise a growing number of new drug approvals.

In addition, a commenter representing several 340B-enrolled hospitals stated that multiple hospitals report that the 340B Program is the reason the hospital can provide oncology infusions in their local community and that the chemotherapy infusion centers tend to be small with variation in patients served based on the needs of the community. The commenter stated that, without the 340B Program, many rural hospitals would likely need to stop providing many of the outpatient infusions, thereby forcing patients to either travel 35 miles (in the case of SCHs which must generally be located at least 35 miles from the nearest like hospital) to another facility or receive care in a hospital inpatient setting, which is a more costly care setting.

Another commenter, a member of Congress representing a district in the State of Ohio, commented that while the 340B Program is in need of reform, the program remains an important safety net for rural hospitals in Ohio and around the country. The commenter stated that 340B hospitals offer safety-net programs to their communities, including opioid treatment programs, behavioral health science programs, and others. The commenter further stated that the 340B drug payment proposal did not address broader structural issues with the 340B Program itself, including lack of oversight and clear guidance and definitions, and that the proposal could harm the hospitals that the 340B Program was intended to help. In addition, the commenter noted that "arbitrary cuts" to the 340B Program for safety-net hospitals could have detrimental impacts on the economic growth and opportunities in the communities those hospitals serve and that the proposal does not advance the larger goals of 340B Program reform.

One commenter noted that SCHs face 47.5 percent higher levels of bad debt and 55 percent lower profit margins. Thus, even with 340B discounts, the commenter argued that rural hospitals like rural SCHs are financially threatened. Commenters also noted that rural hospitals are typically located in lower income economic areas and are

not able to absorb the proposed reduction in drug payment for 340B purchased drugs. Moreover, commenters suggested that the proposal disproportionately impacts rural hospitals compared to its effect on urban hospitals.

Finally, commenters requested that, if CMS finalizes the policy as proposed, CMS exempt hospitals with a RRC or SCH designation from the alternative 340B drug payment policy. The commenters asserted that RRCs and SCHs are rural safety-net hospitals that provide localized care for Medicare beneficiaries and also serve as "economic engines" for many rural communities.

Response: We share commenters' concerns about access to care, especially in rural areas where access issues may be even more pronounced than in other areas of the country. We note our proposal would not alter covered entities' access to the 340B Program. The alternative 340B drug payment methodology solely changes Medicare payment for 340B-acquired drugs.

Medicare has long recognized the particularly unique needs of rural communities and the financial challenges rural hospital providers face. Across the various Medicare payment systems, CMS has established a number of special payment provisions for rural providers to maintain access to care and to deliver high quality care to beneficiaries in rural areas. With respect to the OPPI, section 1833(t)(13) of the Act provided the Secretary the authority to make an adjustment to OPPI payments for rural hospitals, effective January 1, 2006, if justified by a study of the difference in costs by APC between hospitals in rural areas and hospitals in urban areas. Our analysis showed a difference in costs for rural SCHs. Therefore, for the CY 2006 OPPI, we finalized a payment adjustment for rural SCHs of 7.1 percent for all services and procedures paid under the OPPI, excluding separately payable drugs and biologicals, brachytherapy sources, and devices paid under the pass-through payment policy, in accordance with section 1833(t)(13)(B) of the Act. We have continued this 7.1 percent payment adjustment since 2006.

In the CY 2018 OPPI/ASC proposed rule, we sought public comment for future policy refinements on whether, due to access to care issues, exceptions should be granted to certain groups of hospitals, such as those with special adjustments under the OPPI (for example, rural SCHs or PPS-exempt cancer hospitals) if a policy were adopted to adjust OPPI payments for drugs acquired under the 340B program.

Taking into consideration the comments regarding rural hospitals, we believe further study on the effect of the 340B drug payment policy is warranted for classes of hospitals that receive statutory payment adjustments under the OPSS. In particular, given challenges such as low patient volume, it is important that we take a closer look at the effect of an ASP minus 22.5 percent payment on rural SCHs.

With respect to RRCs, we note that there is no special payment designation for RRCs under the OPSS. By definition, RRCs must have at least 275 beds and therefore are larger relative to rural SCHs. In addition, RRCs are not subject to a distance requirement from other hospitals. Accordingly, at this time, we are not exempting RRCs from the 340B payment adjustment.

For CY 2018, we are excluding rural SCHs (as described under the regulations at 42 CFR 412.92 and designated as rural for Medicare purposes) from this policy. We may revisit our policy to exempt rural SCHs, as well as other hospital designations for exemption from the 340B drug payment reduction, in the CY 2019 OPSS rulemaking.

- Children's and PPS-Exempt Cancer Hospitals

Comment: Commenters representing children's hospitals ("children's") raised objections to the proposal because of the potential impact on the approximate 8,000 children with end-stage renal disease (ESRD) who are eligible for Medicare. One commenter cited that currently 48 children's hospitals participate in the 340B Program and rely on the savings the program provides to enhance care for vulnerable children. According to the commenter, pediatric ESRD patients require high levels of care and rely on life-saving pharmaceuticals that often come at a high cost. Therefore, the commenters posited that it is because children's patients are more expensive to treat and not because of inappropriate drug use that 340B hospitals incur higher drug expenditures. In addition, the commenters expressed concern with the effect the 340B drug payment policy may have on State Medicaid programs, considering Medicaid is the predominant payer type for children's hospitals. The commenters requested that, unless CMS is able to examine the impact on pediatric Medicare beneficiaries, CMS should exempt children's hospitals from the alternative 340B drug payment methodology.

An organization representing PPS-exempt cancer hospitals commented that CMS' proposal would severely

harm the hospitals that treat the most vulnerable and underserved patients and communities, undermining these hospitals' ability to continue providing programs designed to improve access to services. The commenter believed that assumptions alluded to in the CY 2018 OPSS/ASC proposed rule, which suggested that providers are abusing the savings generated from the 340B Program or potentially creating incentives to over utilize drugs, are inaccurate and that clinicians provide the care that is necessary to treat a patient's disease. The commenter suggested that CMS work with, or defer to, HRSA to first conduct a complete analysis of how the 340B Program is utilized for the benefit of patients prior to proposing any changes to Medicare payment for drugs purchased through the program.

Response: We share the commenters' views on protecting access to high quality care for all Medicare beneficiaries, including those treated in children's or PPS-exempt cancer hospitals. Further, because of how these classes of hospitals are paid under the OPSS, we recognize that the 340B drug payment proposal may not result in reduced payments for these hospitals in the aggregate.

Specifically, in accordance with section 1833(t)(7)(D)(ii) of the Act, we make transitional outpatient payments (TOPs) to both children's and PPS-exempt cancer hospitals. That is, these hospitals are permanently held harmless to their "pre-BBA amount," and they receive hold harmless payments to ensure that they do not receive a payment that is lower in amount under the OPSS than the payment amount they would have received before implementation of the OPSS. Accordingly, if we were to reduce drug payments to these hospitals on a per claim basis, it is very likely that the reduction in payment would be paid back to these hospitals at cost report settlement, given the TOPs structure.

Accordingly, we believe it is appropriate to exempt children's and PPS-exempt cancer hospitals from the alternative 340B drug payment methodology for CY 2018. Therefore, for CY 2018, we are excluding children's and PPS-exempt cancer hospitals from the alternative 340B drug payment policy. As discussed in a later section in this final rule with comment period, because we are redistributing the dollars in a budget neutral manner within the OPSS through an offsetting increase to the conversion factor, children's hospitals and PPS-exempt cancer hospitals will receive a higher payment when providing a non-drug service.

In summary, we are adopting for CY 2018 an exemption for rural SCHs, children's hospitals, and PPS-exempt cancer hospitals from the alternative 340B drug payment methodology. These three types of hospitals will not be subject to a reduced drug payment for drugs that are purchased under the 340B Program in CY 2018. We may revisit the specific types of hospitals excluded, if any, from the 340B payment policy in CY 2019 rulemaking. However, as discussed in more detail below, it remains important to collect information on which drugs being billed to Medicare were acquired under the 340B Program. Accordingly, these three types of hospitals will still be required to report an informational modifier "TB" for tracking and monitoring purposes. We may revisit this 340B drug payment policy, including whether these types of hospitals should continue to be excepted from the reduced Medicare payment rate, in future rulemaking.

- Biosimilar Biological Products

Comment: Some commenters expressed opposing views about applying the proposed 340B payment methodology to biosimilar biological products. One pharmaceutical manufacturer recommended that the Secretary use his equitable adjustment authority at section 1833(t)(2)(E) of the Act to apply a narrow equitable adjustment to biosimilar biological products with pass-through payment status to pay for these drugs at ASP minus 22.5 percent of the reference product rather than ASP+6 percent of the reference product. The commenter asserted that excluding biosimilar biological products from the alternative 340B payment methodology would result in a significant payment differential between biosimilar biological products and reference products which may cause providers to switch patients to different products for financial reasons, rather than clinical factors. The commenter stated that, if the policy is implemented as proposed, the competitive biosimilar marketplace would significantly change because Medicare would pay more for the biosimilar biological product with pass-through payment status and weaken market forces. The commenter estimated that if the 340B drug policy is implemented as proposed, up to \$50 million of any savings could be lost due to hospitals switching to the biosimilar biological product on pass-through payment status (that will be paid at ASP+6 percent of the reference product). Moreover, the commenter pointed out that CMS' policy to only

provide pass-through payments for the first eligible biosimilar biological product of any reference biological product would also create a similar payment disadvantage for any subsequent biosimilar biological product, which would be ineligible for pass-through payment under CMS' policy.

Another commenter, a different pharmaceutical manufacturer, requested that CMS exclude biosimilar biological products from the proposed payment adjustment until such time as the biosimilar biological product market is better established. The commenter indicated that while a biosimilar biological product is less expensive to the Medicare program, hospitals are incented by the 340B Program to purchase the originator product because of "the spread" or payment differential with respect to the originator product. Moreover, the commenter stated that applying the proposed adjustment to payment for biosimilar biological products in certain hospitals will retain market share for the more expensive reference product that is further compounded by market practices of volume-based rebates and exclusionary contracts for the reference product.

Response: We understand the commenters' concerns. As discussed in section V.B.2. of this CY 2018 OPPS/ASC final rule with comment period, we are adopting the biosimilar biological products HCPCS coding established under the CY 2018 MPFS final rule. Briefly, we adopted a final policy to establish separate HCPCS codes for each biosimilar biological product for a particular reference product beginning January 1, 2018. In addition, we also stated in section V.B.2. of this CY 2018 OPPS/ASC final rule with comment period that we are making a conforming amendment to our pass-through payment policy for biosimilar biological products such that each FDA-approved biosimilar biological product will be eligible for transitional pass-through payment instead of only the first biosimilar for a particular reference product.

Therefore, given the policy changes affecting coding and payment for biosimilar biological products that we are adopting in the CY 2018 MPFS final rule and this CY 2018 OPPS/ASC final rule with comment period, we disagree with the commenters that we should exclude biosimilar biological products from the 340B payment policy or use our equitable adjustment authority under section 1833(t)(2)(E) of the Act to adjust payment to ASP minus 22.5 percent of the reference product for biosimilar biological products with pass-through payment status. We

believe the statutory provision on transitional drug pass-through payment under section 1833(t)(6)(D)(i) of the Act provides for an explicit payment for drugs eligible for pass-through payment. Therefore, we are unable to accept the commenter's request to pay a biosimilar biological product on pass-through payment status the reduced 340B payment rate. We are adopting a policy that any biosimilar biological product with pass-through payment status will be exempt from the alternative payment methodology for 340B drugs and will continue to be paid at ASP+6 percent of the reference product. Biosimilar biological products that are not on pass-through payment status will be paid ASP minus 22.5 percent of the reference product. We believe it is appropriate to pay this amount for biosimilar biological products as it is consistent with the amount paid for non-340B-acquired biosimilar biological products, which is ASP+6 percent of the reference product. Currently, there are two biosimilar biological products available on the market and both are on pass-through payment status for the entirety of CY 2018. Therefore, no biosimilar biological products currently available will be affected by the alternative payment methodology for 340B-acquired drugs for CY 2018. We recognize the concerns about paying different rates for similar drugs and biologics and continue to assess the feasibility and practicality of an alternative 340B payment adjustment for biosimilar biological products in the future.

- **Nonexcepted Off-Campus Hospital Outpatient Departments**

Comment: A few commenters noted that CMS' proposed alternative payment methodology for 340B purchased drugs would not apply to nonexcepted off-campus provider-based departments (PBDs) of a hospital and could result in behavioral changes that may undermine CMS' policy goals of reducing beneficiary cost-sharing liability and undercut the goals of section 603 of the Bipartisan Budget Act of 2015. Commenters recommended that, if CMS adopts a final policy to establish an alternative payment methodology for 340B drugs in CY 2018, CMS also apply the same adjustment to payment rates for drugs furnished in nonexcepted off-campus PBDs of a hospital if such drugs are acquired under the 340B Program. In addition, the commenters believed that because CMS did not propose to limit the expansion of services or volume increases at excepted off-campus PBDs, CMS will create financial incentives for hospitals to shift or reallocate services

to the site of care that pays the highest rate for an item or service.

Response: We appreciate the commenter's concerns about potential unintended consequences of our proposal. We will continue to monitor the billing patterns of claims submitted by nonexcepted off-campus outpatient PBDs as we continue to explore whether to pursue future rulemaking on the issues of clinical service line expansion or volume increases, and other related section 603 implementation policies.

In the CY 2017 OPPS/ASC final rule with comment period, we discussed the provision of section 603 of the Bipartisan Budget Act of 2015 (Pub. L. 114-74), enacted on November 2, 2015, which amended section 1833(t) of the Act. Specifically, this provision amended the OPPS statute at section 1833(t) by amending paragraph (1)(B) and adding a new paragraph (21). As a general matter, under sections 1833(t)(1)(B)(v) and (t)(21) of the Act, applicable items and services furnished by certain off-campus outpatient departments of a provider on or after January 1, 2017, are not considered covered outpatient department services as defined under section 1833(t)(1)(B) of the Act for purposes of payment under the OPPS and are instead paid "under the applicable payment system" under Medicare Part B if the requirements for such payment are otherwise met (81 FR 79699). We issued an interim final rule with comment period along with the CY 2017 OPPS/ASC final rule with comment period to establish the MPFS as the "applicable payment system," which will apply in most cases, and payment rates under the MPFS for non-excepted items and services furnished by nonexcepted off-campus outpatient provider based departments (PBDs) (81 FR 79720). (Other payment systems, such as the Clinical Laboratory Fee Schedule, continue to apply in appropriate cases.) That is, items and services furnished by nonexcepted off-campus outpatient PBDs, are nonexcepted items and services that are not covered outpatient services, and thus, are not payable under the OPPS. Rather, these nonexcepted items and services are paid "under the applicable payment system," which, in this case, is generally the MPFS.

As we discussed in the CY 2017 OPPS/ASC interim final with comment period (81 FR 79718) and reiterated in the CY 2018 MPFS final rule, payment for Part B drugs that would be separately payable under the OPPS (assigned status indicator "K") but are not payable under the OPPS because they are furnished by nonexcepted off-campus outpatient PBDs will be paid in

accordance with section 1847A of the Act (generally, ASP+6 percent), consistent with Part B drug payment policy in the physician office. We did not propose to adjust payment for 340B-acquired drugs in nonexcepted off-campus PBDs in CY 2018 but may consider adopting such a policy in CY 2019 notice-and-comment rulemaking.

- Data Collection and Modifier

Comment: The vast majority of commenters objected to CMS' intention to require hospitals that *do not* purchase a drug or biological through the 340B program to apply a modifier to avoid a reduced drug payment. A few commenters supported the modifier proposal. The commenters who disagreed with proposal stated that it would place an unnecessary administrative and financial burden on hospitals that do not participate or are not eligible to participate in the 340B Program. Similarly, the commenters stated that the modifier requirement as described in the proposed rule would put a financial and administrative strain on hospitals with fewer resources. In addition, the commenters contended that a requirement for hospitals to report a modifier for drugs that were not acquired under the 340B Program would place hospitals at significant risk for noncompliance if not implemented correctly, which many commenters believe is nearly impossible to do. As an alternative approach, numerous commenters recommended that CMS require hospitals that *do* purchase a drug under the 340B Program to report the modifier, rather than those that do not.

Regarding a January 1, 2018, implementation date for the modifier, some commenters expressed concern and doubted their ability to implement the modifier as described in the proposed rule accurately. The commenters indicated that additional time would be needed to adapt billing systems, allow for testing of claims reported with the modifier, and educate staff. Based on discussion of how the modifier would work in the proposed rule, the commenters stated that hospitals would either have to append the modifier to the claim at the time the drug is furnished, or retroactively apply the modifier, thus delaying claims submission to Medicare.

The commenters provided detailed descriptions on hospital pharmacy set up, including information on software tools to support inventory management of drugs dispensed to 340B and non-340B patients (based on HRSA definition of an eligible patient). One commenter indicated that the drug

supply system used for purchasing covered outpatient drugs is completely separate from—and does not necessarily communicate with—the hospital's pharmacy drug dispensing and patient billing systems. While these software tools enable split-billing to distinguish 340B and non-340B patients, the commenters noted that this patient determination is typically not done in real time when a drug is administered. Commenters noted that 340B hospitals that use split-billing software do not receive information on 340B patient status on a daily basis and the proposal could result in delayed billing. The commenters stated that hospitals typically make these determinations retrospectively and it may be 3 to 10 days post-dispensing before the hospital knows whether a drug was replenished under 340B or at regular pricing. The commenters noted that, under this “replenishment model,” hospitals track how many 340B-eligible drugs are used, and once enough drugs are dispensed to complete a package, they will replenish the drug at the 340B rate. As such, the commenters argued that hospitals do not know when the drug is dispensed whether it will cost them the 340B rate or the wholesale acquisition cost (WAC). Therefore, the commenters expressed concern that the modifier requirement as described in the proposed rule would result in billing delays and, for some hospitals, may cause a short-term interruption in cash flow.

In addition, the commenters requested that, while the payment reduction would apply to nonpass-through separately payable drugs purchased with a 340B discount, CMS accept the modifier when reported with drug HCPCS codes that are packaged (and for which no separate payment will be made) to reduce or prevent operational burden that may be caused if affected providers have to determine on a claim-by-claim basis whether a drug is eligible for separate payment.

With respect to State Medicaid programs that also require a modifier to identify 340B-purchased drugs on outpatient claims, the commenters noted that CMS' proposal would be counter to Medicaid requirements and would create confusion and add complexity for providers who treat Medicaid recipients in multiple states. The commenters reported that many State Medicaid programs require a modifier to identify drugs that were purchased under 340B to administer their Medicaid drug rebate programs to prevent duplicate discounts on 340B drugs. The commenters suggested that if CMS reversed its position on

application of the modifier, it would ensure crossover claims (claims transferred from Medicare to Medicaid) are correctly interpreted by State Medicaid programs so that they can appropriately request manufacturer rebates on drugs not purchased under the 340B Program. Moreover, some commenters believed that if CMS required the modifier to be reported for 340B-purchased drugs, State Medicaid programs would also adopt the modifier, leading to national uniformity in reporting of 340B drugs.

Finally, in the event that CMS required the modifier on claims for 340B drugs, rather than non-340B drugs, commenters sought clarity on whether the modifier applies only to drugs purchased under the 340B Program which are subject to a ceiling price payment from the manufacturer or if the modifier would also apply to drugs purchased by a 340B-registered facility, but purchased under the Prime Vendor Program for which only 340B facilities are eligible. One commenter asked that CMS emphasize that 340B pricing is not available on drugs furnished to hospital inpatients.

Response: We appreciate the detailed comments that were submitted. As noted in the proposed rule, we did not propose to establish the modifier but rather noted our intent to establish the modifier, regardless of whether we adopted the alternative payment methodology for drugs acquired through the 340B Program. However, we are responding to some of the comments submitted in this final rule with comment period with information on this modifier that we believe is important to communicate as soon as possible. We will consider whether additional details will need to be communicated through a subregulatory process, such as information posted to the CMS Web site.

After considering the administrative and financial challenges associated with providers reporting the modifier as described in the CY 2018 OPPI/ASC proposed rule, and in order to reduce regulatory burden, we are reversing our position on how the modifier will be used by providers to effectuate the payment adjustment for 340B-purchased drugs.

Specifically, beginning January 1, 2018, providers who are not excepted from the 340B payment adjustment will report modifier “JG” (Drug or biological acquired with 340B Drug Pricing Program Discount) to identify if a drug was acquired under the 340B Program. This requirement is aligned with the modifier requirement already mandated in several States under their Medicaid

programs. Therefore, we believe that this option will pose less of an administrative burden. Further, having consistent application of the modifier being required for a drug that was purchased under the 340B Program instead of a drug not purchased under the 340B Program will help improve program integrity by helping ensure that hospitals are not receiving “duplicate discounts” through both the Medicaid rebate program and the 340B Program. The phrase “acquired under the 340B Program” is inclusive of all drugs acquired under the 340B Program or PVP, regardless of the level of discount applied to the drug. Drugs that were not acquired under the 340B Program should not be reported with the modifier “JG”. For separately payable drugs (status indicator “K”), application of modifier “JG” will trigger a payment adjustment such that the 340B-acquired drug is paid at ASP minus 22.5 percent. In response to the commenters’ request that we allow the 340B modifier to be reported with status indicator “N” drugs (that is, drugs that are always packaged), we will accept modifier “JG” or “TB” to be reported with a packaged drug (although such modifier will not result in a payment adjustment).

In addition, beginning January 1, 2018, providers that are excepted from the 340B drug payment policy for CY 2018, which include rural SCHs, children’s hospitals, and PPS-exempt cancer hospitals, should not report modifier “JG”. Instead, these excepted providers should report the informational modifier “TB” (Drug or Biological Acquired With 340B Drug Pricing Program Discount, Reported for Informational Purposes) to identify OPPS separately payable drugs purchased with a 340B discount. The informational modifier “TB” will facilitate the collection and tracking of 340B claims data for OPPS providers that are excepted from the payment adjustment in CY 2018. However, use of modifier “TB” will not trigger a payment adjustment and these providers will receive ASP+6 percent for separately payable drugs furnished in CY 2018, even if such drugs were acquired under the 340B Program.

For drugs administered to dual-eligible beneficiaries (that is, beneficiaries covered under both Medicare and Medicaid) for whom covered entities do not receive a discount under the 340B Program, the State Medicaid programs should be aware of modifier “JG” to help further prevent inappropriate billing of manufacturer rebates.

With respect to comments about timing to operationalize a modifier, we

note that hospitals have been on notice since the proposed rule went on display at the Office of the Federal Register on July 13, 2017 that we intended to establish a modifier to implement the policy for payment of drugs acquired under the 340B Program, if finalized. In addition, the modifier will not be required until January 1, 2018, which after display of this final rule with comment period will give hospitals two additional months to operationalize the modifier. Under section 1835(a) of the Act, providers have 12 months after the date of service to timely file a claim for payment. Therefore, for those hospitals that may need more time to ensure that they are in compliance with the modifier requirements, they have 12 months from the date of service to do so.

Further, to the extent many hospitals already report a modifier through their State Medicaid program, we believe that also requiring the modifier on outpatient claims for 340B-acquired drugs paid for under the OPPS would not be a significant administrative burden and would promote consistency between the two programs. With respect to providers in States that are not currently required to report a modifier under the Medicaid program, we note that providers are nonetheless responsible for ensuring that drugs are furnished to “covered patients” under the 340B Program and, therefore, should already have a tracking mechanism in place to ensure that they are in compliance with this requirement. Furthermore, modifiers are commonly used for payment purposes; in this case, the presence of the modifier will enable us to pay the applicable 340B drug rate of ASP minus 22.5 percent and track these claims in the Medicare data (in the case of “JG” modifier) and will allow us to track other drugs billed on claims that are not subject to the payment reduction (modifier “TB”). In addition, the presence of the both modifiers will enable Medicare and other entities to conduct research on 340B-acquired drugs in the future.

We remind readers that our 340B payment policy applies to only OPPS separately payable drugs (status indicator “K”) and does not apply to vaccines (status indicator “L” or “M”), or drugs with transitional pass-through payment status (status indicator “G”).

Finally, Federal law permits Medicare to recover its erroneous payments. Medicare requires the return of any payment it erroneously paid as the primary payer. Medicare can also fine providers for knowingly, willfully, and repeatedly billing incorrectly coded claims. Providers are required to submit accurate claims, maintain current

knowledge of Medicare billing policies, and ensure all documentation required to support the validity of the services reported on the claim is available upon request.

d. Summary of Final Policies for CY 2018

In summary, for CY 2018, in accordance with section 1833(t)(14)(A)(iii)(II) of the Act, separately payable Part B drugs (assigned status indicator “K”), other than vaccines and drugs on pass-through payment status, that meet the definition of “covered outpatient drug” as defined in the section 1927(k) of the Act, that are acquired through the 340B Program or through the 340B PVP at or below the 340B ceiling price will be paid at the ASP minus 22.5 percent when billed by a hospital paid under the OPPS that is not excepted from the payment adjustment. Part B drugs or biologicals excluded from the 340B payment adjustment include vaccines (assigned status indicator “L” or “M”) and drugs with OPPS transitional pass-through payment status (assigned status indicator “G”). Medicare will continue to pay drugs that were not purchased with a 340B discount at ASP+6 percent.

Effective January 1, 2018, biosimilar biological products not on pass-through payment status that are purchased through the 340B program or through the 340B PVP will be paid at ASP minus 22.5 percent of the reference product’s ASP, while biosimilar biological products on drug pass-through payment status will continue to be paid ASP+6 percent of the reference product.

To effectuate the payment adjustment for 340B-acquired drugs, CMS is implementing modifier “JG”, effective January 1, 2018. Hospitals paid under the OPPS, other than a type of hospital excluded from the OPPS (such as CAHs or those hospitals paid under the Maryland waiver) or excepted from the 340B drug payment policy for CY 2018, are required to report modifier “JG” on the same claim line as the drug HCPCS code to identify a 340B-acquired drug. For CY 2018, rural SCHs, children’s hospitals and PPS-exempt cancer hospitals will be excepted from the 340B payment adjustment. These hospitals will be required to report informational modifier “TB” for 340B-acquired drugs, and will continue to be paid ASP+6 percent.

To maintain budget neutrality within the OPPS, the estimated \$1.6 billion in reduced drug payments from adoption of this final alternative 340B drug payment methodology will be redistributed in an equal offsetting amount to all hospitals paid under the

OPPS through increased payment rates for non-drug items and services furnished by all hospitals paid under the OPSS for CY 2018. Specifically, the redistributed dollars will increase the conversion factor across non-drug rates by 3.2 percent for CY 2018.

We may revisit the alternative 340B drug payment methodology in CY 2019 rulemaking.

e. Comment Solicitation on Additional 340B Considerations

As discussed above, we recognize there are data limitations in estimating the average discount for 340B drugs. In the CY 2018 OPSS/ASC proposed rule (82 FR 33634 through 33635), we welcomed stakeholder input with regard to MedPAC's May 2015 analysis and the resulting estimate of ASP minus 22.5 percent as the proposed payment rate for separately payable, nonpass-through OPSS drugs purchased under the 340B Program in CY 2018. We also requested comment on whether we should adopt a different payment rate to account for the average minimum discount of OPSS drugs purchased under the 340B Program. Also, we sought comment on whether the proposal to pay ASP minus 22.5 percent for 340B-acquired drugs should be phased in over time (such as over a period of 2 to 3 years).

In addition, we recognize that the acquisition costs for drugs may vary among hospitals, depending on a number of factors such as size, patient volume, labor market area and case-mix. Accordingly, in the longer term, we are interested in exploring ways to more closely align the actual acquisition costs that hospitals incur rather than using an average minimum discounted rate that would apply uniformly across all 340B hospitals. In the proposed rule, we requested public comment on whether, as a longer term option, Medicare should require 340B hospitals to report their acquisition costs in addition to charges for each drug on the Medicare claim. Having the acquisition cost on a drug-specific basis would enable us to pay a rate under the OPSS that is directly tied to the acquisition costs for each separately payable drug. To the extent that the acquisition costs for some drugs may equal the ceiling price for a drug, we recognize that there may be challenges with keeping the ceiling price confidential as required by section 1927(b)(3)(D) of the Act and we sought comment on this point.

Lastly, for consideration for future policy refinements, we requested public comment on (1) whether, due to access to care issues, exceptions should be granted to certain groups of hospitals, such as those with special adjustments

under the OPSS (for example, rural SCHs or PPS-exempt cancer hospitals) if a policy were adopted to adjust OPSS payments to 340B participating hospitals (if so, describe how adjusted rates for drugs purchased under the 340B Program would disproportionately affect access in these provider settings); (2) whether other types of drugs, such as blood clotting factors, should also be excluded from the reduced payment; and (3) whether hospital-owned or affiliated ASCs have access to 340B discounted drugs.

We received feedback on a variety of issues in response to the comment solicitation on additional future considerations. These comments are summarized below.

Comment: One commenter recommended that CMS establish an exemption mechanism for use by stakeholders to request exemptions for certain groups of hospitals. The commenters urged CMS to propose and seek comment on specific guidelines that outline procedures for stakeholders to request an exemption and the criteria CMS would use to determine whether to grant an exception.

Response: We appreciate the comment. As we stated in the summary of final policies, we may revisit the 340B drug payment policy in the CY 2019 rulemaking. For CY 2018, as stated earlier in this section, rural SCHs, children's hospitals and PPS-exempt cancer hospitals will be excepted from the alternative 340B drug payment methodology being adopted in this final rule with comment period. However, each of these excepted providers will report informational modifier "TB" on the same claim line as the HCPCS code for their 340B-acquired drugs.

Comment: In response to the solicitation of comments on whether CMS should exclude certain types of drugs from the proposed alternative 340B drug payment methodology, manufacturers of blood clotting factors and radiopharmaceuticals recommended that CMS continue to pay these drug types at ASP+6 percent. With respect to blood clotting factors, the commenters stated that individuals with bleeding disorders have unique needs and are expensive to treat such that the proposed reduced payment could threaten access and/or create unnecessary treatment delays for these patients. With respect to radiopharmaceuticals, the commenters stated that they do not believe that these products are covered outpatient drugs (because it is not possible for the manufacturer to accurately report final dose and pricing information), and therefore these drugs should be

excluded as a category of drugs included in the covered drug definition for the 340B Program.

In addition, one commenter recommended that CMS develop a process for stakeholders to request exemptions from the alternative 340B payment methodology that CMS would evaluate using objective patient guidelines designed to ensure patient access.

Response: We appreciate the comments. To the extent that blood clotting factors and radiopharmaceuticals are covered outpatient drugs purchased under the 340B Program, we believe that the OPSS payment rate for these drugs should account for the discounted rate under which they were purchased. Therefore, for CY 2018, OPSS payment for separately payable, nonpass-through drugs, biologicals, and radiopharmaceuticals, including blood clotting factors and radiopharmaceuticals, if purchased through the 340B Program, will be paid at ASP minus 22.5 percent. As we stated in the summary of final policies, we may revisit the 340B drug payment policy in the CY 2019 rulemaking. We will consider these requests for exceptions for certain drug classes in development of the CY 2019 OPSS/ASC proposed rule.

It is unclear to us whether the commenter meant that radiopharmaceuticals are not considered covered outpatient drugs under the OPSS or not considered a covered outpatient drug for purposes of the 340B Program. We assume the commenter was referring to the definition of covered outpatient drug for purposes of the 340B Program and, as such, these comments are outside the scope of the CY 2018 OPSS/ASC proposed rule. We refer commenters to HRSA with questions related to the 340B Program.

Comment: One commenter representing community oncology practices urged CMS not to "reduce the size of the reimbursement reduction" or to phase in the adjustment over 2 to 3 years because the commenter believed that hospitals would use that time to "aggressively strong-arm independent community oncology practices to sell out to them."

Response: As stated earlier in this section, we are finalizing our proposal to pay ASP minus 22.5 percent for separately payable nonpass-through drugs (other than vaccines). In addition, we agree that it is not necessary to phase in the payment reduction and are implementing the full adjustment for CY 2018.

Comment: Commenters expressed concern about the challenges and costs of implementing acquisition cost billing. The commenters reported that hospital charge masters are not designed to bill drugs to one payer at a different rate than other payers. The commenters cited a survey response from hospitals that revealed acquisition cost billing would require investment in expensive software upgrades, obtaining a second charge master, or devising burdensome manual workarounds. One commenter stated that hospital cost reports already reflect the 340B acquisition cost based on expenses reported in the pharmacy cost center. The commenter further stated that these lower costs are already reflected in the drug CCR, which will likely be lower because the cost to acquire these drugs is lower. Thus, the commenter asserted, the OPPS ratesetting process already reflects a blend of discounting/lower expenses with respect to 340B drug acquisition in the annual application of CCRs to pharmacy charges.

Response: We thank the commenters for their feedback and will take these comments into consideration for future policymaking. We note that several State Medicaid programs require reporting of actual acquisition cost (AAC) for 340B drugs so the magnitude of the challenges to implement may be less than the commenter suggests.

VI. Estimate of OPPS Transitional Pass-Through Spending for Drugs, Biologicals, Radiopharmaceuticals, and Devices

A. Background

Section 1833(t)(6)(E) of the Act limits the total projected amount of transitional pass-through payments for drugs, biologicals, radiopharmaceuticals, and categories of devices for a given year to an “applicable percentage,” currently not to exceed 2.0 percent of total program payments estimated to be made for all covered services under the OPPS furnished for that year. If we estimate before the beginning of the calendar year that the total amount of pass-through payments in that year would exceed the applicable percentage, section 1833(t)(6)(E)(iii) of the Act requires a uniform prospective reduction in the amount of each of the transitional pass-through payments made in that year to ensure that the limit is not exceeded. We estimate the pass-through spending to determine whether payments exceed the applicable percentage and the appropriate prorata reduction to the conversion factor for the projected level

of pass-through spending in the following year to ensure that total estimated pass-through spending for the prospective payment year is budget neutral, as required by section 1833(t)(6)(E) of the Act.

For devices, developing an estimate of pass-through spending in CY 2018 entails estimating spending for two groups of items. The first group of items consists of device categories that are currently eligible for pass-through payment and that will continue to be eligible for pass-through payment in CY 2018. The CY 2008 OPPS/ASC final rule with comment period (72 FR 66778) describes the methodology we have used in previous years to develop the pass-through spending estimate for known device categories continuing into the applicable update year. The second group of items consists of items that we know are newly eligible, or project may be newly eligible, for device pass-through payment in the remaining quarters of CY 2017 or beginning in CY 2018. The sum of the CY 2018 pass-through spending estimates for these two groups of device categories equals the total CY 2018 pass-through spending estimate for device categories with pass-through payment status. We base the device pass-through estimated payments for each device category on the amount of payment as established in section 1833(t)(6)(D)(ii) of the Act, and as outlined in previous rules, including the CY 2014 OPPS/ASC final rule with comment period (78 FR 75034 through 75036). We note that, beginning in CY 2010, the pass-through evaluation process and pass-through payment for implantable biologicals newly approved for pass-through payment beginning on or after January 1, 2010, that are surgically inserted or implanted (through a surgical incision or a natural orifice) use the device pass-through process and payment methodology (74 FR 60476). As has been our past practice (76 FR 74335), in the CY 2018 OPPS/ASC proposed rule (82 FR 33635), we proposed to include an estimate of any implantable biologicals eligible for pass-through payment in our estimate of pass-through spending for devices. Similarly, we finalized a policy in CY 2015 that applications for pass-through payment for skin substitutes and similar products be evaluated using the medical device pass-through process and payment methodology (76 FR 66885 through 66888). Therefore, as we did beginning in CY 2015, for CY 2018, we also proposed to include an estimate of any skin substitutes and similar products in our estimate of pass-through spending for devices.

For drugs and biologicals eligible for pass-through payment, section 1833(t)(6)(D)(i) of the Act establishes the pass-through payment amount as the amount by which the amount authorized under section 1842(o) of the Act (or, if the drug or biological is covered under a competitive acquisition contract under section 1847B of the Act, an amount determined by the Secretary equal to the average price for the drug or biological for all competitive acquisition areas and year established under such section as calculated and adjusted by the Secretary) exceeds the portion of the otherwise applicable fee schedule amount that the Secretary determines is associated with the drug or biological. Because we proposed to pay for most nonpass-through separately payable drugs and biologicals under the CY 2018 OPPS at ASP+6 percent, and because we proposed to pay for CY 2018 pass-through drugs and biologicals at ASP+6 percent, as we discussed in section V.A. of the proposed rule, our estimate of drug and biological pass-through payment for CY 2018 for this group of items was \$0, as discussed below. In the proposed rule, we noted that our estimate did not reflect the proposed payment policy for drugs purchased through the 340B program, as we discussed in section V.A. of the proposed rule.

Furthermore, payment for certain drugs, specifically diagnostic radiopharmaceuticals and contrast agents without pass-through payment status, is packaged into payment for the associated procedures, and these products will not be separately paid. In addition, we policy-package all nonpass-through drugs, biologicals, and radiopharmaceuticals that function as supplies when used in a diagnostic test or procedure and drugs and biologicals that function as supplies when used in a surgical procedure, as discussed in section II.A.3. of the proposed rule and this final rule with comment period. In the CY 2018 OPPS/ASC proposed rule (82 FR 33635 through 33636), we proposed that all of these policy-packaged drugs and biologicals with pass-through payment status would be paid at ASP+6 percent, like other pass-through drugs and biologicals, for CY 2018. Therefore, our estimate of pass-through payment for policy-packaged drugs and biologicals with pass-through payment status approved prior to CY 2018 was not \$0, as discussed below. In section V.A.5. of the proposed rule, we discussed our policy to determine if the costs of certain policy-packaged drugs or biologicals are already packaged into the existing APC structure. If we

determine that a policy-packaged drug or biological approved for pass-through payment resembles predecessor drugs or biologicals already included in the costs of the APCs that are associated with the drug receiving pass-through payment, we proposed to offset the amount of pass-through payment for the policy-packaged drug or biological. For these drugs or biologicals, the APC offset amount is the portion of the APC payment for the specific procedure performed with the pass-through drug or biological, which we refer to as the policy-packaged drug APC offset amount. If we determine that an offset is appropriate for a specific policy-packaged drug or biological receiving pass-through payment, we proposed to reduce our estimate of pass-through payments for these drugs or biologicals by this amount.

Similar to pass-through spending estimates for devices, the first group of drugs and biologicals requiring a pass-through payment estimate consists of those products that were recently made eligible for pass-through payment and that will continue to be eligible for pass-through payment in CY 2018. The second group contains drugs and biologicals that we know are newly eligible, or project will be newly eligible in the remaining quarter of CY 2017 or beginning in CY 2018. The sum of the CY 2018 pass-through spending estimates for these two groups of drugs and biologicals equals the total CY 2018 pass-through spending estimate for drugs and biologicals with pass-through payment status.

B. Estimate of Pass-Through Spending

In the CY 2018 OPPTS/ASC proposed rule (82 FR 33636), we proposed to set the applicable pass-through payment percentage limit at 2.0 percent of the total projected OPPTS payments for CY 2018, consistent with section 1833(t)(6)(E)(ii)(III) of the Act and our OPPTS policy from CY 2004 through CY 2017 (81 FR 79676 through 79678).

For the first group, consisting of device categories that are currently eligible for pass-through payment and will continue to be eligible for pass-through payment in CY 2018, there are no active categories for CY 2018. Because there are no active device categories for CY 2018, we proposed an estimate for the first group of devices of \$0.

We did not receive any public comments on our proposed estimate for the first group of devices. For this final rule with comment period, using the latest available data, we calculated a CY 2018 spending estimate for this first group of devices of \$0.

In estimating our proposed CY 2018 pass-through spending for device categories in the second group, we included: Device categories that we knew at the time of the development of the proposed rule will be newly eligible for pass-through payment in CY 2018; additional device categories that we estimated could be approved for pass-through status subsequent to the development of the proposed rule and before January 1, 2018; and contingent projections for new device categories established in the second through fourth quarters of CY 2018. In the CY 2018 OPPTS/ASC proposed rule (82 FR 33636), we proposed to use the general methodology described in the CY 2008 OPPTS/ASC final rule with comment period (72 FR 66778), while also taking into account recent OPPTS experience in approving new pass-through device categories. For the proposed rule, the estimate of CY 2018 pass-through spending for this second group of device categories was \$10 million.

We did not receive any public comments on our proposed estimate for the second group of devices. For this final rule with comment period, using the latest available data, we calculated a CY 2018 spending estimate for this second group of devices of \$10 million.

To estimate proposed CY 2018 pass-through spending for drugs and biologicals in the first group, specifically those drugs and biologicals recently made eligible for pass-through payment and continuing on pass-through payment status for CY 2018, we proposed to use the most recent Medicare hospital outpatient claims data regarding their utilization, information provided in the respective pass-through applications, historical hospital claims data, pharmaceutical industry information, and clinical information regarding those drugs or biologicals to project the CY 2018 OPPTS utilization of the products.

For the known drugs and biologicals (excluding policy-packaged diagnostic radiopharmaceuticals, contrast agents, drugs, biologicals, and radiopharmaceuticals that function as supplies when used in a diagnostic test or procedure, and drugs and biologicals that function as supplies when used in a surgical procedure) that will be continuing on pass-through payment status in CY 2018, we estimated the pass-through payment amount as the difference between ASP+6 percent and the payment rate for nonpass-through drugs and biologicals that will be separately paid at ASP+6 percent, which is zero for this group of drugs. Because payment for policy-packaged drugs and biologicals is packaged if the

product was not paid separately due to its pass-through payment status, we proposed to include in the CY 2018 pass-through estimate the difference between payment for the policy-packaged drug or biological at ASP+6 percent (or WAC+6 percent, or 95 percent of AWP, if ASP or WAC information is not available) and the policy-packaged drug APC offset amount, if we determine that the policy-packaged drug or biological approved for pass-through payment resembles a predecessor drug or biological already included in the costs of the APCs that are associated with the drug receiving pass-through payment. For the proposed rule, using the proposed methodology described above, we calculated a CY 2018 proposed spending estimate for this first group of drugs and biologicals of approximately \$7.7 million.

We did not receive any public comments on our proposed spending estimate for this first group of drugs and biologicals. For this final rule with comment period, using the latest available data, we calculated a CY 2018 spending estimate for this first group of drugs and biologicals of approximately \$9.83 million. We note that this estimate does not reflect drugs purchased with a 340B discount and therefore subject to a payment reduction based on final policy for CY 2018.

To estimate proposed CY 2018 pass-through spending for drugs and biologicals in the second group (that is, drugs and biologicals that we knew at the time of development of the proposed rule were newly eligible for pass-through payment in CY 2018, additional drugs and biologicals that we estimated could be approved for pass-through status subsequent to the development of the proposed rule and before January 1, 2017, and projections for new drugs and biologicals that could be initially eligible for pass-through payment in the second through fourth quarters of CY 2018), we proposed to use utilization estimates from pass-through applicants, pharmaceutical industry data, clinical information, recent trends in the per unit ASPs of hospital outpatient drugs, and projected annual changes in service volume and intensity as our basis for making the CY 2018 pass-through payment estimate. We also proposed to consider the most recent OPPTS experience in approving new pass-through drugs and biologicals. Using our proposed methodology for estimating CY 2018 pass-through payments for this second group of drugs, we calculated a proposed spending estimate for this second group of drugs and biologicals of approximately \$8.5 million.

We did not receive any public comments on our proposed methodology or the proposed spending estimate for this second group of drugs. Therefore, for CY 2018, we are continuing to use the general methodology described earlier. For this final rule with comment period, based on the latest available data, we calculated a CY 2018 spending estimate for this second group of drugs and biologicals of approximately \$8.23 million.

In summary, in accordance with the methodology described earlier in this section, for this final rule with comment period, we estimate that total pass-through spending for the device categories and the drugs and biologicals that are continuing to receive pass-through payment in CY 2018 and those device categories, drugs, and biologicals that first become eligible for pass-through payment during CY 2018 is approximately \$28.06 million (approximately \$10 million for device categories and approximately \$18.06 million for drugs and biologicals) compared to the proposed \$26.2 million (approximately \$10 million for device categories and approximately \$16.2 million for drugs and biologicals), which represents 0.04 percent of total projected OPPS payments for CY 2018 (approximately \$70 billion). Therefore, we estimate that pass-through spending in CY 2018 will not amount to 2.0 percent of total projected OPPS CY 2018 program spending.

VII. OPPS Payment for Hospital Outpatient Visits and Critical Care Services

In the CY 2018 OPPS/ASC proposed rule (82 FR 33637), for CY 2018, we proposed to continue with our current clinic and emergency department (ED) hospital outpatient visits payment policies. For a description of the current clinic and ED hospital outpatient visits policies, we refer readers to the CY 2016 OPPS/ASC final rule with comment period (80 FR 70448). We also proposed to continue with and not propose any change to our payment policy for critical care services for CY 2018. For a description of the current payment policy for critical care services, we refer readers to the CY 2016 OPPS/ASC final rule with comment period (80 FR 70449), and for the history of the payment policy for critical care services, we refer readers to the CY 2014 OPPS/ASC final rule with comment period (78 FR 75043). In the proposed rule, we sought public comments on any changes to these codes that we should consider for future rulemaking cycles. We continued to encourage those parties

who comment to provide the data and analysis necessary to justify any suggested changes.

We did not receive any public comments on our proposals for CY 2018. Therefore, we are finalizing our proposal, without modification, to continue our current clinic and ED hospital outpatient visits and critical care services payment policies. We also did not receive any public comments on any changes to these codes that we should consider for future rulemaking cycles.

VIII. Payment for Partial Hospitalization Services

A. Background

A partial hospitalization program (PHP) is an intensive outpatient program of psychiatric services provided as an alternative to inpatient psychiatric care for individuals who have an acute mental illness, which includes, but is not limited to, conditions such as depression, schizophrenia, and substance use disorders. Section 1861(ff)(1) of the Act defines partial hospitalization services as the items and services described in paragraph (2) prescribed by a physician and provided under a program described in paragraph (3) under the supervision of a physician pursuant to an individualized, written plan of treatment established and periodically reviewed by a physician (in consultation with appropriate staff participating in such program), which sets forth the physician's diagnosis, the type, amount, frequency, and duration of the items and services provided under the plan, and the goals for treatment under the plan. Section 1861(ff)(2) of the Act describes the items and services included in partial hospitalization services. Section 1861(ff)(3)(A) of the Act specifies that a PHP is a program furnished by a hospital to its outpatients or by a community mental health center (CMHC), as a distinct and organized intensive ambulatory treatment service, offering less than 24-hour-daily care, in a location other than an individual's home or inpatient or residential setting. Section 1861(ff)(3)(B) of the Act defines a CMHC for purposes of this benefit.

Section 1833(t)(1)(B)(i) of the Act provides the Secretary with the authority to designate the OPD services to be covered under the OPPS. The Medicare regulations that implement this provision specify, at 42 CFR 419.21, that payments under the OPPS will be made for partial hospitalization services furnished by CMHCs as well as Medicare Part B services furnished to

hospital outpatients designated by the Secretary, which include partial hospitalization services (65 FR 18444 through 18445).

Section 1833(t)(2)(C) of the Act requires the Secretary, in part, to establish relative payment weights for covered outpatient department (OPD) services (and any groups of such services described in section 1833(t)(2)(B) of the Act) based on median (or, at the election of the Secretary, mean) hospital costs using data on claims from 1996 and data from the most recent available cost reports. In pertinent part, section 1833(t)(2)(B) of the Act provides that the Secretary may establish groups of covered OPD services, within a classification system developed by the Secretary for covered OPD services, so that services classified within each group are comparable clinically and with respect to the use of resources. In accordance with these provisions, we have developed the PHP APCs. Because a day of care is the unit that defines the structure and scheduling of partial hospitalization services, we established a per diem payment methodology for the PHP APCs, effective for services furnished on or after July 1, 2000 (65 FR 18452 through 18455). Under this methodology, the median per diem costs were used to calculate the relative payment weights for the PHP APCs. Section 1833(t)(9)(A) of the Act requires the Secretary to review, not less often than annually, and revise the groups, the relative payment weights, and the wage and other adjustments described in section 1833(t)(2) of the Act to take into account changes in medical practice, changes in technology, the addition of new services, new cost data, and other relevant information and factors.

We began efforts to strengthen the PHP benefit through extensive data analysis, along with policy and payment changes finalized in the CY 2008 OPPS/ASC final rule with comment period (72 FR 66670 through 66676). In that final rule with comment period, we made two refinements to the methodology for computing the PHP median: The first remapped 10 revenue codes that are common among hospital-based PHP claims to the most appropriate cost centers; and the second refined our methodology for computing the PHP median per diem cost by computing a separate per diem cost for each day rather than for each bill.

In CY 2009, we implemented several regulatory, policy, and payment changes, including a two-tier payment approach for partial hospitalization services under which we paid one

amount for days with 3 services under PHP APC 0172 (Level 1 Partial Hospitalization) and a higher amount for days with 4 or more services under PHP APC 0173 (Level 2 Partial Hospitalization) (73 FR 68688 through 68693). We also finalized our policy to deny payment for any PHP claims submitted for days when fewer than 3 units of therapeutic services are provided (73 FR 68694). Furthermore, for CY 2009, we revised the regulations at 42 CFR 410.43 to codify existing basic PHP patient eligibility criteria and to add a reference to current physician certification requirements under 42 CFR 424.24 to conform our regulations to our longstanding policy (73 FR 68694 through 68695). We also revised the partial hospitalization benefit to include several coding updates (73 FR 68695 through 68697).

For CY 2010, we retained the two-tier payment approach for partial hospitalization services and used only hospital-based PHP data in computing the PHP APC per diem costs, upon which PHP APC per diem payment rates are based. We used only hospital-based PHP data because we were concerned about further reducing both PHP APC per diem payment rates without knowing the impact of the policy and payment changes we made in CY 2009. Because of the 2-year lag between data collection and rulemaking, the changes we made in CY 2009 were reflected for the first time in the claims data that we used to determine payment rates for the CY 2011 rulemaking (74 FR 60556 through 60559).

In the CY 2011 OPPTS/ASC final rule with comment period (75 FR 71994), we established four separate PHP APC per diem payment rates: Two for CMHCs (APC 0172 (for Level 1 services) and APC 0173 (for Level 2 services)) and two for hospital-based PHPs (APC 0175 (for Level 1 services) and 0176 (for Level 2 services)), based on each provider type's own unique data. For CY 2011, we also instituted a 2-year transition period for CMHCs to the CMHC APC per diem payment rates based solely on CMHC data. Under the transition methodology, CMHC APCs Level 1 and Level 2 per diem costs were calculated by taking 50 percent of the difference between the CY 2010 final hospital-based PHP median costs and the CY 2011 final CMHC median costs and then adding that number to the CY 2011 final CMHC median costs. A 2-year transition under this methodology moved us in the direction of our goal, which is to pay appropriately for partial hospitalization services based on each provider type's data, while at the same time allowing providers time to adjust their business

operations and protect access to care for Medicare beneficiaries. We also stated that we would review and analyze the data during the CY 2012 rulemaking cycle and, based on these analyses, we might further refine the payment mechanism. We refer readers to section X.B. of the CY 2011 OPPTS/ASC final rule with comment period (75 FR 71994 through 71994) for a full discussion.

In addition, in accordance with section 1301(b) of the Health Care and Education Reconciliation Act of 2010 (HCERA 2010), we amended the description of a PHP in our regulations to specify that a PHP must be a distinct and organized intensive ambulatory treatment program offering less than 24-hour daily care other than in an individual's home or in an inpatient or residential setting. In accordance with section 1301(a) of HCERA 2010, we revised the definition of a CMHC in the regulations to conform to the revised definition now set forth under section 1861(ff)(3)(B) of the Act (75 FR 71990).

For CY 2012, as discussed in the CY 2012 OPPTS/ASC final rule with comment period (76 FR 74348 through 74352), we determined the relative payment weights for partial hospitalization services provided by CMHCs based on data derived solely from CMHCs and the relative payment weights for partial hospitalization services provided by hospital-based PHPs based exclusively on hospital data.

In the CY 2013 OPPTS/ASC final rule with comment period, we finalized our proposal to base the relative payment weights that underpin the OPPTS APCs, including the four PHP APCs (APCs 0172, 0173, 0175, and 0176), on geometric mean costs rather than on the median costs. We established these four PHP APC per diem payment rates based on geometric mean cost levels calculated using the most recent claims and cost data for each provider type. For a detailed discussion on this policy, we refer readers to the CY 2013 OPPTS/ASC final rule with comment period (77 FR 68406 through 68412).

In the CY 2014 OPPTS/ASC proposed rule (78 FR 43621 through 43622), we solicited comments on possible future initiatives that may help to ensure the long-term stability of PHPs and further improve the accuracy of payment for PHP services, but proposed no changes. In the CY 2014 OPPTS/ASC final rule with comment period (78 FR 75050 through 75053), we summarized the comments received on those possible future initiatives. We also continued to apply our established policies to calculate the four PHP APC per diem payment rates based on geometric mean

per diem costs using the most recent claims data for each provider type. For a detailed discussion on this policy, we refer readers to the CY 2014 OPPTS/ASC final rule with comment period (78 FR 75047 through 75050).

In the CY 2015 OPPTS/ASC final rule with comment period (79 FR 66902 through 66908), we continued to apply our established policies to calculate the four PHP APC per diem payment rates based on PHP APC geometric mean per diem costs, using the most recent claims and cost data for each provider type.

In the CY 2016 OPPTS/ASC final rule with comment period (80 FR 70455 through 70465), we described our extensive analysis of the claims and cost data and ratesetting methodology. We found aberrant data from some hospital-based PHP providers that were not captured using the existing OPPTS ± 3 standard deviation trims for extreme CCRs and excessive CMHC charges resulting in CMHC geometric mean costs per day that were approximately the same as or more than the daily payment for inpatient psychiatric facility services. Consequently, we implemented a trim to remove hospital-based PHP service days that use a CCR that was greater than 5 (CCR5) to calculate costs for at least one of their component services, and a trim on CMHCs with a geometric mean cost per day that is above or below 2 (± 2) standard deviations from the mean. We stated in the CY 2016 OPPTS/ASC final rule with comment period (80 FR 70456) that, without using a trimming process, the data from these providers would inappropriately skew the geometric mean per diem cost for Level 2 CMHC services.

In addition, in the CY 2016 OPPTS/ASC final rule with comment period (80 FR 70459 through 70460), we corrected a cost inversion that occurred in the final rule data with respect to hospital-based PHP providers. We corrected the cost inversion with an equitable adjustment to the actual geometric mean per diem costs by increasing the Level 2 hospital-based PHP APC geometric mean per diem costs and decreasing the Level 1 hospital-based PHP APC geometric mean per diem costs by the same factor, to result in a percentage difference equal to the average percent difference between the hospital-based Level 1 PHP APC and the Level 2 PHP APC for partial hospitalization services from CY 2013 through CY 2015.

Finally, we renumbered the PHP APCs, which were previously 0172, 0173, 0175, and 0176, to 5851, 5852, 5861, and 5862, respectively. For a detailed discussion of the PHP ratesetting process, we refer readers to

the CY 2016 OPPTS/ASC final rule with comment period (80 FR 70462 through 70467).

In the CY 2017 OPPTS/ASC final rule with comment period (81 FR 79687 through 79691), we continued to apply our established policies to calculate the PHP APC per diem payment rates based on geometric mean per diem costs using the most recent claims and cost data for each provider type. However, we finalized a policy to combine the Level 1 and Level 2 PHP APCs for CMHCs and to combine the Level 1 and Level 2 APCs for hospital-based PHPs because we believed this would best reflect actual geometric mean per diem costs going forward, provide more predictable per diem costs, particularly given the small number of CMHCs, and generate more appropriate payments for these services, for example by avoiding the cost inversions for hospital-based PHPs addressed in the CY 2016 and CY 2017 OPPTS/ASC final rules with comment period (80 FR 70459 and 81 FR 79682). We implemented an 8-percent outlier cap for CMHCs to mitigate potential outlier billing vulnerabilities by limiting the impact of inflated CMHC charges on outlier payments. We will continue to monitor the trends in outlier payments and consider policy adjustments as necessary.

For a comprehensive description on the background of the PHP payment policy, we refer readers to the CY 2016 and CY 2017 OPPTS/ASC final rules with comment period (80 FR 70453 through 70455 and 81 FR 79678 through 79680).

B. PHP APC Update for CY 2018

1. PHP APC Geometric Mean Per Diem Costs

For CY 2018, in the CY 2018 OPPTS/ASC proposed rule (82 FR 33639), we proposed to continue to apply our established policies to calculate the PHP APC per diem payment rates based on geometric mean per diem costs using the most recent claims and cost data for each provider type. Specifically, we proposed to continue to use CMHC APC 5853 (Partial Hospitalization (3 or More Services Per Day)) and hospital-based PHP APC 5863 (Partial Hospitalization (3 or More Services Per Day)). We proposed to continue to calculate the geometric mean per diem costs for CY 2018 for APC 5853 for CMHCs using only CY 2016 CMHC claims data and the most recent CMHC cost data, and the CY 2018 geometric mean per diem costs for APC 5863 for hospital-based PHPs using only CY 2016 hospital-based PHP claims data and the most recent hospital cost data.

2. Development of the PHP APC Geometric Mean Per Diem Costs

In the CY 2018 OPPTS/ASC proposed rule (82 FR 33639), for CY 2018 and subsequent years, we proposed to follow the PHP ratesetting methodology described in section VIII.B.2. of the CY 2016 OPPTS/ASC final rule with comment period (80 FR 70462 through 70466) to determine the PHP APCs' geometric mean per diem costs and to calculate the payment rates for APCs 5853 and 5863, incorporating the modifications made in our CY 2017 OPPTS/ASC final rule with comment period. As discussed in section VIII.B.1. of the CY 2017 OPPTS/ASC final rule with comment period (81 FR 79680 through 79687), we finalized our proposal that, for CY 2017 and subsequent years, the geometric mean per diem cost for hospital-based PHP APC 5863 would be based upon actual hospital-based PHP claims and costs for PHP service days providing 3 or more services. Similarly, we finalized our proposal that, for CY 2017 and subsequent years, the geometric mean per diem cost for CMHC APC 5853 would be based upon actual CMHC claims and costs for CMHC service days providing 3 or more services.

The CMHC or hospital-based PHP APC per diem costs are the provider-type specific costs derived from the most recent claims and cost data. The CMHC or hospital-based PHP APC per diem payment rates are the national unadjusted payment rates calculated from the CMHC or hospital-based PHP APC per diem costs, after applying the OPPTS budget neutrality adjustments described in section II.A.4. of this final rule with comment period.

We proposed to apply our established methodologies in developing the CY 2018 geometric mean per diem costs and payment rates, including the application of a ± 2 standard deviation trim on costs per day for CMHCs and a $CCR \leq 5$ hospital service day trim for hospital-based PHP providers. These two trims were finalized in the CY 2016 OPPTS/ASC final rule with comment period (80 FR 70455 through 70462) for CY 2016 and subsequent years.

a. CMHC Data Preparation: Data Trims, Exclusions, and CCR Adjustments

For the CY 2018 proposed rule, prior to calculating the proposed geometric mean per diem cost for CMHC APC 5853, we prepared the data by first applying trims and data exclusions, and assessing CCRs as described in the CY 2016 OPPTS/ASC final rule with comment period (80 FR 70463 through 70465), so that ratesetting is not skewed

by providers with extreme data. For this CY 2018 OPPTS/ASC final rule with comment period, we followed the same data preparation steps. Before any trims or exclusions, there were 50 CMHCs in the final PHP claims data file (compared to 47 CMHCs in the CY 2018 OPPTS/ASC proposed rule). Under the ± 2 standard deviation trim policy, we excluded any data from a CMHC for ratesetting purposes when the CMHC's geometric mean cost per day was more than ± 2 standard deviations from the geometric mean cost per day for all CMHCs. By applying this trim for CY 2018 ratesetting, in this final rule with comment period, we excluded 3 CMHCs with geometric mean per diem costs per day below the trim's lower limit of \$47.44 and 1 CMHC above the trim's upper limit of \$427.72 from the final ratesetting for CY 2018. This standard deviation trim removed 4 providers from ratesetting whose data would have skewed the calculated final geometric mean per diem cost.

In accordance with our PHP ratesetting methodology, in the proposed rule, we also removed service days with no wage index values because we use the wage index data to remove the effects of geographic variation in costs prior to APC geometric mean per diem cost calculation (80 FR 70465). In this CY 2018 final rule ratesetting, no CMHCs were missing wage index data for all of their service days. Therefore, we did not exclude any CMHCs due to lack of wage index data.

In addition to our trims and data exclusions, before determining the PHP APC geometric mean per diem costs, we also assess CCRs (80 FR 70463). Our longstanding PHP OPPTS ratesetting methodology defaults any CMHC $CCR > 1$ to the statewide hospital ancillary CCR (80 FR 70457). In this CY 2018 final rule ratesetting, we identified one CMHC that had a $CCR > 1$. This CMHC's CCR was 1.002, and it was defaulted to its appropriate statewide hospital ancillary CCR for CY 2018 ratesetting purposes.

In summary, these data preparation steps adjusted the CCR for 1 CMHC and excluded 4 CMHCs, resulting in the inclusion of a total of 46 CMHCs in our CY 2018 final rule ratesetting modeling (compared to 39 CMHCs in our proposed rule ratesetting modeling in the CY 2018 OPPTS/ASC proposed rule). The trims removed 864 CMHC claims from the 16,242 total CMHC claims, resulting in 15,378 CMHC claims used in ratesetting. We believe that excluding providers with extremely low or high geometric mean costs per day or extremely low or high CCRs protects CMHCs from having that data inappropriately skew the calculation of

the CMHC APC geometric mean per diem cost. Moreover, we believe that these trims, exclusions, and adjustments help prevent inappropriate fluctuations in the PHP APC geometric mean per diem payment rates.

After applying all of the above trims, exclusions, or adjustments, the final CY 2018 geometric mean per diem cost for all CMHCs for providing 3 or more services per day (APC 5853) is \$143.22 (compared to the proposed geometric mean per diem cost of \$128.81).

b. Hospital-Based PHP Data Preparation: Data Trims and Exclusions

For the CY 2018 proposed rule and for this CY 2018 final rule with comment period, we followed a data preparation process for hospital-based PHP providers that is similar to that used for CMHCs by applying trims and data exclusions as described in the CY 2016 OPPS/ASC final rule with comment period (80 FR 70463 through 70465) so that our ratesetting is not skewed by providers with extreme data. Before any trimming or exclusions, there were 424 hospital-based PHP providers in the CY 2016 final PHP claims data used in this CY 2018 OPPS/ASC final rule with comment period (compared to 420 hospital-based PHPs in the CY 2018 OPPS/ASC proposed rule).

For hospital-based PHP providers, we applied a trim on hospital service days when the CCR was greater than 5 at the cost center level. The CCR>5 hospital service day trim removed hospital-based PHP service days that use a CCR>5 to calculate costs for at least one of their component services. Unlike the ± 2 standard deviation trim, which excluded CMHC providers that failed the trim, the CCR>5 trim excluded any hospital-based PHP service day where any of the services provided on that day were associated with a CCR>5.

Applying this trim removed from our final rule ratesetting service days from 8 hospital-based PHP providers with CCRs ranging from 5.2024 to 17.5702. However, all of the service days for these 8 hospital-based PHP providers had at least one service associated with a CCR>5, so the trim removed these providers entirely from our final rule ratesetting. In addition, 16 hospital-based PHPs reported zero daily costs, and therefore were removed for having no days with PHP payment; 1 hospital-based PHP was removed for missing wage index data; and 1 hospital-based PHP was removed by the OPPS ± 3 standard deviation trim on costs per day.

Therefore, we excluded 26 hospital-based PHP providers, resulting in 398 hospital-based PHP providers in the

data used for final rule ratesetting (compared to 393 hospital-based PHPs in the CY 2018 OPPS/ASC proposed rule). In addition, 2 hospital-based PHP providers were defaulted to using their overall hospital ancillary CCR due to outlier cost center CCR values (72.7362 and 117.1943). After completing these data preparation steps, we calculated the final geometric mean per diem cost for hospital-based PHP APC 5863 for hospital-based PHP services. The final geometric mean per diem cost for hospital-based PHP providers that provide 3 or more services per service day (hospital-based PHP APC 5863) is \$208.09 (compared to \$213.60 from the CY 2018 OPPS/ASC proposed rule).

We received a few public comments relating to our proposal to use our established methodology and policies in developing the PHP geometric mean per diem costs.

Comment: One commenter opposed CMS continuing to use the single-tier payment system implemented in CY 2017 OPPS/ASC rulemaking because the commenter believed this system punished CMHCs for the cost inversion in the hospital-based PHP data. The commenter suggested that CMS return to the two-tier payment system. Another commenter was concerned that the single-tier payment system could have unintended consequences, including reducing the number of PHPs or the number of services provided per day, and urged CMS to monitor the data.

One commenter disagreed with CMS paying CMHCs and hospital-based PHPs differently for providing the exact same services and believed that the APCs distinguished by provider type hurts rather than rewards CMHCs for being more cost effective than hospital-based PHPs. The commenter referred to a 2011 bill introduced in the Congress to address the “inequity” of the current payment system and stated that CMHCs should be paid the same rate as hospital-based PHPs. This commenter also stated that setting CMHCs’ payment rates based on a small number of CMHCs does not reflect the actual cost of providing these services and expressed concern that basing payments at the mean or median level would result in half of CMHCs receiving payments less than their costs, which would guarantee that more CMHCs would close, further limiting access to care.

Response: We thank the commenters for their input. We reiterate our single-tier payment policy and rationale. In the CY 2017 OPPS/ASC final rule with comment period, we combined the Level 1 and Level 2 PHP APCs into a single tier PHP APC for CMHCs, and we

did the same for hospital-based PHPs. We cited several reasons for implementing the single-tier payment system (81 FR 79682 through 79686) and noted that one primary reason for combining the two-tier system into a single tier, by provider type, was the decrease in the number of CMHCs (81 FR 79683). With a small number of providers, data from large providers with a high percentage of all PHP service days and unusually high or low geometric mean costs per day would have a more pronounced effect on the PHP APCs geometric mean per diem costs, skewing costs up or down. The effect would be magnified by continuing to split the geometric mean per diem costs further by distinguishing between Level 1 and Level 2 PHP services. We believed that creating a single PHP APC for each provider type for providing 3 or more PHP services per day would reduce these cost fluctuations and provide more stability in the PHP APC geometric mean per diem costs.

We do not believe that the single-tier payment system will lead to a reduction in the number of PHPs, but rather that the increased stability in CMHC and hospital-based PHP payment rates will provide more stability for the PHP APCs. In addition, the calculated rates for APCs 5853 and 5863 continue to be based upon the actual costs of CMHCs and hospital-based PHPs, respectively. Therefore, we believe that the payment rates for the single-tier PHP APCs should be an appropriate approximation of provider costs, and should not result in reduced access to care.

Because the single-tier PHP APCs 5853 and 5863 became effective January 1, 2017, we will have to wait until our CY 2017 claims data are available to determine any effect of the payment rates for these APCs on the provision of services per day. We will continue to monitor PHP data for any unintended consequences resulting from the single-tier APC policy.

The OPPS pays for hospital outpatient services, including partial hospitalization services. This system bases payment on the geometric mean per diem costs of providing services using provider data from claims and cost reports. We calculate the PHP APC geometric mean per diem costs based on the data provided for each type of provider to determine payment for these services. We believe that this system provides appropriate payment for partial hospitalization services based on actual provider costs. The final PHP APC geometric mean per diem costs for CY 2018 reflect these actual provider costs.

Regarding the 2011 bill introduced in the Congress that would have required CMHCs and hospital-based PHPs to be paid at the same rate, we note that this bill was not enacted.

The difference in payment between CMHCs and hospital-based PHPs is based upon differences in resource use (or costs). When Congress required the Secretary to implement an outpatient prospective payment system, it generally required that this payment system group clinically similar covered services with respect to resource use (section 1833(t)(2) of the Act). Because the resource uses of CMHCs and hospital-based PHPs are different, these two provider types are paid under different APCs, based on their actual resource use.

Because the cost of providing partial hospitalization services differs significantly by site of service, we established different PHP APC payment rates for hospital-based PHPs and CMHCs in the CY 2011 OPSS/ASC final rule with comment period (75 FR 71991 through 71994). However, we allowed a 2-year transition to the CMHC payment rates based solely on CMHC data. With respect to the continued use of PHP APC geometric mean per diem costs for determining payment rates by provider, we refer readers to the CY 2013 OPSS/ASC final rule with comment period (77 FR 68406 through 68412) for a discussion of the implementation of this policy. The resulting payment rates reflect the geometric mean cost of what providers expend to maintain such programs, based on data provided by CMHCs and hospital-based PHPs, which we believe are an improvement over the payment rates under the two-tier methodology calculated based on median costs using only hospital-based data.

Comment: One commenter was concerned that the PHP trim methodologies could cause changes to the payment rates which could lead to a reduction in the number of PHPs. The commenter urged CMS to monitor the data to ensure that there are no unintended consequences, such as a reduction in the number of PHPs.

Response: We thank the commenter for sharing these concerns. We are continuing to monitor PHP data, including the number of PHPs that provide care to Medicare beneficiaries. Our trim methodologies should protect PHP ratesetting from skewing by aberrant data, such as extremely low or extremely high costs per day. We do not believe that our PHP trim methodologies will lead to a reduction in PHPs, but rather that the trims we apply will provide stability to PHPs by reducing

fluctuations in their payment rates due to aberrant data.

Comment: One commenter suggested that CMS consider paying PHPs using a quality-based payment system, and that CMS use a value-based purchasing program for PHPs.

Response: Currently, there is no statutory language explicitly authorizing a value-based purchasing program for PHPs. We responded to a similar public comment in the CY 2016 OPSS/ASC final rule with comment period (80 FR 70462) and refer readers to a summary of that comment and our response. To reiterate, sections 1833(t)(2) and 1833(t)(9) of the Act set forth the requirements for establishing and adjusting OPSS payment rates, which include PHP payment rates. Section 1833(t)(17) of the Act authorizes the Hospital OQR Program, which applies a payment reduction to subsection (d) hospitals that fail to meet program requirements. In the CY 2015 OPSS/ASC proposed rule (79 FR 41040), we considered future inclusion of, and requested comments on, the following quality measures addressing PHP issues that would apply in the hospital outpatient setting: (1) 30-day Readmissions; (2) Group Therapy; and (3) No Individual Therapy. We also refer readers to the CY 2015 OPSS/ASC final rule with comment period (79 FR 66957 through 66959) for a detailed discussion of PHP measures considered for inclusion in the Hospital OQR Program in future years. The Hospital OQR Program does not apply to CMHCs.

Comment: One commenter presented a number of suggestions for a more holistic approach to the way Medicare (or Medicaid) pays for and covers PHP services, including coverage for case management, and assistance with medication compliance, proper housing, and work and training facilities.

Response: We appreciate these suggestions. As we noted in the preceding comment response, the payment methodology for PHP services is governed by sections 1833(t)(2) and 1833(t)(9) of the Act. PHP services are defined in section 1861(ff) of the Act and do not include those services described by the commenter. We do not have the authority to cover and pay for services beyond those described in the Act, or to pay outside of the statutory methodology.

Comment: One commenter stated that the CMHC PHP payment rate is too low, which can affect access to care by some of the most disadvantaged Medicare beneficiaries. This commenter expressed concern about the closure of CMHCs, which the commenter attributed to low CMHC PHP payment

rates. The commenter noted that declining payment rates are occurring at a time when CMHCs have experienced higher costs due to the establishment of CMHC conditions of participation (CoPs) and higher bad debt expenses. The commenter believed that CMS is only concerned about protecting access to hospital-based PHPs, and not to CMHCs PHPs.

Response: The final CY 2018 CMHC geometric mean per diem costs are 11 percent higher than the proposed geometric mean per diem costs, and are approximately 15 percent higher than those costs finalized in the CY 2017 rulemaking. These final CY 2018 CMHC geometric mean per diem costs are based upon the most recent CMHC claims and cost data reported by providers. Therefore, we believe the payment rate derived from these geometric mean per diem costs represents an appropriate payment to CMHCs and should not result in provider closures or affect beneficiary access to care.

Most (if not all) of the costs associated with adhering to CoPs should be captured in the cost report data used in ratesetting and, therefore, are accounted for when computing the geometric mean per diem costs. The reduction to bad debt reimbursement was a result of provisions of section 3201 of the Middle Class Tax Extension and Job Creation Act of 2012 (Pub. L. 112-96). The reduction to bad debt reimbursement impacted all providers eligible to receive bad debt reimbursement, as discussed in the CY 2013 End-Stage Renal Disease final rule (77 FR 67518). Medicare currently reimburses bad debt for eligible providers at 65 percent.

We appreciate the commenter's input regarding the effect any reduction in PHP payment rates would have on access to care, but we disagree with the commenter's assertion that CMS is only concerned about access to hospital-based PHPs. We are working to strengthen continued access to both CMHCs and hospital-based PHPs for eligible Medicare beneficiaries. For example, for the CY 2016 ratesetting, we conducted an extensive analysis of the ratesetting process, and discovered errors providers had made in claims coding of revenue and HCPCS codes that were leading to lower geometric mean per diem costs. In the CY 2016 OPSS/ASC final rule with comment period (80 FR 70462 through 70466), we also included a detailed description of the ratesetting process to help all PHPs record costs correctly so that we can more fully capture PHP costs in ratesetting. In that same final rule with comment period, we also addressed

fluctuations in payments and protected ratesetting from aberrant data by implementing trims on all PHP data used in ratesetting (80 FR 70455 through 70457). For example, the CMHC ±2 standard deviation trim has protected CMHCs by removing from ratesetting those providers with aberrantly low costs per day, which would have lowered total CMHC geometric mean per diem costs, and thus lowered CMHC per diem payment rates. In this CY 2018 final rule with comment period ratesetting, that ±2 standard deviation trim resulted in our removing 4 CMHCs from the ratesetting data, 3 of which had costs per day that were extremely low.

We agree that both CMHCs and hospital-based PHPs serve some of the most disadvantaged Medicare beneficiaries, and appreciate the care that these providers give. We remain concerned about access to all PHP services, and particularly about the small numbers of CMHCs. The CY 2016 PHP data file of claims used for CY 2018

ratesetting showed only 50 CMHCs before we applied our data trims. We want to ensure that CMHCs remain a viable option as providers of mental health care, and will continue to explore policy options for strengthening the PHP benefit and increasing access to the valuable services provided by CMHCs and hospital-based PHPs.

We did not receive any public comments on the hospital-based PHP geometric mean per diem costs.

After consideration of the public comments we received, we are finalizing our proposals to apply our established policies to calculate the PHP APC per diem payment rates based on geometric mean per diem costs using the most recent claims and cost data for each provider type. Specifically, we are finalizing our proposal to continue to pay CMHCs using APC 5853 (Partial Hospitalization (3 or More Services Per Day)) and to continue to pay hospital-based PHPs using APC 5863 (Partial Hospitalization (3 or More Services Per

Day)). We calculated the geometric mean per diem costs for CY 2018 for APC 5853 for CMHCs using only CY 2016 CMHC claims data and the most recent CMHC cost data, and the CY 2018 geometric mean per diem costs for APC 5863 for hospital-based PHPs using only CY 2016 hospital-based PHP claims data and the most recent hospital cost data. We also are finalizing our proposal to continue applying our established trim methodologies, including the application of a ±2 standard deviation trim on costs per day for CMHCs and a CCR>5 hospital service day trim for hospital-based PHP providers.

The final CY 2018 PHP APC geometric mean per diem costs for CMHC PHP APC 5853 are \$143.22 and for hospital-based PHP APC 5863 are \$208.09, as shown in Table 74 below. The final PHP APC payment rates are included in Addendum A to this final rule with comment period (which is available via the Internet on the CMS Web site).

TABLE 74—CY 2018 PHP APC GEOMETRIC MEAN PER DIEM COSTS

CY 2018 APC	Group title	Final PHP APC geometric mean per diem costs
5853	Partial Hospitalization (3 or more services per day) for CMHCs	\$143.22
5863	Partial Hospitalization (3 or more services per day) for hospital-based PHPs	\$208.09

3. PHP Service Utilization Updates

In the CY 2016 OPPS/ASC final rule with comment period (81 FR 79684 through 79685), we expressed concern over the low frequency of individual therapy provided to beneficiaries. The final CY 2016 claims data used for this CY 2018 final rule with comment period revealed some increases in the provision of individual therapy compared to CY 2015 claims data. In the CY 2016 final claims data, hospital-based PHPs provided individual therapy on 4.7 percent of days with only 3 services and 5.8 percent of days with 4 or more services (compared to 4.0 percent and 6.2 percent, respectively, in CY 2015). Similarly, in the CY 2016 final claims data, CMHCs provided individual

therapy on 8.5 percent of days with only 3 services provided and 5.0 percent of days with 4 or more services provided (compared to 7.9 percent and 4.4 percent, respectively, in CY 2015 claims).

In the CY 2018 OPPS/ASC proposed rule (82 FR 33640), we stated that we are aware that our single-tier payment policy may influence a change in service provision because providers are able to obtain payment that is heavily weighted to the cost of providing 4 or more services when they provide only 3 services. We indicated that we are interested in ensuring that providers furnish an appropriate number of services to beneficiaries enrolled in PHPs. Therefore, with the CY 2017

implementation of APC 5853 and APC 5863 for providing 3 or more PHP services per day, we are continuing to monitor utilization of days with only 3 PHP services.

For this CY 2018 final rule with comment period, we used the final update of the CY 2016 claims data. The final CY 2016 claims data showed that PHPs maintained an appropriately low utilization of 3 service days compared to CY 2015. Hospital-based PHPs have increased their provision of services since CY 2015 by providing fewer days with 3 services only, and more days with 5 or more services. CMHCs have remained steady in providing an appropriately low level of 3 service days.

TABLE 75—PERCENTAGE OF PHP DAYS BY SERVICE UNIT FREQUENCY

	CY 2015 (%)	CY 2016* (%)	Change (%)
CMHCs:			
Percent of Days with 3 services	4.7	4.8	2.1
Percent of Days with 4 services	62.9	70.3	11.8
Percent of Days with 5 or more services	32.4	24.9	-23.1
Hospital-based PHPs:			
Percent of Days with 3 services	12.4	10.9	-12.1
Percent of Days with 4 services	69.8	64.9	-7.0

TABLE 75—PERCENTAGE OF PHP DAYS BY SERVICE UNIT FREQUENCY—Continued

	CY 2015 (%)	CY 2016* (%)	Change (%)
Percent of Days with 5 or more services	17.8	24.1	35.4

* May not sum to 100 percent by provider type due to rounding.

As we noted in the CY 2017 OPPS/ASC final rule with comment period (81 FR 79685), we will continue to monitor the provision of days with only 3 services, particularly now that the single-tier PHP APCs 5853 and 5863 are in place for providing 3 or more services per day to CMHCs and hospital-based PHPs, respectively.

It is important to reiterate our expectation that days with only 3 services are meant to be an exception and not the typical PHP day. In the CY 2009 OPPS/ASC final rule with comment period, we clearly stated that we consider the acceptable *minimum* units of PHP services required in a PHP day to be 3 and explained that it was never our intention that 3 units of service represent the number of services to be provided in a typical PHP day. PHP is furnished in lieu of inpatient psychiatric hospitalization and is intended to be more intensive than a half-day program. We further indicated that a typical PHP day should include 5 to 6 hours of services (73 FR 68687 through 68694). We explained that days with only 3 units of services may be appropriate to bill in certain limited circumstances, such as when a patient might need to leave early for a medical appointment and, therefore, would be unable to complete a full day of PHP treatment. At that time, we noted that if a PHP were to only provide days with 3 services, it would be difficult for patients to meet the eligibility requirement in 42 CFR 410.43, that patients must require a minimum of 20 hours per week of therapeutic services as evidenced in their plan of care (73 FR 68689).

4. Minimum Service Requirement: 20 Hours Per Week

In the CY 2009 OPPS/ASC final rule with comment period (73 FR 68694), we codified patient eligibility criteria to reflect the intensive nature of a PHP. At that time, we noted that many of the patient eligibility criteria had been longstanding policy requirements that did not reflect a change in policy. The added regulatory text was intended to

strengthen and enhance the integrity of the PHP benefit. We further stated that because PHP is provided in lieu of inpatient care, it should be a highly structured and clinically intensive program. Our goal was to improve the level of service furnished in a day of PHP, while also ensuring that the appropriate population utilizes the PHP benefit (73 FR 68695).

As discussed in the CY 2018 OPPS/ASC proposed rule (82 FR 33641 through 33642), when we codified these eligibility criteria, we acknowledged commenters' concerns related to the eligibility requirement that a patient must require a minimum of 20 hours per week of therapeutic services as evidenced in their plan of care. For example, we recognized commenters' concerns that it may sometimes be difficult for patients to receive 20 hours per week of therapeutic services, such as when transitioning into or out of a PHP program (73 FR 68695). Therefore, to permit flexibility in treating PHP patients, we require a minimum of 20 hours per week of therapeutic services, with the understanding that patients may not always meet this minimum, and qualified the requirement by adding "as evidenced in their plan of care." This eligibility requirement only addresses the minimum amount of PHP services beneficiaries must require as evidenced in their plan of care. It does not address whether or not beneficiaries receive a particular number of therapeutic services per week. However, we have noted in multiple prior OPPS/ASC final rules with comment period that a typical PHP day would include 5 to 6 hours per day of PHP services (70 FR 68548, 71 FR 67999, 72 FR 66671, and 73 FR 68687).

Most recently, we discussed the 20 hours of services requirement in the CY 2017 rulemaking when we reminded providers that our regulations at §§ 410.43(a)(3) and (c)(1) continue to require that PHP beneficiaries must require a minimum of 20 hours per week of therapeutic services as evidenced in their plan of care, and that

PHP services must be furnished in accordance with a physician certification and the beneficiary's plan of care reflecting that need.

We analyzed CY 2015 and CY 2016 PHP claims data to assess the intensity of PHP services provided, using PHP-allowable HCPCS codes and provider and service date information. To calculate the number of hours of PHP services provided to each beneficiary each day, we assumed each unit of service equaled 1 hour of time. Each service day was then mapped to its Sunday through Saturday calendar week, and the number of PHP hours per week was calculated for each beneficiary. Next, the service weeks for each beneficiary were sorted chronologically and assessed: The first service week in a continuous series of service weeks was flagged as an "Admission" week, and the last service week in a continuous series of service weeks was flagged as a "Discharge" week. We removed from the analysis the admission and discharge weeks for each beneficiary to permit us to assess the intensity of services provided to beneficiaries fully engaged in PHPs (that is, those in "nontransitional" weeks). We then calculated the total number of service weeks and the number of service weeks with at least 20 PHP hours for each beneficiary. These two values were then used to determine the percentage of nontransitional service weeks that met the 20-hour PHP threshold for each beneficiary.

As stated in the CY 2018 OPPS/ASC proposed rule (82 FR 33641), we found that a majority of PHP patients did not receive at least 20 hours of PHP services per week. Approximately half of Medicare beneficiaries receiving PHP services received 20 hours or more of services in 50 percent or more of nontransitional weeks. In CY 2016 claims data, only 16.4 percent of Medicare beneficiaries in CMHCs and 34.8 percent of Medicare beneficiaries in hospital-based PHPs received at least 20 hours of PHP services in 100 percent of nontransitional weeks.

TABLE 76—NUMBER AND PERCENTAGE OF MEDICARE BENEFICIARIES RECEIVING AT LEAST 20 HOURS OF PHP SERVICES PER WEEK—CY 2015 THROUGH CY 2016

Type	Beneficiaries Receiving 20 or more hours of PHP services per nontransitional week *	CY 2015		CY 2016	
		Number	Percentage	Number	Percentage
CMHC PHP Beneficiaries	In 50 percent or more of weeks	1,205	53.1	1,016	57.3
	In 100 percent of weeks	319	14.1	291	16.4
Hospital-Based PHP Beneficiaries	In 50 percent or more of weeks	8,610	51.0	8,333	56.7
	In 100 percent of weeks	5,003	29.6	5,115	34.8

* Weeks are trimmed to exclude admission and discharge weeks based on a Sunday through Saturday week. Nontransitional weeks are weeks that are not admission or discharge weeks.

Overall, the data suggest that some PHP beneficiaries may not be receiving the intensive services that eligible beneficiaries actually need. In the CY 2018 OPPS/ASC proposed rule, we stated that we were concerned about these findings, and encouraged PHPs to review their admission practices and ensure they are providing the services beneficiaries need.

Given similar concerns, in the CY 2017 OPPS/ASC final rule with comment period, we solicited public comments on potential future editing of PHP claims for the 20 hours per week minimum eligibility requirement and on strengthening the tie between a beneficiary’s receipt of 20 hours per week of PHP services and payment for those services (81 FR 79686). We received a number of public comments in response to our solicitation, which we addressed in the CY 2018 OPPS/ASC proposed rule (82 FR 33641 through 33642).

In the CY 2018 OPPS/ASC proposed rule, we solicited public comments on the advisability of applying a payment requirement conditioned on a beneficiary’s receipt of a minimum of 20 hours of therapeutic services per week. We also solicited public comments addressing the need for exceptions to such a policy. Specifically, we wanted to know and understand the type of occurrences or circumstances that would cause a PHP patient to not receive at least 20 hours of PHP services per week, particularly where payment would still be appropriate.

Comment: Many commenters agreed it is critical that beneficiaries requiring PHP services receive the appropriate intensity of services, but suggested that CMS work with industry to define “intensity” more broadly than total hours of services received per week. A few commenters suggested that CMS check the Local Coverage Determinations (LCDs) when evaluating intensity. One commenter provided a history of the PHP benefit, and noted that, historically, day programs similar to PHPs were required to offer 20 hours

per week in programming, but the patient and the treatment team determined the amount of time in treatment.

A few commenters suggested that CMS forego editing, and instead implement a targeted medical review of those providers whose data are problematic. These and other commenters suggested that CMS educate the PHP provider community about a 20-hour per week minimum service requirement. A number of commenters suggested that CMS reissue the rescinded Special Edition 1607 MedLearn Matters article and its associated Change Request 9880, about messaging on the remittance advice to providers. One commenter suggested that CMS include beneficiaries in any communications about a 20-hour per week minimum service requirement.

Several commenters believed that it would be premature to edit claims until CMS could determine the effect of the single-tier payment system on provision of services. These commenters urged a delay in editing until the CY 2019 rulemaking when CMS could analyze the CY 2017 data (the first year that could show the effect of the single-tier payment system on provision of services) and monitor utilization in the meantime. A few commenters stated that CMS should not require weekly billing of claims in order to implement payment editing of the 20-hour requirement, as it would increase providers’ administrative burden because it would increase the number of claims providers would be required to submit.

Some commenters cited language from the CY 2009 OPPS/ASC final rule with comment period which implemented this eligibility requirement: That CMS stated it is to be documented in the plan of care and the language did not require PHP patients to receive 20 hours of care. One commenter believed that an edit limiting payment would be unduly burdensome, particularly given the PHP preamble language in the CY 2009 final

rule with comment period. One commenter suggested that allowing nurse practitioners to create the treatment plan, and supervise and direct patients in PHPs, would give providers more flexibility in providing services to meet the minimum requirements.

One commenter was concerned that a 20-hour minimum service requirement, combined with limiting payment to essentially a 3-service encounter, would not fully serve the patients and would push patients out of PHPs and into “Intensive Outpatient Programs (IOPs).” One commenter stated that if there were editing for a 20-hour requirement, the PHP revenue for one provider, for example, would decline by \$100,000 at a time when the provider is struggling to find nursing staff, and its psychiatry and nursing costs are rising.

Multiple commenters described reasons why PHP patients are sometimes unable to attend the program for 20 hours per week. Commenters suggested exceptions for weather, acute illness or comorbid disease, family or childcare issues, holidays, transportation problems, other medical or social service appointments, court or legal appointments, and local emergencies or disasters. Several commenters discussed problems with medication compliance and medication adjustments, the cognitive effects of which could make attending for 20 hours per week clinically suboptimal. Several commenters noted that an overly strict edit could result in inappropriate changes and reduce access to PHP services.

Response: We thank the commenters for their insights and suggestions. We will consider these comments in future rulemaking and in developing subregulatory guidance.

We wish to correct two erroneous assumptions included in the comments. First, we have not rescinded Change Request 9880 about messaging on the provider remittance advice. This Change Request is available online at: <https://www.cms.gov/Regulations-and-Guidance/Guidance/Transmittals/2017->

Transmittals-Items/R1833OTN.html?DLPage=1&DLEntries=10&DLFilter=9880&DLSort=1&DLSortDir=ascending.

However, we did rescind MLN Special Edition (SE) article 1607, partly because it referred to requiring weekly billing. We do not currently require PHPs to bill weekly, although PHPs may do so if they wish. Second, regarding the comment about limiting payment to a 3-service encounter, it was unclear if the commenter believed that PHP per diem payment was limited to that for 3 services. We note that the single-tier APCs for CMHCs and for hospital-based PHPs are based upon the geometric mean per diem costs for providing 3 or more PHP services per day. PHP APCs 5853 and 5863 do not limit PHP services to 3 per day.

Our goal is for PHP providers to continue to have flexibility in providing PHP services. However, we must ensure that Medicare beneficiaries enrolled in PHPs are legitimately eligible for PHP services and receive appropriately intensive treatment. As we seek to understand the usage of PHP services by Medicare beneficiaries, we also will continue to monitor the intensity of services provided on a weekly basis.

C. Outlier Policy for CMHCs

As discussed in the CY 2004 OPPS final rule with comment period (68 FR 63469 through 63470), after examining the costs, charges, and outlier payments for CMHCs, we concluded that establishing a separate OPPS outlier policy for CMHCs would be appropriate. Beginning in CY 2004, we created a separate outlier policy specific to the estimated costs and OPPS payments provided to CMHCs. We designated a portion of the estimated OPPS outlier threshold specifically for CMHCs, consistent with the percentage of projected payments to CMHCs under the OPPS each year, excluding outlier payments, and established a separate outlier threshold for CMHCs.

The separate outlier threshold for CMHCs resulted in \$1.8 million in outlier payments to CMHCs in CY 2004, and \$0.5 million in outlier payments to CMHCs in CY 2005. In contrast, in CY 2003, more than \$30 million was paid to CMHCs in outlier payments. We note that, in the CY 2009 OPPS/ASC final rule with comment period, we also established an outlier reconciliation policy to address charging aberrations related to OPPS outlier payments (73 FR 68594 through 68599). In CY 2017, we implemented a CMHC outlier payment cap to be applied at the provider level, such that in any given year, an individual CMHC will receive no more than a set percentage of its CMHC total

per diem payments in outlier payments (81 FR 79692 through 79695). This outlier payment cap only affects CMHCs, and does not affect other provider types. This outlier payment cap is in addition to and separate from the current outlier policy and reconciliation policy in effect. We finalized the CMHC outlier payment cap to be set at 8 percent of the CMHC's total per diem payments (81 FR 79694 through 79695).

In the CY 2018 OPPS/ASC proposed rule (82 FR 33642), we proposed to continue to designate a portion of the estimated 1.0 percent hospital outpatient outlier threshold specifically for CMHCs, consistent with the percentage of projected payments to CMHCs under the OPPS in CY 2018, excluding outlier payments. This policy results in CMHC outliers being paid under limited circumstances associated with costs from complex cases, rather than as a substitute for the standard PHP payment to CMHCs. In the CY 2018 OPPS/ASC proposed rule, we also noted that CMHCs are projected to receive 0.02 percent of total hospital outpatient payments in CY 2018, excluding outlier payments. Therefore, we proposed to designate approximately 0.0027 percent of the estimated 1.0 percent hospital outpatient outlier threshold for CMHCs. As we do for each rulemaking cycle, we have updated the CMHC CCRs and claims data used to model the PHP payments rates for this final rule with comment period.

Based on our simulations of CMHC payments for CY 2018, in the proposed rule, we proposed to continue to set the cutoff point for outlier payments for CY 2018 at 3.4 times the highest CMHC APC payment rate implemented for that calendar year, which for CY 2018 is the payment rate for CMHC APC 5853. In addition, we proposed to continue to apply the same outlier payment percentage that applies to hospitals. Therefore, for CY 2018, we proposed to continue to pay 50 percent of CMHC APC geometric mean per diem costs over the cutoff point. For example, for CY 2018, if a CMHC's cost for partial hospitalization services paid under CMHC APC 5853 exceeds 3.4 times the proposed payment rate for CMHC APC 5853, the outlier payment would be calculated as 50 percent of the amount by which the cost exceeds 3.4 times the payment rate for CMHC APC 5853.

In section II.G. of the proposed rule, for the hospital outpatient outlier payment policy, we proposed to set a fixed dollar threshold in addition to an APC multiplier threshold. APC 5853 is the only APC for which CMHCs may receive payment under the OPPS, and is

for providing a defined set of services that are relatively low cost when compared to other OPPS services. As such, it is not necessary to also impose a fixed dollar threshold on CMHCs. Therefore, we did not propose to set a dollar threshold for CMHC outlier payments.

In summary, we proposed to continue to calculate our CMHC outlier threshold and CMHC outlier payments according to our established policies.

We did not receive any public comments on these proposals. Therefore, we are finalizing our proposals to continue to calculate CMHC outlier threshold and CMHC outlier payments according to our established policies. Using the updated data for this final rule with comment period, CMHCs are projected to receive 0.03 percent of total hospital outpatient payments in CY 2018, excluding outlier payments. Therefore, for CY 2018 we are designating approximately 0.02 percent of the estimated 1.0 percent hospital outpatient outlier threshold for CMHCs.

IX. Procedures That Will Be Paid Only as Inpatient Procedures

A. Background

We refer readers to the CY 2012 OPPS/ASC final rule with comment period (76 FR 74352 through 74353) for a full historical discussion of our longstanding policies on how we identify procedures that are typically provided only in an inpatient setting (referred to as the inpatient only (IPO) list) and, therefore, will not be paid by Medicare under the OPPS, and on the criteria that we use to review the IPO list each year to determine whether or not any procedures should be removed from the list. The complete list of codes that will be paid by Medicare in CY 2018 as inpatient only procedures is included as Addendum E to this final rule with comment period (which is available via the Internet on the CMS Web site).

B. Changes to the Inpatient Only (IPO) List

1. Methodology for Identifying Appropriate Changes to IPO List

In the CY 2018 OPPS/ASC proposed rule (82 FR 33642 through 33645), for CY 2018, we proposed to use the same methodology (described in the November 15, 2004 final rule with comment period (69 FR 65834)) of reviewing the current list of procedures on the IPO list to identify any procedures that may be removed from the list. We have established five criteria that are part of this methodology. As

noted in the CY 2012 OPPS/ASC final rule with comment period (76 FR 74353), we utilize these criteria when reviewing procedures to determine whether or not they should be removed from the IPO list and assigned to an APC group for payment under the OPPS when provided in the hospital outpatient setting. We note that a procedure is not required to meet all of the established criteria to be removed from the IPO list. The criteria include the following:

1. Most outpatient departments are equipped to provide the services to the Medicare population.

2. The simplest procedure described by the code may be performed in most outpatient departments.

3. The procedure is related to codes that we have already removed from the IPO list.

4. A determination is made that the procedure is being performed in numerous hospitals on an outpatient basis.

5. A determination is made that the procedure can be appropriately and safely performed in an ASC, and is on the list of approved ASC procedures or has been proposed by us for addition to the ASC list.

Using the above-listed criteria, in the CY 2018 OPPS/ASC proposed rule (82 FR 33643 and 33644), we identified the procedures described by the following codes that we proposed to remove from the IPO list for CY 2018: CPT code 27447 (Arthroplasty, knee, condyle and plateau; medical and lateral compartments with or without patella resurfacing (total knee arthroplasty)) and CPT code 55866 (Laparoscopy, surgical prostatectomy, retroperitoneal radical, including nerve sparing, includes robotic assistance, when performed). The procedures that we proposed to remove from the IPO list for CY 2018 and subsequent years, including the HCPCS code, long descriptors, and the CY 2018 payment indicators, were displayed in Table 29 of the proposed rule.

We note that we address the public comments we received on removing the procedure described by CPT code 55866 from the IPO list under section IX.B.2. of this final rule with comment period. We address the public comments we received on removing CPT code 27447 from the IPO list under section IX.B.3. of this final rule with comment period.

2. Removal of Procedure Described by CPT Code 55866

In the CY 2018 OPPS/ASC proposed rule, we proposed to remove CPT code 55866 from the IPO list and to assign it to C-APC 5362 (Level 2 Laparoscopy &

Related Services) with status indicator "J1". We stated in the proposed rule that after consulting with stakeholders and our clinical advisors regarding the procedure described by CPT code 55866, we believe that this procedure meets criteria 1 and 2. We sought comment on whether the public believes that these criteria are met and whether CPT code 55866 meets any other of the five criteria cited earlier.

Comment: Commenters, including cancer centers, physicians, and individual stakeholders, supported the proposal to remove CPT code 55866 from the IPO list. These commenters believed this procedure could be safely performed on hospital outpatients and noted that many hospital outpatient departments are equipped to do so.

Response: We appreciate the commenters' support.

Comment: One commenter opposed the removal of CPT code 55866 from the IPO list, stating that the procedure cannot be safely performed as an outpatient procedure for a majority of patients.

Response: We continue to believe that the procedure described by CPT code 55866 can be safely performed in the hospital outpatient setting on patients who are appropriate candidates to receive the procedure in that setting. Because the procedure meets several of the criteria for removal from the IPO list, we believe it is appropriate to remove it.

3. Removal of the Total Knee Arthroplasty (TKA) Procedure Described by CPT Code 27447

For a number of years, total knee arthroplasty (TKA) has been a topic of discussion for removal from the IPO list with both stakeholder support and opposition. Most recently, in the CY 2017 OPPS/ASC proposed rule (81 FR 45679 through 45681), we sought public comments on the removal of the TKA procedure from the IPO list from interested parties, including specifically: Medicare beneficiaries and advocate associations for Medicare beneficiaries; orthopedic surgeons and physician specialty societies that represent orthopedic surgeons who perform TKA procedures; hospitals and hospital trade associations; and any other interested stakeholders. In the CY 2017 proposed rule comment solicitation, we requested stakeholder input on whether the TKA procedure met the established criteria used to identify procedures to remove from the IPO list. We also requested input regarding how to modify current Medicare payment models that include TKA, such as the Bundled Payments for

Care Improvement (BPCI) and the Comprehensive Care for Joint Replacement (CJR) initiatives, if the procedure was removed from the IPO list.

Below is a summary of the public comments we received in response to the comment solicitation in the CY 2017 OPPS/ASC proposed rule. These public comments were varied and nuanced.

- A number of commenters believed that continued refinements to the TKA surgical procedure allowed it to be performed safely on properly selected Medicare beneficiaries in the outpatient setting. A number of facilities indicated that they were currently performing TKA procedures on an outpatient basis in both the HOPD and ASC on non-Medicare patients. Commenters who supported removing the TKA procedure from the IPO list also noted recent peer-reviewed publications that reported on investigations of the feasibility of outpatient TKA with positive results; that is, TKA outpatients did not experience higher rates of complications or readmissions in comparison to TKA inpatients.

- A minority of commenters (including teaching hospital stakeholders and some professional organizations representing orthopedic surgeons) stated that the risk of postsurgical complications was too high for patients with the TKA procedure performed in the outpatient setting for the Medicare population and noted that patients appropriate for the TKA procedure performed on an outpatient basis tend to be younger, more active, have fewer complications, and have more at home support than most Medicare beneficiaries. These commenters also believed there was insufficient research on the TKA procedure performed on an outpatient basis to definitively claim that the procedure could be safely performed in the outpatient setting.

- Some commenters noted that if the TKA procedure was removed from the IPO list, inpatient TKA cases should not be subject to Recovery Audit Contractor (RAC) review for appropriate site-of-service. In addition, some commenters expressed concerns about the effect that removing the TKA procedure from the IPO list could have on the BPCI and CJR Medicare payment models. We stated in the CY 2017 OPPS/ASC final rule with comment period (81 FR 79699) that we would consider all public comments received in future policymaking.

In the CY 2018 OPPS/ASC proposed rule (82 FR 33643), we stated that we have reviewed the clinical characteristics of the TKA procedure and related evidence, including current

length-of-stay (LOS) data for inpatient TKA procedures and peer-reviewed literature related to outpatient TKA procedures. We also stated that we have considered input from the comment solicitation in the CY 2017 OPPTS/ASC proposed rule (as summarized earlier) and the professional opinions of orthopedic surgeons and CMS clinical advisors. In addition, we stated that we have taken into account the recommendation from the summer 2016 meeting of the HOP Panel to remove the TKA procedure from the IPO list. Based on this information, we stated in the CY 2018 OPPTS/ASC proposed rule that we have determined that the TKA procedure would be an appropriate candidate for removal from the IPO list. We stated that we expect providers to carefully develop evidence-based patient selection criteria to identify patients who are appropriate candidates for an outpatient TKA procedure as well as exclusionary criteria that would disqualify a patient from receiving an outpatient TKA procedure. We believe that the subset of Medicare beneficiaries who meet patient selection criteria for performance of the TKA procedure on an outpatient basis may have the procedure performed safely in the outpatient setting.

In the CY 2018 OPPTS/ASC proposed rule, we stated that we believe that the TKA procedure described by CPT code 27447 meets a number of criteria for removal from the IPO list, including criteria 1, 2, and 4. We sought comments on whether the public believes that these criteria are met and whether the TKA procedure meets any other of the five criteria stated in the beginning of this section. In the proposed rule, we also proposed that CPT code 27447 would be assigned to C-APC 5115 (Level 5 Musculoskeletal Procedures) with status indicator “J1”.

Comment: Numerous commenters, including individual stakeholders, orthopedic surgeons, clinical specialty societies, national and State-level hospital associations, hospital systems, device manufacturers, and private insurance providers responded to this proposal. Some commenters, including some orthopedic specialty societies and surgeons, private insurance providers, ambulatory surgical centers, hospital systems, and beneficiaries supported the proposal to remove CPT code 27447 from the IPO list. Many of these commenters believed that TKA met CMS’ established criteria for removing a procedure from the IPO list and stated that appropriately selected patients who were in excellent health and with no or limited medical comorbidities and sufficient caregiver support could be

successful candidates for outpatient TKA. Several commenters referenced their personal, positive experiences with outpatient TKA. Other commenters supported the proposal, but with certain caveats regarding patient safety, including requests that CMS develop, with input from stakeholders, patient selection criteria and risk stratification protocols for TKA to be performed in an outpatient setting. Two orthopedic specialty societies stated that their organization was in the process of developing these patient selection and protocol tools.

In addition, some commenters requested that CMS explicitly state that the surgeon is the final arbiter of the appropriate site for the surgical procedure, that CMS provide an incentive for outpatient and ambulatory settings performing TKA, PHA, and THA to be a part of a registry such as the American Joint Replacement Registry, and that CMS confirm that surgeons will continue to have the option to select the appropriate setting (inpatient or outpatient) for the procedure.

Some commenters expressed concerns that removal of TKA from the IPO list may lead commercial payers to implement coverage policies that would drive these surgeries from the inpatient setting to lower cost outpatient settings that may not be sufficiently prepared to handle the complexities or risks associated with some outpatient TKA procedures. Further, some commenters stated that removing TKA from the IPO list could drive TKA to specific facilities based on cost alone, which could result in significant further stresses in isolated rural care settings.

Response: We appreciate the commenters’ support of our proposal. As previously stated in the discussion of the CY 2018 OPPTS/ASC proposed rule, we continue to believe that the decision regarding the most appropriate care setting for a given surgical procedure is a complex medical judgment made by the physician based on the beneficiary’s individual clinical needs and preferences and on the general coverage rules requiring that any procedure be reasonable and necessary. We also reiterate our previous statement that the removal of any procedure from the IPO list does *not* require the procedure to be performed only on an outpatient basis.

While we continue to expect providers who perform outpatient TKA on Medicare beneficiaries to use comprehensive patient selection criteria to identify appropriate candidates for the procedure, we believe that the surgeons, clinical staff, and medical specialty societies who perform

outpatient TKA and possess specialized clinical knowledge and experience are most suited to create such guidelines. Therefore, we do not expect to create or endorse specific guidelines or content for the establishment of providers’ patient selection protocols. However, we remind commenters that the “2-midnight” rule continues to be in effect and was established to provide guidance on when an inpatient admission would be appropriate for payment under Medicare Part A (inpatient hospital services). In general, this guidance provides that if the physician expects the beneficiary to require hospital care that spans at least 2 midnights and admits the beneficiary based upon that expectation, the case is appropriate for payment under the IPPS (80 FR 70539). For stays for which the physician expects the patient to need less than 2 midnights of hospital care, an inpatient admission is payable under Medicare Part A on a case-by-case basis if the documentation in the medical record supports the admitting physician’s determination that the patient requires inpatient hospital care. This documentation and the physician’s admission decision are subject to medical review, which is discussed in greater detail below (80 FR 70541). The 2-midnight rule does not apply to procedures on the IPO list; that is, medically necessary procedures that are on the IPO list are appropriate for Medicare Part A payment without regard to the actual or expected length of stay (80 FR 70539).

With regard to the behavior of commercial insurance providers and site selection for outpatient TKA, while we believe that these comments are out of the scope of the proposed rule, we note that commercial providers are responsible for establishing their own rules governing payment for services.

Comment: Several commenters opposed the proposal to remove the TKA procedure from the IPO list, including national and State-level hospital associations, hospital systems, and individual stakeholders. Some of these commenters expressed concerns that TKA was not clinically appropriate for the outpatient setting. The commenters stated that the TKA procedure is invasive and Medicare beneficiaries are more likely to have comorbidities that could make pain more difficult to control. The commenters also stated that, because of these comorbidities, Medicare beneficiaries will face greater complications, recovery times, and rehabilitation needs than non-Medicare populations to recover from TKA procedures.

Response: We continue to believe that the TKA procedure meets a number of our established criteria for removal from the IPO list, including criteria 1, 2, and 4. We also continue to believe that there are a subset of Medicare beneficiaries with less medical complexity who are able to receive this procedure safely on a hospital outpatient basis and that providers should adopt evidence-based patient selection protocols to appropriately identify these patients. As previously noted, removal of a procedure from the IPO list does not require the procedure to be performed only on an outpatient basis. Rather, it allows payment to be made under the OPSS when the procedure is performed on a hospital outpatient. In addition, we expect that physicians will continue to exercise their complex medical judgment, based on a number of factors, including the patient's comorbidities, the expected length of stay in the hospital (in accordance with the 2-midnight rule), the patient's anticipated need for postoperative skilled nursing care, and other factors.

Comment: Several commenters stated their concerns regarding the ability of beneficiaries to access postacute care for a TKA procedure at an SNF. By statute, beneficiaries must have a prior inpatient hospital stay of no fewer than 3 consecutive days to be eligible for Medicare coverage of inpatient SNF care. The commenters stated that discharging outpatient TKA patients without a 3-day stay and access to adequate rehabilitation would increase the likelihood of further medical concerns that may result in readmissions, which will result in higher expenses for the beneficiary, the Medicare program, and the hospital. These commenters stated that if there is no commensurate waiver of the SNF 3-day stay requirement, all outpatient TKA patients would need to be appropriate for discharge to home or home health care. One commenter questioned beneficiaries' ability to access the SNF benefit if a beneficiary has outpatient TKA surgery and is then admitted as an inpatient after being discharged from the hospital outpatient department. Other commenters noted that the vast majority of beneficiaries who fit the criteria for an outpatient TKA or THA procedure would not need institutional postacute care services. Commenters also stated that a large percentage of TKA inpatients do not require a 3-day length of stay, and that removing TKAs from the IPO list would not preclude these patients from meeting the 3-day qualifying stay requirement when warranted.

Response: We reiterate that removal of the TKA procedure from the IPO list does not require the procedure to be performed only on an outpatient basis. Removal of the TKA procedure from the IPO list allows for payment of the procedure in either the inpatient setting or the outpatient setting. The commenter is correct that a prior inpatient hospital stay of at least 3 consecutive days is required by law under Medicare FFS as a prerequisite for SNF coverage. We note that Medicare Advantage plans may elect, pursuant to 42 CFR 409.30 and 422.101(c), to provide SNF coverage without imposing the SNF 3-day qualifying stay requirement and that CMS has issued conditional waivers of the 3-day qualifying stay requirement as necessary to carry out the Medicare Shared Savings Program and to test certain Innovation Center payment models, including the Next Generation ACO Model.

We agree that the physician should take the beneficiaries' need for post-surgical services into account when selecting the site of care to perform the surgery. We would expect that Medicare beneficiaries who are selected for outpatient TKA would be less medically complex cases with few comorbidities and would not be expected to require SNF care following surgery. Instead, we expect that many of these beneficiaries would be appropriate for discharge to home (with outpatient therapy) or home health care. We believe that comprehensive patient selection protocols should be implemented to properly identify these beneficiaries. However, we do not believe that Medicare should establish such protocols and believe that physicians and providers should select an appropriate patient selection protocol.

Comment: Numerous commenters from stakeholders addressed the effect that removing TKA from the IPO list could potentially have on two Medicare payment models currently being administered by the Center for Medicare and Medicaid Innovation: BPCI and the CJR model. The commenters were concerned that the proposal to remove TKA from the IPO list could significantly alter the composition of BPCI and CJR participant hospitals' patient populations. Specifically, the commenters believed that younger and healthier patients would be more likely to receive outpatient TKAs and that a higher proportion of patients receiving inpatient TKAs would be high risk and/or more likely to require additional postacute care support. As a result, the commenters believed that a change in patient-mix could increase the average

episode payment of the remaining inpatient TKA BPCI and CJR episodes when compared to current payment levels and affect a hospital's ability to fall below the established target price for the episode, thereby hindering the hospital's ability to generate savings under the BPCI or CJR model. The commenters presented several proposed refinements to the BPCI and CJR models to mitigate these effects, including adjusting the target price for BPCI and CJR episodes involving TKA to exclude procedures that could have been performed in the HOPD or allowing BPCI Model 2 and CJR episodes to be initiated by TKA performed in the hospital outpatient department.

Response: As mentioned earlier, we believe that there is a subset of less medically complex TKA cases that could be appropriately and safely performed on an outpatient basis. However, we do not expect a significant volume of TKA cases currently being performed in the hospital inpatient setting to shift to the hospital outpatient setting as a result of removing this procedure from the IPO list. At this time, we expect that a significant number of Medicare beneficiaries will continue to receive treatment as an inpatient for TKA procedures. As providers' knowledge and experience in the delivery of hospital outpatient TKA treatment develops, there may be a greater migration of cases to the hospital outpatient setting. However, we do not expect a significant shift in TKA cases from the hospital inpatient setting to the hospital outpatient setting between January 1, 2018 (the effective date for the removal of TKA from the IPO list) and the current end dates of the performance periods for the BPCI and CJR models, September 30, 2018 and December 31, 2020, respectively. Accordingly, we do not expect a substantial impact on the patient-mix for the BPCI and CJR models. We intend to monitor the overall volume and complexity of TKA cases performed in the hospital outpatient department to determine whether any future refinements to these models are warranted.

Comment: Some commenters asked CMS to reconsider the proposed assignment of CPT code 27447 to C-APC 5115 (Level 5 Musculoskeletal Procedures) with status indicator "J1". The commenters presented an analysis of OPSS claims data which indicated that approximately one-third of the TKA claims reported no joint implant HCPCS C-code on the claim. Some of these commenters asserted that the claims that did not include a joint implant had a geometric mean cost of approximately

\$3,808 and the claims that did include a joint implant had a geometric mean cost of approximately \$13,843, while the overall geometric mean cost for claims with CPT code 27447 was approximately \$8,602. The commenters requested that CMS only use claims for ratesetting for CPT 27447 that include a joint implant and to assign the procedure to APC 5116 (Level 6 Musculoskeletal Procedures). One commenter also stated that CMS failed to provide the general public with an explanation of the source of the geometric mean cost of the TKA procedure, which was CMS' basis for assigning the TKA procedure to a C-APC.

Response: Since the assignment of CPT code 27447 to the IPO list, no payment for claim lines billing this procedure code were made. Based on clinical similarity with other musculoskeletal procedures, we continue to believe that C-APC 5115 is an appropriate APC assignment for CPT code 27447. Further, we note that the 50th percentile IPPS payment for TKA without major complications or comorbidities (MS-DRG 470) is roughly \$11,760 for FY 2018. We note that the geometric mean cost for C-APC 5116 is over \$15,000. As previously stated, we would expect that beneficiaries selected for outpatient TKA would generally be expected to be less complex and to not have major complications or comorbidities. Therefore, we do not believe that it would be appropriate for the OPSS payment rate to exceed the IPPS payment rate for TKA without major complications/comorbidities because IPPS cases would generally be expected to be more complicated and complex than those selected for performance in the hospital outpatient setting and because inpatient cases would include room and board as well as more time in the hospital.

With respect to the billing concern, we rely on hospitals to bill all HCPCS codes accurately in accordance with their code descriptors and CPT and CMS instructions, as applicable, and to report charges on claims and charges and costs on their Medicare hospital cost reports appropriately (77 FR 68324). As we do every year, we will review and evaluate the APC groupings based on the latest available data in the next rulemaking cycle.

After consideration of the public comments we received, we are

finalizing our proposal to remove the TKA procedure described by CPT code 27447 from the IPO list beginning in CY 2018 and to assign the TKA procedure to C-APC 5115 with status indicator "J1".

4. Recovery Audit Contractor (RAC) Review of TKA Procedures

In the CY 2018 OPSS/ASC proposed rule (82 FR 33643 and 33644), we proposed that if we finalized our proposal to remove the TKA procedure described by CPT code 27447 from the IPO list, we would also prohibit RAC review of patient status for TKA procedures performed in the inpatient setting for a period of 2 years to allow providers time to gain experience with these procedures in the outpatient setting. We believe this approach will help ensure that hospitals can determine whether to perform the procedure on a hospital outpatient or hospital inpatient basis without taking into account the possibility of an inpatient TKA claim being denied upon a patient status review by a RAC. That is, given that this surgical procedure is newly eligible for payment under either the IPPS or the OPSS, we proposed that RAC patient status reviews of a hospital claim is prohibited for a period of 2 years. We note that RAC reviews of TKA procedures described by CPT code 27447 will continue to be permitted for issues other than patient status as an inpatient or outpatient, including those for underlying medical necessity.

Comment: Many commenters supported a prohibition on RAC review for patient status for TKA procedures performed in the inpatient setting for a period of 2 years. Some commenters suggested that CMS prohibit RAC review for a period of at least 36 months to allow consensus to develop around appropriate evidence-based patient selection criteria. One commenter requested that CMS impose a permanent moratorium on RAC reviews of patient status for TKA or confirm that after any moratorium is lifted, a RAC will only be permitted to undertake such a review upon a referral by a Quality Improvement Organization ("QIO"). One commenter also requested that CMS also clarify that its current 2-midnight policy will apply to the TKA procedure if it were to be removed from the IPO, as it does for other inpatient admissions.

Response: We continue to believe that a 2-year prohibition on RAC review for TKA procedures performed in the inpatient setting is an adequate amount of time to allow providers to gain experience with determining the most appropriate setting to perform these procedures and establishing patient selection criteria to assist in the determination. As stated in the CY 2016 OPSS/ASC final rule with comment period (80 FR 70538 through 70549), under the 2-midnight rule, an inpatient admission is generally appropriate for Medicare Part A payment if the physician (or other qualified practitioner) admits the patient as an inpatient based upon the expectation that the patient will need hospital care that crosses at least 2 midnights. However, Medicare Part A payment is allowed on a case-by-case basis for inpatient admissions that do not satisfy the 2-midnight benchmark, if the documentation in the medical record supports the admitting physician's determination that the patient requires inpatient hospital care despite an expected length of stay that is less than 2 midnights. The initial medical reviews of claims for short-stay inpatient admissions are conducted by QIOs, which may refer providers to the RACs due to exhibiting persistent noncompliance with Medicare payment policies, including, but not limited to: Having high denial rates and consistently failing to adhere to the 2-midnight rule, or failing to improve their performance after QIO educational intervention. The 2-midnight rule and this medical review policy do not apply to procedures that are included on the IPO list. However, these policies do apply to other inpatient admissions for procedures that are not included on the IPO list and would also generally apply to TKA procedures performed in the hospital inpatient setting. As mentioned previously, however, RAC patient status reviews for TKA procedures performed in the hospital inpatient setting is prohibited for a period of 2 years.

5. Public Requests for Additions to or Removal of Procedures on the IPO List

Commenters who responded to the CY 2018 OPSS/ASC proposed rule also requested that CMS remove several additional procedures from the IPO list. These additional procedures are listed in Table 77 below.

TABLE 77—PROCEDURES REQUESTED BY COMMENTERS TO BE REMOVED FROM THE CY 2018 INPATIENT ONLY LIST

CY 2018 PT code	CY 2018 long descriptor
23470	Arthroplasty, glenohumeral joint; hemiarthroplasty.
23472	Arthroplasty, glenohumeral joint; total shoulder (glenoid and proximal humeral replacement (eg, total shoulder)).
27125	Hemiarthroplasty, hip, partial (eg, femoral stem prosthesis, bipolar arthroplasty).
27130	Arthroplasty, acetabular and proximal femoral prosthetic replacement (total hip arthroplasty), with or without autograft or allograft.
27702	Arthroplasty, ankle; with implant (total ankle).
27703	Arthroplasty, ankle; revision, total ankle.
43282	Laparoscopy, surgical, repair of paraesophageal hernia with implantation of mesh.
43772	Laparoscopy, surgical, gastric restrictive procedure; removal of adjustable gastric restrictive device component only.
43773	Laparoscopy, surgical, gastric restrictive procedure; removal and replacement of adjustable gastric restrictive device component only.
43774	Laparoscopy, surgical, gastric restrictive procedure; removal of adjustable gastric restrictive device and subcutaneous port components.

After evaluating the above list of codes that commenters requested to be removed from the IPO list against our established criteria, we believe that CPT codes 43282, 43772, 43773, 43774 meet several criteria to be removed from the IPO list, including criteria 3. Accordingly, we are removing these four CPT codes from the IPO list for CY 2018 and assigning them to APCs in this final rule with comment period.

For the remaining CPT codes requested to be removed from the IPO list that describe joint replacement procedures, because of the strong public interest and numerous comments that we have received from stakeholders regarding our proposals to remove other joint replacement procedures, namely the TKA procedure, from the IPO list, we are not removing these procedures from the IPO list at this time to allow for further discussion. We will take

these requests into consideration and any proposed policy changes regarding these procedures will be announced in future rulemaking. A further discussion of the comment solicitation of the possible removal of partial hip arthroplasty (PHA) and total hip arthroplasty (THA) procedures from the IPO list is included under section IX.C. of this final rule with comment period.

One commenter requested that CMS add the procedure described by CPT code 92941 (Percutaneous transluminal revascularization of acute total/subtotal occlusion during acute myocardial infarction, coronary artery or coronary artery bypass graft, any combination of intracoronary stent, arterectomy and angioplasty, including aspiration thrombectomy when performed, single vessel) to the IPO list because this procedure is performed emergently to

treat acute myocardial infarction patients.

We evaluated the procedure described by CPT code 92941 against our criteria, and we agree with the commenter that CPT code 92941 should be added to the IPO list.

6. Summary of Changes to the IPO List for CY 218

After consideration of the public comments we received and for the reasons discuss previously, we are removing the following procedures from the IPO list for CY 2018: CPT codes 27447, 43282, 43772, 43773, 43774, and 55866. We also are adding CPT code 92941 to the IPO list for CY 2018. The specific procedures, including the CPT code, long descriptors, and the CY 2018 status indicators, are displayed in Table 78 below.

TABLE 78—CHANGES TO THE INPATIENT ONLY LIST FOR CY 2018

CY 2018 CPT code	CY 2018 long descriptor	Status	CY 2018 OPPIs APC assignment	CY 2018 OPPIs Status indicator
27447	Arthroplasty, knee, condyle and plateau; medical and lateral compartments with or without patella resurfacing (total knee arthroplasty).	Removed	5115	J1
43282	Laparoscopy, surgical, repair of paraesophageal hernia with implantation of mesh.	Removed	5362	J1
43772	Laparoscopy, surgical, gastric restrictive procedure; removal of adjustable gastric restrictive device component only.	Removed	5303	J1
43773	Laparoscopy, surgical, gastric restrictive procedure; removal and replacement of adjustable gastric restrictive device component only.	Removed	5361	J1
43774	Laparoscopy, surgical, gastric restrictive procedure; removal of adjustable gastric restrictive device and subcutaneous port components.	Removed	5303	J1
55866	Laparoscopy, surgical prostatectomy, retropubic radical, including nerve sparing, includes robotic assistance, when performed.	Removed	5362	J1
92941	Percutaneous transluminal revascularization of acute total/subtotal occlusion during acute myocardial infarction, coronary artery or coronary artery bypass graft, any combination of intracoronary stent, arterectomy and angioplasty, including aspiration thrombectomy when performed, single vessel.	Added	N/A	C

The complete list of codes (the IPO list) that will be paid by Medicare in CY 2018 as inpatient only procedures is

included as Addendum E to this final rule with comment period (which is

available via the Internet on the CMS Web site).

C. Discussion of Solicitation of Public Comments on the Possible Removal of Partial Hip Arthroplasty (PHA) and Total Hip Arthroplasty (THA) Procedures From the IPO List

1. Background

Partial hip arthroplasty (PHA), CPT code 27125 (Hemiarthroplasty, hip, partial (eg, femoral stem prosthesis, bipolar arthroplasty)), and total hip arthroplasty (THA) or total hip replacement, CPT code 27130 (Arthroplasty, acetabular and proximal femoral prosthetic replacement (total hip arthroplasty), with or without autograft or allograft), have traditionally been considered inpatient surgical procedures. The procedures were placed on the original IPO list in the CY 2001 OPSS final rule (65 FR 18780). In 2000, the primary factors that were used to determine the assignment of a procedure to the IPO list were as follows: (1) The invasive nature of the procedure; (2) the need for at least 24 hours of postoperative care; and (3) the underlying physical condition of the patient who would require the surgery (65 FR 18455). In 2000, the geometric mean average length of stay for the DRG to which uncomplicated PHA and THA procedures were assigned was 4.6 days, and in 2016, the average length of stay for current uncomplicated PHA and THA procedures for the MS-DRG was 2.7 days.

In the CY 2017 OPSS/ASC proposed rule, we solicited public comments on the possible removal of total knee arthroplasty (TKA) from the IPO list (81 FR 45679 through 45681). Included in the public comments received related to the removal of TKA from the IPO list were several comments in support of removal of THA from the IPO list as well. Among those commenters expressing support for removal of THA from the IPO list were several surgeons and other stakeholders who believed that, given thorough preoperative screening by medical teams with significant experience and expertise involving hip replacement procedures, the THA procedure could be provided on an outpatient basis for some Medicare beneficiaries. These commenters noted significant success involving same day discharge for patients who met the screening criteria and whose experienced medical teams were able to perform the procedure early enough in the day for the patients to achieve postoperative goals, allowing home discharge by the end of the day. The commenters believed that the benefits of providing the THA procedure on an outpatient basis will lead to significant enhancements in

patient well-being, improved efficiency, and cost savings to the Medicare program, including shorter hospital stays resulting in fewer medical complications, improved results, and enhanced patient satisfaction.

As discussed in the CY 2018 OPSS/ASC proposed rule (82 FR 33644 and 33645), recent innovations have enabled surgeons to perform the PHA and THA procedures on an outpatient basis on non-Medicare patients (both in the HOPD and in the ASC). These innovations in PHA and THA care include minimally invasive techniques, improved perioperative anesthesia, alternative postoperative pain management, and expedited rehabilitation protocols. Patients undergoing minimally invasive surgical procedures instead of open surgical techniques generally benefit from a shorter hospital stay. However, not all patients are candidates for minimally invasive PHA or THA. Commenters on the CY 2017 OPSS/ASC proposed rule comment solicitation on the TKA procedure have stated that benefits of outpatient PHA and THA procedures include a likelihood of fewer complications, more rapid recovery, increased patient satisfaction, recovery at home with the assistance of family members, and a likelihood of overall improved outcomes. On the contrary, unnecessary inpatient hospitalization exposes patients to the risk of hospital-acquired conditions such as infections and a host of other iatrogenic mishaps.

We stated in the CY 2018 OPSS/ASC proposed rule that, like most surgical procedures, both PHA and THA need to be tailored to the individual patient's needs. Patients with a relatively low anesthesia risk and without significant comorbidities who have family members at home who can assist them may likely be good candidates for an outpatient PHA or THA procedure. These patients may be determined to also be able to tolerate outpatient rehabilitation in either an outpatient facility or at home postsurgery. On the other hand, patients with multiple medical comorbidities, aside from their osteoarthritis, would more likely require inpatient hospitalization and possibly postacute care in a skilled nursing facility or other facility. Surgeons who have discussed outpatient PHA and THA procedures in public comments in response to our CY 2017 OPSS/ASC proposed rule comment solicitation on the TKA procedure have emphasized the importance of careful patient selection and strict protocols to optimize outpatient hip replacement outcomes. These protocols typically manage all aspects of the patient's care,

including the at-home preoperative and postoperative environment, anesthesia, pain management, and rehabilitation to maximize rapid recovery, ambulation, and performance of activities of daily living.

We also noted in the proposed rule that not uncommonly we receive questions from the public about the IPO list that lead us to believe that some members of the public may misunderstand certain aspects of the IPO list. Therefore, two important principles of the IPO list must be reiterated at the outset of this discussion. First, just because a procedure is not on the IPO list does not mean that the procedure cannot be performed on an inpatient basis. IPO list procedures must be performed on an inpatient basis (regardless of the expected length of the hospital stay) in order to qualify for Medicare payment, but procedures that are not on the IPO list can be and very often are performed on individuals who are inpatients (as well as individuals who are hospital outpatients and ASC patients). Second, the IPO list status of a procedure has no effect on the MPFS professional payment for the procedure. Whether or not a procedure is on the IPO list is not in any way a factor in the MPFS payment methodology.

2. Topics and Questions for Public Comments

In the CY 2018 OPSS/ASC proposed rule (82 FR 33645), we sought public comments on whether we should remove the procedures described by CPT codes 27125 and 27130 from the IPO list from all interested parties, including the following groups or individuals: Medicare beneficiaries and advocate associations for Medicare beneficiaries; orthopedic surgeons and physician specialty societies that represent orthopedic surgeons who perform PHA and/or THA procedures; hospitals and hospital trade associations; and any other interested stakeholders. We sought public comments on the following questions:

- Are most outpatient departments equipped to provide PHA and/or THA to some Medicare beneficiaries?
- Can the simplest procedure described by CPT codes 27125 and 27130 be performed in most outpatient departments?
- Are the procedures described by CPT codes 27125 and 27130 sufficiently related to or similar to other procedures we have already removed from the IPO list?
- How often is the procedure described by CPT codes 27125 and 27130 being performed on an outpatient

basis (either in an HOPD or ASC) on non-Medicare patients?

- Would it be clinically appropriate for some Medicare beneficiaries in consultation with his or her surgeon and other members of the medical team to have the option of either a PHA or THA procedure as a hospital outpatient, which may or may not include a 24-hour period of recovery in the hospital after the operation?

In addition, we sought public comments on whether the PHA and THA procedures may meet the criteria to be added to the ASC Covered Procedures List. We refer readers to section XII.C.1.d. of this final rule with comment period for a complete discussion of the ASC Covered Procedures List.

Finally, as noted when we solicited public comment on removing the TKA procedure from the IPO list in the CY 2017 rulemaking, we solicited public comment on the effect of removing the TKA procedure from the IPO list on the CJR Model and the BPCI Model. We refer readers to the CY 2017 OPPS/ASC proposed rule for a discussion of questions we raised for public comments, and we again sought public comment on the effect of removing the PHA and THA procedures from the IPO list on these models. For a discussion of these models in the CY 2017 rulemaking, we refer readers to 81 FR 79698 through 79699.

Comment: Numerous commenters representing a variety of stakeholders, including physicians and other care providers, individual stakeholders, specialty societies, hospital associations, hospital systems, ASCs, device manufacturers, and beneficiaries responded to our solicitation of comments regarding the removal of PHA and THA from the IPO list. The comments were diverse and some were similar to the comments we received on our proposal to remove TKA from the IPO list. Some commenters, including hospital systems and associations, as well as specialty societies and physicians, stated that it would not be clinically appropriate to remove PHA and THA from the IPO list, indicating that the patient safety profile of outpatient THA and PHA in the non-Medicare population is not well-established. Commenters representing orthopedic surgeons also stated that patients requiring a hemiarthroplasty (PHA) for fragility fractures are by nature higher risk, suffer more extensive comorbidities and require closer monitoring and preoperative optimization; therefore, it would not be medically appropriate to remove the PHA procedure from the IPO list.

Other commenters, including ambulatory surgery centers, physicians, and beneficiaries, supported the removal of PHA and THA from the IPO list. These commenters stated that the procedures were appropriate for certain Medicare beneficiaries and most outpatient departments are equipped to provide THA to some Medicare beneficiaries. They also referenced their own personal successful experiences with outpatient THA.

Finally, commenters stated concerns regarding the effect of removing THA on the pricing methodologies, target pricing, and reconciliation process of the procedure in certain Medicare payment models (that is, the CJR and the BPCI models). They requested modifications to these models if the THA procedure is removed from the IPO list and requested that these procedures be suspended from quality programs such as the Hospital Readmissions Reduction Program, the Hospital Value-Based Purchasing Program, and Hospital Inpatient Quality Reporting Program if they are removed from the IPO list.

Response: We thank the commenters for their detailed responses. We will consider these comments in future policymaking.

X. Nonrecurring Policy Changes

A. Payment for Certain Items and Services Furnished by Certain Off-Campus Departments of a Provider

1. Background

Section 603 of the Bipartisan Budget Act of 2015 (Pub. L. 114–74), enacted on November 2, 2015, amended section 1833(t) of the Act by amending paragraph (1)(B) and adding a new paragraph (21). As a general matter, under sections 1833(t)(1)(B)(v) and (t)(21) of the Act, applicable items and services furnished by certain off campus outpatient departments of a provider on or after January 1, 2017, will not be considered covered OPD services as defined under section 1833(t)(1)(B) of the Act for purposes of payment under the OPPS and will instead be paid “under the applicable payment system” under Medicare Part B if the requirements for such payment are otherwise met. To be considered part of a hospital, an off-campus department of a hospital must meet the provider-based criteria established under 42 CFR 413.65. The implementation of section 603 of the Bipartisan Budget Act of 2015 was finalized in the CY 2017 OPPS/ASC final rule with comment period (81 FR 79699 through 79719) and interim final rule with comment period (79720 through 79729).

2. Expansion of Services by Excepted Off-Campus Hospital Outpatient Departments

In the CY 2018 OPPS/ASC proposed rule (82 FR 33645 through 33648), we did not propose any policies to limit clinical service line expansion or volume increases at excepted off-campus provider-based departments (PBDs). However, we stated that we would continue to monitor claims data for changes in billing patterns and utilization, and continue to invite public comments on the issue of service expansion.

We received a number of comments from various stakeholders regarding both clinical service line expansion and volume increases, as well as other topics not discussed in the CY 2018 OPPS/ASC proposed rule, including relocation and change of ownership. We appreciate all of the comments received, and we will consider them as we consider whether to pursue future rulemaking on these issues.

We also received some public comments regarding issues that are outside the scope of the policies addressed in the CY 2018 OPPS/ASC proposed rule, including comments related to the proposed payment adjustment applied for nonexcepted items and services furnished by nonexcepted off-campus PBDs, which are addressed in the CY 2018 MPFS final rule, and comments regarding technical billing questions. With respect to the payment adjustment for nonexcepted items and services furnished by nonexcepted off-campus PBDs and changes to the payment relativity adjuster, we refer readers to the CY 2018 MPFS final rule for that information and, more broadly, for the payment rates under the MPFS that will apply to nonexcepted items and services furnished by nonexcepted off-campus PBDs for CY 2018. We expect the CY 2018 MPFS final rule to be issued on or about the same date as this OPPS/ASC final rule with comment. Comments submitted regarding technical billing questions are addressed through applicable program instructions.

3. Section 16002 of the 21st Century Cures Act (Treatment of Cancer Hospitals in Off-Campus Outpatient Department of a Provider Policy)

As discussed in the CY 2018 OPPS/ACS proposed rule (82 FR 33648), in the CY 2017 OPPS/ASC final rule with comment period (81 FR 79699), we finalized a number of proposals to implement section 603 of the Bipartisan Budget Act of 2016 (Pub. L. 114–74), enacted on November 2, 2015, which

amended section 1833(t) of the Act. Specifically, this provision amended the OPSS statute to require that certain items and services furnished by certain off-campus PBDs on or after January 1, 2017 will not be considered covered OPD services as defined under section 1833(t)(1)(B) of the Act for purposes of payment under the OPSS, and instead will be paid “under the applicable payment system” under Medicare Part B if the requirements for such payment are otherwise met. In the CY 2017 OPSS/ASC final rule with comment period (81 FR 79699), we established the Medicare Physician Fee Schedule as the “applicable payment system” for the majority of the nonexcepted items and services furnished by nonexcepted off-campus PBDs.

Section 16002(a) of the 21st Century Cures Act (Pub. L. 114–255) amended the Act at section 1833(t)(20)(B) and provided that, with respect to applicable items and services furnished during 2017 or a subsequent year, the term “off-campus outpatient department of a provider” excludes certain cancer hospitals. To meet this exclusion, section 16002(a) requires that such cancer hospitals (1) be described in section 1886(d)(1)(B)(v) of the Act; and (2) for hospital outpatient departments that meet the requirements for 42 CFR 413.65, after November 1, 2015 and before December 15, 2016, that the Secretary has received from the provider an attestation that the department met such requirements not later than 60 days after the date of enactment of section 16002 (December 13, 2016), or, for departments that meet the requirements after December 13, 2016, the Secretary has received from the provider an attestation that the department met the requirements not later than 60 days after the date the department first met the requirements of 42 CFR 413.65. As we stated in the CY 2018 OPSS/ASC proposed rule, through operational guidance, we have provided direction to all MACs regarding this provision. We also have provided guidance on this provision to hospital providers, which can be found on the CMS Web site at: <https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/HospitalOutpatientPPS/Downloads/Sections-16001-16002.pdf>.

Section 16002(b) of Public Law 114–255 amended section 1833(t)(18) of the Act by adding a new subparagraph (C) that requires the Secretary, in applying 42 CFR 419.43(i) for services furnished on or after January 1, 2018, to use a target payment-to-cost ratio (PCR) that is 1 percentage point less than the target PCR that would otherwise apply. In addition to the 1 percentage point

reduction, the Secretary may consider making an additional percentage point reduction to the target PCR that takes into account payment rates for applicable items and services described in section 1833(t)(21)(C) of the Act other than for services furnished by certain cancer hospitals. Further, in making any budget neutrality adjustments under section 1833(t) of the Act, the Secretary shall not take into account the reduced expenditures that result from application of section 1833(t)(18)(C) of the Act. We refer readers to section II.F. of this final rule with comment period for a discussion on the calculation of the target PCR for cancer hospitals for CY 2018.

B. Medicare Site-of-Service Price Transparency (Section 4011 of the 21st Century Cures Act)

Section 4011 of the 21st Century Cures Act (Pub. L. 114–255), enacted on December 13, 2016, amended section 1834 of the Act by adding a new subsection (t). New section 1834(t) of the Act provides that, in order to facilitate price transparency with respect to items and services for which payment may be made either to a hospital outpatient department or to an ambulatory surgical center under Title XVIII, the Secretary shall, for 2018 and each year thereafter, make available to the public via a searchable Web site, with respect to an appropriate number of items and services, the estimated payment amount for the item or service under the OPSS and ASC payment system and the estimated beneficiary liability applicable to the item or service. In the CY 2018 OPSS/ASC proposed rule (82 FR 33648), we announced our plan to establish the searchable Web site required by section 1834(t) of the Act. We indicated that details regarding the Web site will be issued through our subregulatory process. We stated in the proposed rule that we anticipate that the Web site will be made available in early CY 2018.

Comment: One commenter requested that CMS ensure that the Web site is designed in a user-friendly manner, and err on the side of including services for display. Another commenter requested that Web site users be provided with the proper context for understanding some of the reasons for potential cost differences.

Response: We appreciate these comments and will take them into consideration as we develop the Web site.

C. Appropriate Use Criteria for Advanced Diagnostic Imaging Services

Section 218(b) of the Protecting Access to Medicare Act of 2014 (PAMA) (Pub. L. 113–93) added subsection (q) to section 1834 of the Act, which directs the Secretary to establish a program to promote the use of appropriate use criteria (AUC) for advanced diagnostic imaging services (the AUC program). Section 1834(q)(1)(B) of the Act defines AUC as criteria that are evidence-based (to the extent feasible) and assist professionals who order and furnish applicable imaging services to make the most appropriate treatment decisions for a specific clinical condition. The current policies for the AUC program for advanced diagnostic imaging services are codified in the regulations at 42 CFR 414.94.

There are four components of the AUC program for advanced diagnostic imaging services program. In the CY 2016 MPFS final rule with comment period (80 FR 71102 through 71116 and 80 FR 71380 through 71382), we addressed the first component of the Medicare AUC program. The first component includes the requirements and process for the establishment and specification of the AUC. In the CY 2017 MPFS final rule (81 FR 80403 through 80428 and 81 FR 80554 through 80555), we addressed the second component of the AUC program. The second component includes the specification of qualified clinical decision support mechanisms (CDSMs). A CDSM is the electronic tool through which the ordering practitioner consults AUC. In the CY 2018 OPSS/ASC proposed rule (82 FR 33648 and 33649), we stated that we had proposed in the CY 2018 MPFS proposed rule to address the third component of the AUC program. The third component includes the requirements for an ordering professional to consult with a qualified CDSM when ordering an applicable imaging service, and for the furnishing professional to include that consultation information on claims for the service that is furnished in an applicable setting and paid under an applicable payment system. Based on the statutory language of section 1834(q)(4)(B) of the Act, the AUC program applies to advanced imaging services for which payment is made under the following applicable payment systems: The MPFS; the OPSS; and the ASC payment system. The fourth component of the program is prior authorization for outlier ordering professionals. This component will be discussed in future rulemaking.

We indicated in the CY 2018 OPSS/ASC proposed rule that public

comments related to the requirements for the AUC program should be addressed in response to the CY 2018 MPFS proposed rule. Therefore, we refer readers to the CY 2018 MPFS final rule for further information governing the Medicare AUC program and the finalized policies for CY 2018, including summaries of any public comments we received on the proposals in the CY 2018 MPFS proposed rule and our responses to those comments.

D. Enforcement Instruction for the Supervision of Outpatient Therapeutic Services in Critical Access Hospitals (CAHs) and Certain Small Rural Hospitals

As discussed in the CY 2018 OPSS/ASC proposed rule (82 FR 33649), in the CY 2009 OPSS/ASC proposed rule and final rule with comment period (73 FR 41518 through 41519 and 73 FR 68702 through 68704, respectively), we clarified that direct supervision is required for hospital outpatient therapeutic services covered and paid by Medicare that are furnished in hospitals as well as in PBDs of hospitals, as set forth in the CY 2000 OPSS final rule with comment period (65 FR 18525). In the CY 2010 OPSS/ASC final rule with comment period (74 FR 60575 through 60591), we finalized a technical correction to the title and text of the applicable regulation at 42 CFR 410.27 to clarify that this standard applies in CAHs as well as hospitals. In response to concerns expressed by the hospital community, in particular CAHs and small rural hospitals, that they would have difficulty meeting this standard, on March 15, 2010, we instructed all MACs not to evaluate or enforce the supervision requirements for therapeutic services provided to outpatients in CAHs from January 1, 2010 through December 31, 2010, while the agency revisited the supervision policy during the CY 2011 OPSS/ASC rulemaking cycle.

Due to continued concerns expressed by CAHs and small rural hospitals, we extended this notice of nonenforcement (“enforcement instruction”) as an interim measure for CY 2011, and expanded it to apply to small rural hospitals having 100 or fewer beds (75 FR 72007). We continued to consider the issue further in our annual OPSS notice-and-comment rulemaking, and implemented an independent review process in 2012 to obtain advice from the HOP Panel on this matter (76 FR 74360 through 74371). Under this process used since CY 2012, the HOP Panel considers and advises CMS regarding stakeholder requests for changes in the required level of

supervision of individual hospital outpatient therapeutic services. In addition, we extended the enforcement instruction through CY 2012 and CY 2013. The enforcement instruction has not been in effect since December 31, 2013. Congress has taken legislative action (Pub. L. 113–198 and Pub. L. 114–112) to extend nonenforcement of the direct supervision requirement for hospital outpatient therapeutic services in CAHs and small rural hospitals having 100 or fewer beds since December 31, 2013. The latest legislative action (Pub. L. 114–255) extended nonenforcement until December 31, 2016. The current enforcement instruction is available on the CMS Web site at: <https://www.cms.gov/Regulations-and-Guidance/Guidance/FACA/Downloads/Moratorium-on-Hospital-Supervision-Enforcement.pdf>.

As discussed in the CY 2018 OPSS/ASC proposed rule, stakeholders have consistently requested that CMS continue the nonenforcement of the direct supervision requirement for hospital outpatient therapeutic services for CAHs and small rural hospitals having 100 or fewer beds. Stakeholders stated that some small rural hospitals and CAHs have insufficient staff available to furnish direct supervision. The primary reason stakeholders cited for this request is the difficulty that CAHs and small rural hospitals have in recruiting physicians and nonphysician practitioners to practice in rural areas. These stakeholders noted that it is particularly difficult to furnish direct supervision for critical specialty services, such as radiation oncology services, that cannot be directly supervised by a hospital emergency department physician or nonphysician practitioner because of the volume of emergency patients or lack of specialty expertise. In addition, we are not aware of any quality of care complaints from beneficiaries or providers relating to the enforcement instruction related to direct physician supervision.

Therefore, in the CY 2018 OPSS/ASC proposed rule, we proposed to reinstate the enforcement instruction for outpatient therapeutic services furnished in CAHs and small rural hospitals having 100 or fewer beds for CYs 2018 and 2019 to give these CAHs and small rural hospitals more time to comply with the supervision requirements for outpatient therapeutic services and to give all parties additional time to submit specific services to be evaluated by the HOP Panel for a recommended change in the supervision level. We stated that these hospitals will continue to be subject to

conditions of participation for hospitals and other Medicare rules regarding supervision. We welcomed public comments on this proposal.

Comment: A few commenters opposed the proposal to reinstate the enforcement instruction for CAHs and small rural hospitals because of concerns about patient safety or having qualified physicians perform certain medical services. One commenter believed that supervision requirements should be applied uniformly to hospitals in all care settings to ensure patient safety. Another commenter focused on radiation oncology services and believed that those services should be delivered by personnel trained in radiation oncology. The commenter understood concerns about physician availability in rural areas, but encouraged CMS to create more incentives for radiation oncologists to practice in rural areas instead of not enforcing requirements for direct supervision.

Response: We agree that patient safety is a critically important consideration for each service, and that only qualified physicians and nonphysician practitioners who are practicing within their State scope of practice should perform and oversee therapeutic services, as applicable. We note that our proposal did not change State licensure and scope of practice requirements. We would expect all hospitals to ensure that appropriate clinical personnel direct and oversee each beneficiary’s care such that patient safety is not compromised. As stated in our proposal, we are not aware of any quality of care complaints from beneficiaries or providers relating to the level of physician supervision for hospital outpatient therapeutic services. In addition, CAHs and small rural hospitals will continue to be subject to the Medicare conditions of participation for hospitals and other Medicare rules regarding supervision.

Comment: Several commenters supported the proposal for CYs 2018 and 2019. Some commenters suggested that CMS adopt the nonenforcement policy for CY 2017 and permanently beyond CY 2019. Commenters also suggested changing the level of supervision for some or most hospital outpatient therapeutic services, such as therapy services, to general supervision as the default supervision level. These commenters also suggested that the change in supervision level should apply to additional categories of hospitals or to all hospitals and not just for CAHs and small rural hospitals. The commenters believed changing the level of supervision for all hospitals will help rural providers with the shortages of

health care professionals and reduce the regulatory burden on providers while providing a level of supervision consistent with the conditions of participation for CAHs.

Response: We appreciate the support for this proposal. Permanent changes to the supervision level for outpatient therapeutic services for all hospitals are beyond the scope of this proposal. We note that we have an established process for stakeholders to submit specific services to be evaluated by the HOP Panel for a recommended change in the supervision levels. Likewise, permanently reinstating the enforcement instruction after CY 2019 is beyond the scope of this proposal. As we stated in the CY 2018 OPPS/ASC proposed rule, we proposed to reinstate the enforcement instruction for 2 years to give small rural hospitals and CAHs additional time to comply with the supervision requirements for outpatient therapeutic services and to give all parties additional time to submit specific services to be evaluated by the HOP Panel for a recommended change in the supervision level.

With respect to applying the nonenforcement policy to CY 2017, we proposed to reinstate the enforcement instruction prospectively, for services administered beginning on the effective date of this final rule with comment period, which is scheduled for January 1, 2018; and we are finalizing that proposal. We anticipate issuing guidance outside of this rule to address enforcement policy for the direct supervision requirement for outpatient therapeutic services for CY 2017.

After consideration of the public comments we received, we are finalizing our proposal, without modification, to reinstate the nonenforcement policy for direct supervision enforcement of outpatient therapeutic services furnished in CAHs and small rural hospitals having 100 or fewer beds, and to reinstate our enforcement instruction for CYs 2018 and 2019.

E. Payment Changes for Film X-Ray Services and Payment Changes for X-Rays Taken Using Computed Radiography Technology

Section 502 of Division O, title V of the Consolidated Appropriations Act, 2016 (Pub. L. 114–113), which was enacted on December 18, 2015, contains provisions to incentivize the transition from traditional X-ray imaging to digital radiography. In particular, section 502(b) of Public Law 114–113 amended section 1833(t)(16) of the Act by adding subparagraph (F), which includes provisions that limit payment for film

X-ray imaging services and computed radiography imaging services.

Section 1833(t)(16)(F)(i) of the Act specifies that, effective for services furnished during 2017 or a subsequent year, the payment under the OPPS for imaging services that are X-rays taken using film (including the X-ray component of a packaged service) that would otherwise be made under the OPPS (without application of subparagraph (F)(i) and before application of any other adjustment under section 1833(t) of the Act) shall be reduced by 20 percent. Section 1833(t)(16)(F)(iii) of the Act provides that the reductions made under section 1833(t)(16)(F) of the Act shall not be considered an adjustment under section 1833(t)(2)(E) of the Act, and shall not be implemented in a budget neutral manner.

As discussed in the CY 2018 OPPS/ASC proposed rule (82 FR 33649 through 33650), consistent with section 1833(t)(16)(F)(iv) of the Act, which requires the implementation of the reductions in payment set forth in subparagraph (F) through appropriate mechanisms, which may include modifiers, we implemented section 1833(t)(16)(F)(i) of the Act by establishing the modifier “FX” (X-ray taken using film), effective January 1, 2017. The payment for X-rays taken using film and furnished during 2017 or a subsequent year is reduced by 20 percent when modifier “FX” (X-ray taken using film) is reported with the appropriate HCPCS codes. The applicable HCPCS codes describing imaging services can be found in Addendum B to this final rule with comment period (which is available via the Internet on the CMS Web site). When payment for an X-ray service taken using film is packaged into the payment for another item or service under the OPPS, no separate payment for the X-ray service is made and, therefore, there is no payment amount that can be attributed to the X-ray service. Accordingly, the amount of the payment reduction for a packaged film X-ray service is \$0 (20 percent of \$0). Further discussion of these policies and modifier “FX” can be found in the CY 2017 OPPS/ASC final rule with comment period (81 FR 79729 through 79730).

Section 1833(t)(16)(F)(ii) of the Act provides for a phased-in reduction of payments for imaging services that are taken using computed radiography technology (as defined in section 1848(b)(9)(C) of the Act). Payments for such services (including the X-ray component of a packaged service) furnished during CY 2018, 2019, 2020,

2021, or 2022, that would otherwise be determined under section 1833(t) of the Act (without application of subparagraph (F)(ii) and before application of any other adjustment), will be reduced by 7 percent, and if such services are furnished during CY 2023 or a subsequent year, by 10 percent. For purposes of this reduction, computed radiography technology is defined in section 1848(b)(9)(C) of the Act as cassette-based imaging which utilizes an imaging plate to create the image involved. (82 FR 33650).

To further implement this provision, we stated in the proposed rule that we were establishing a new modifier (82 FR 33650), specifically, “FY” (X-ray taken using computed radiography technology/cassette-based imaging), as permitted by section 1833(t)(16)(F)(iv) of the Act, that would be reported on claims to identify those HCPCS codes that describe X-rays taken using computed radiography technology. (We note that modifier “FY” was listed as placeholder “XX” in the CY 2018 OPPS/ASC proposed rule and that we indicated (82 FR 33650) that the 2-digit modifier and long descriptor would be described in this final rule with comment period.) We proposed that the payment reduction would be taken when this payment modifier is reported with the applicable HCPCS code(s) to describe imaging services that are taken using computed radiography technology (82 FR 33650). In the proposed rule, we stated that the applicable HCPCS codes describing imaging services could be found in Addendum B to the proposed rule (which is available via the Internet on the CMS Web site). When payment for an X-ray service taken using computed radiography imaging is packaged into the payment for another item or service under the OPPS, no separate payment for the X-ray service is made and, therefore, there is no payment amount that can be attributed to the X-ray. Accordingly, the amount of the payment reduction for a packaged X-ray service would be \$0 (7 percent of \$0, and 10 percent of \$0). We invited public comments on these proposals.

Comment: One commenter believed that reporting the modifier “FY” would be burdensome to hospitals and create another opportunity for miscoding.

Response: Modifier “FY” will be reported by hospitals only to identify those services that involve X-rays taken using computed radiography technology. We do not believe that the use of this modifier would be unduly burdensome to hospitals. The reporting of this modifier is similar to the reporting of other existing modifiers that hospitals currently include when

reporting HCPCS codes and modifiers for procedures, services, and items on Medicare claims under the OPPIs. To the extent the hospital is already reporting a code for an X-ray taken using computed radiography, appending the modifier to the same claim should not be unduly burdensome. Further, Medicare is required by law to make this payment adjustment and the commenter did not offer an alternative (less burdensome) method by which Medicare could ensure payment accuracy for these services.

Comment: One commenter urged CMS to publish the list of specific CPT and HCPCS codes that would apply to this new modifier ("FY") as well as to the film x-ray modifier ("FX") that was implemented last year. The commenter indicated that not having published lists is burdensome to providers and also exposes them to additional risk of audit. This same commenter offered to provide technical assistance from its X-ray manufacturer members on the creation of such a list.

Response: We thank the commenter for the offer of assistance. However, we expect hospitals to appropriately report the "FY" modifier to identify those services that involve X-rays taken using computed radiography technology, and to appropriately report the "FX" modifier to identify those X-ray services taken using film. The applicable HCPCS codes describing imaging services can be found in Addendum B to this final rule with comment period (which is available via the Internet on the CMS Web site).

Comment: One commenter requested detailed guidance on the implementation of the computed radiography to digital X-ray payment differential. Specifically, the commenter stated that CMS instructions are unclear as to which specific CPT and HCPCS codes require the amended modifier. Prior to implementation, the commenter suggested that CMS publish all applicable codes requiring the modifier, with specific billing guidance.

Response: As indicated above, the new "FY" modifier will be used to report those services that involve X-rays taken using computed radiography technology. HOPDs should append modifier "FY" to those HCPCS codes that involve the use of X-ray systems taken using computed radiography technology. We believe that hospitals should know when they are billing a HCPCS code that involves the use of an X-ray taken using computed radiography and, therefore, we are not providing a list of codes.

In addition, in accordance with section 1833(t)(16)(F)(ii) of the Act,

payments for X-rays taken using computed radiography technology will be reduced by 7 percent during CY 2018, 2019, 2020, 2021, or 2022, and thereafter by 10 percent when furnished during CY 2023 or a subsequent year. Specifically, the payment reduction will apply when the "FY" modifier is reported with the applicable HCPCS code(s) to describe imaging services that are taken using computed radiography technology. In addition, when payment for an X-ray service taken using computed radiography imaging is packaged into the payment for another item or service under the OPPIs, no separate payment for the X-ray service is made and, therefore, there is no payment amount that can be attributed to the X-ray. Accordingly, the amount of the payment reduction for a packaged X-ray service will be \$0 (7 percent of \$0, and 10 percent of \$0). We note that the applicable HCPCS codes describing imaging services could be found in Addendum B to this final rule with comment period (which is available via the Internet on the CMS Web site).

Comment: Some commenters supported the transition to digital radiography. However, several commenters expressed concern with the statute requiring hospitals to upgrade to digital radiography systems and indicated that the requirement is financially burdensome and difficult to justify. One commenter stated that a typical computed radiography reader can cost between \$60,000 and \$80,000, while a new digital radiography system can cost up to \$200,000. Another commenter indicated that it estimated its cost to replace or retrofit its nearly 120 computed radiography systems to digital radiography systems to be approximately \$11 million.

One commenter suggested that, to truly incentivize the transition to digital radiography technology, CMS should offer bonus payments similar to the recently proposed 2015 Certified Health Record Technology (CEHRT) bonus under the Quality Payment Program (QPP) Year 2. This same commenter recommended that, in lieu of bonus payments, CMS work with Congress to implement a delay of these cuts for the useful life of a typical computed radiography machine (5 years) to allow practices time to replace older equipment with digital radiography technology.

Other commenters further indicated there is no clinical benefit to using digital radiography systems, and that, for certain clinical situations, computed radiography systems are preferable. Still other commenters stated that the reduction in payments not only

penalizes hospitals, particularly in rural and underserved communities that do not have the financial resources to update their equipment systems, but would also force small clinics and hospitals to no longer provide imaging services that require computed radiography technology.

Response: We are required by section 1833(t)(16)(F) of the Act to reduce payments under the OPPIs for X-rays taken using film and X-rays taken using computed radiography technology. We note that the statute did not address either bonus payments to incentivize the transition to digital radiography technology or a delay in the implementation of section 1833(t)(16)(F) of the Act.

After consideration of the public comments we received, we are finalizing our proposal to establish a new modifier "FY" (X-ray taken using computed radiography technology/cassette-based imaging) as permitted by section 1833(t)(16)(F)(iv) of the Act, that will be reported on claims to identify those HCPCS codes that describe X-rays taken using computed radiography technology. The payment reduction will be taken when this modifier is reported with the applicable HCPCS code(s) to describe imaging services that are taken using computed radiography technology. The applicable HCPCS codes describing imaging services can be found in Addendum B to this final rule with comment period (which is available via the Internet on the CMS Web site).

In addition, although we adopted the payment reduction for the film X-ray imaging services, as required by section 1833(t)(16)(F)(i) of the Act in the CY 2017 OPPIs/ASC final rule with comment period, we did not adopt corresponding regulation text. Therefore, in the CY 2018 OPPIs/ASC proposed rule (82 FR 33650 and 33723 through 33724), we proposed to add new regulation text at 42 CFR 419.71 to codify our existing policies and our proposed policies for computed radiography technology services. We proposed to add the definition of "computed radiography technology," as it is defined in section 1848(b)(9)(C) of the Act, in paragraph (a) of proposed new § 419.71. We stated that the proposed regulation text under paragraph (b) of proposed new § 419.71 would specify the 20-percent reduction for film X-ray imaging services. We proposed that the phased-in payment reduction for computed radiography technology imaging services would be codified at paragraph (c) of proposed new § 419.71. Finally, we proposed that paragraph (d) of proposed new § 419.71

would provide that the payment reductions taken under the section are not considered adjustments under section 1833(t)(2)(E) of the Act and are not implemented in a budget neutral manner. We invited public comments on this proposed regulation text.

We did not receive any public comments on our proposed regulation text. Therefore, we are finalizing our proposal to codify our previously adopted and newly finalized policies regarding section 1833(t)(16)(F) of the Act, without modifications.

F. Revisions to the Laboratory Date of Service Policy

1. Background on the Medicare Part B Laboratory Date of Service Policy

As we discussed in the CY 2018 OPPTS/ASC proposed rule (82 FR 33650), the date of service (DOS) is a required data field on all Medicare claims for laboratory services. However, a laboratory service may take place over a period of time—the date the physician orders the laboratory test, the date the specimen is collected from the patient, the date the laboratory accesses the specimen, the date the laboratory performs the test, and the date results are produced may occur on different dates. In the final rule on coverage and administrative policies for clinical diagnostic laboratory services published in the **Federal Register** on November 23, 2001 (66 FR 58791 through 58792), we adopted a policy under which the DOS for clinical diagnostic laboratory services generally is the date the specimen is collected.

A special rule was developed to apply to “archived” specimens. For laboratory tests that use an archived specimen, we established that the DOS is the date the specimen was obtained from storage (66 FR 58792).

In 2002, we issued Program Memorandum AB–02–134 which permitted contractors discretion in making determinations regarding the length of time a specimen must be stored to be considered “archived.” In response to comments requesting that we issue a national standard to clarify when a stored specimen can be considered “archived,” in the Procedures for Maintaining Code Lists in the Negotiated National Coverage Determinations for Clinical Diagnostic Laboratory Services final notice, published in the **Federal Register** on February 25, 2005 (70 FR 9357), we defined an “archived” specimen as a specimen that is stored for more than 30 calendar days before testing. We established that the DOS for archived specimens is the date the specimen was

obtained from storage. Specimens stored for 30 days or less continued to have a DOS of the date the specimen was collected.

2. Current Medicare DOS Policy (“14-Day Rule”)

In the final rule with comment period entitled, in relevant part, “Revisions to Payment Policies, Five-Year Review of Work Relative Value Units, Changes to the Practice Expense Methodology Under the Physician Fee Schedule, and Other Changes to Payment Under Part B” published in the **Federal Register** on December 1, 2006 (MPFS final rule) (71 FR 69705 through 69706), we added a new § 414.510 in Title 42 of the CFR regarding the clinical laboratory DOS requirements and revised our DOS policy for stored specimens. We explained in the MPFS final rule that the DOS of a test may affect payment for the test, especially in situations in which a specimen that is collected while the patient is being treated in a hospital setting (for example, during a surgical procedure), is later used for testing after the patient has been discharged from the hospital. We noted that payment for the test is usually bundled with payment for the hospital service, even where the results of the test did not guide treatment during the hospital stay. To address concerns raised for tests related to cancer recurrence and therapeutic interventions, we finalized modifications to the DOS policy in § 414.510(b)(2)(i) for a test performed on a specimen stored less than or equal to 30 calendar days from the date it was collected (a non-archived specimen), so that the DOS is the date the test was performed (instead of the date of collection) if the following conditions are met:

- The test is ordered by the patient’s physician at least 14 days following the date of the patient’s discharge from the hospital;
- The specimen was collected while the patient was undergoing a hospital surgical procedure;
- It would be medically inappropriate to have collected the sample other than during the hospital procedure for which the patient was admitted;
- The results of the test do not guide treatment provided during the hospital stay; and
- The test was reasonable and medically necessary for the treatment of an illness.

As we stated in the MPFS final rule, we established these five criteria, which we refer to as the “14-day rule,” to distinguish laboratory tests performed as part of post-hospital care from the

care a beneficiary receives in the hospital. When the 14-day rule applies, laboratory tests are not bundled into the hospital stay, but are instead paid separately under Medicare Part B (as explained in more detail below).

We also revised the DOS requirements for a chemotherapy sensitivity test performed on live tissue. As discussed in the MPFS final rule (71 FR 69706), we agreed with commenters that these tests, which are primarily used to determine post-hospital chemotherapy care for patients who also require hospital treatment for tumor removal or resection, appear to be unrelated to the hospital treatment in cases where it would be medically inappropriate to collect a test specimen other than at the time of surgery, especially when the specific drugs to be tested are ordered at least 14 days following hospital discharge. As a result, we revised the DOS policy for chemotherapy sensitivity tests, based on our understanding that the results of these tests, even if they were available immediately, would not typically affect the treatment regimen at the hospital. Specifically, we modified the DOS for chemotherapy sensitivity tests performed on live tissue in § 414.510(b)(3) so that the DOS is the date the test was performed if the following conditions are met:

- The decision regarding the specific chemotherapeutic agents to test is made at least 14 days after discharge;
- The specimen was collected while the patient was undergoing a hospital surgical procedure;
- It would be medically inappropriate to have collected the sample other than during the hospital procedure for which the patient was admitted;
- The results of the test do not guide treatment provided during the hospital stay; and
- The test was reasonable and medically necessary for the treatment of an illness.

We explained in the MPFS final rule that, for chemotherapy sensitivity tests that meet this DOS policy, Medicare would allow separate payment under Medicare Part B, that is, separate from the payment for hospital services.

3. Billing and Payment for Laboratory Services Under the OPPTS

As discussed in the CY 2018 OPPTS/ASC proposed rule (82 FR 33651), the DOS requirements at 42 CFR 414.510 are used to determine whether a hospital bills Medicare for a clinical diagnostic laboratory test (CDLT) or whether the laboratory performing the test bills Medicare directly. This is because separate regulations at 42 CFR

410.42(a) and 411.15(m) generally provide that Medicare will not pay for a service furnished to a hospital patient during an encounter by an entity other than the hospital unless the hospital has an arrangement (as defined in 42 CFR 409.3) with that entity to furnish that particular service to its patients, with certain exceptions and exclusions. These regulations, which we will call the “under arrangements” provisions in this discussion, require that if the DOS falls during an inpatient or outpatient stay, payment for the laboratory test is usually bundled with the hospital service.

Under our current rules, if a test meets all DOS requirements in § 414.510(b)(2)(i) or § 414.510(b)(3), the DOS is the date the test was performed, and the laboratory would bill Medicare directly for the test and would be paid under the Clinical Laboratory Fee Schedule (CLFS) directly by Medicare. However, if the test does *not* meet the DOS requirements in § 414.510(b)(2)(i) or § 414.510(b)(3), the DOS is the date the specimen was collected from the patient. In that case, the *hospital* would bill Medicare for the test and then would pay the laboratory that performed the test, if the laboratory provided the test under arrangement.

In recent rulemakings, we have reviewed appropriate payment under the OPSS for certain diagnostic tests that are not commonly performed by hospitals. In CY 2014, we finalized a policy to package certain CDLTs under the OPSS (78 FR 74939 through 74942 and 42 CFR 419.2(b)(17) and 419.22(l)). In CYs 2016 and 2017, we made some modifications to this policy (80 FR 70348 through 70350; 81 FR 79592 through 79594). Under our current policy, certain CDLTs that are listed on the CLFS are packaged as integral, ancillary, supportive, dependent, or adjunctive to the primary service or services provided in the hospital outpatient setting during the same outpatient encounter and billed on the same claim. Specifically, we conditionally package most CDLTs and only pay separately for a laboratory test when it is: (1) The only service provided to a beneficiary on a claim; (2) considered a preventive service; (3) a molecular pathology test; or (4) an advanced diagnostic laboratory test (ADLT) that meets the criteria of section 1834A(d)(5)(A) of the Act (78 FR 74939 through 74942; 80 FR 70348 through 70350; and 81 FR 79592 through 79594). In the CY 2016 OPSS/ASC final rule with comment period, we excluded all molecular pathology laboratory tests from packaging because we believed these relatively new tests may have a

different pattern of clinical use, which may make them generally less tied to a primary service in the hospital outpatient setting than the more common and routine laboratory tests that are packaged.

For similar reasons, in the CY 2017 OPSS/ASC final rule with comment period, we extended the exclusion to also apply to all ADLTs that meet the criteria of section 1834A(d)(5)(A) of the Act.³² We stated that we will assign status indicator “A” (Separate payment under the CLFS) to ADLTs once a laboratory test is designated an ADLT under the CLFS. Laboratory tests that are separately payable and are listed on the CLFS are paid at the CLFS payment rates outside the OPSS.

4. ADLTs Under the New Private Payor Rate-Based CLFS

Section 1834A of the Act, as established by section 216(a) of the Protecting Access to Medicare Act of 2014 (PAMA), requires significant changes to how Medicare pays for CDLTs under the CLFS. Section 216(a) of PAMA also establishes a new subcategory of CDLTs known as ADLTs with separate reporting and payment requirements under section 1834A of the Act. In the CLFS final rule published in the **Federal Register** on June 23, 2016, entitled “Medicare Program; Medicare Clinical Diagnostic Laboratory Tests Payment System Final Rule” (CLFS final rule) (81 FR 41036), we implemented the requirements of section 1834A of the Act.

As defined in § 414.502, an ADLT is a CLDT covered under Medicare Part B that is offered and furnished only by a single laboratory. In addition, an ADLT cannot be sold for use by a laboratory other than the single laboratory that designed the test or a successor owner. Also, an ADLT must meet either Criterion (A), which implements section 1834A(d)(5)(A) of the Act, or Criterion (B), which implements section 1834A(d)(5)(B) of the Act, as follows:

- *Criterion (A)*: The test is an analysis of multiple biomarkers of deoxyribonucleic acid (DNA), ribonucleic acid (RNA), or proteins; when combined with an empirically derived algorithm, yields a result that predicts the probability a specific

³² Under section 1834A(d)(5)(A) of the Act, an ADLT is a CDLT covered under Medicare Part B that is offered and furnished only by a single laboratory and not sold for use by a laboratory other than the original developing laboratory (or a successor owner) and . . . “the test is an analysis of multiple biomarkers of DNA, RNA, or proteins combined with a unique algorithm to yield a single patient-specific result.” CMS has established a regulatory definition for this type of ADLT in 42 CFR 414.502.

individual patient will develop a certain condition(s) or respond to a particular therapy(ies); provides new clinical diagnostic information that cannot be obtained from any other test or combination of tests; and may include other assays.

Or:

- *Criterion (B)*: The test is cleared or approved by the Food and Drug Administration.

Generally, under the revised CLFS, ADLTs are paid using the same methodology based on the weighted median of private payor rates as other CDLTs. However, updates to ADLT payment rates occur annually instead of every 3 years. The payment methodology for ADLTs is detailed in the CLFS final rule (81 FR 41076 through 41083).

5. Discussion of Potential Revisions to the Laboratory DOS Policy in the CY 2018 OPSS/ASC Proposed Rule

In the CY 2018 OPSS/ASC proposed rule (82 FR 33650 through 33653), we described the history of our laboratory DOS policy and discussed potentially modifying the DOS policy for certain ADLTs and molecular pathology tests. We explained that, recently, we have heard from certain laboratory stakeholders about operational issues the current laboratory DOS policy creates for hospitals and laboratories with regard to molecular pathology tests and laboratory tests they expect will be designated by CMS as ADLTs that meet the criteria of section 1834A(d)(5)(A) of the Act. These stakeholders have expressed that although these particular tests are not packaged under the OPSS, under current DOS policy, if the tests are ordered within 14 days of a patient’s discharge from the hospital, Medicare still treats the tests as though they were ordered and furnished by the hospital itself. Under those circumstances, laboratories cannot directly seek Medicare payment for the molecular pathology test or ADLT. The hospital must bill Medicare for the test, and the laboratory must seek payment from the hospital. Specifically, we noted that stakeholders representing laboratories have expressed the following concerns:

- The current DOS policy permits hospitals to bill for tests they did not perform and that may have no relationship to or bearing on treatment received by the patient while in the hospital.
- The DOS policy may create inconsistent billing for specialty laboratories. For example, if the hospital is located in a different jurisdiction than the MAC used by the laboratory, a different MAC may be billed.

- Hospitals may be discouraged from utilizing ADLTs because billing for such tests that are not performed by hospitals could create administrative and financial complexities.

- The DOS policy is a potential barrier to CMS' goal of promoting personalized medicine because the policy may disproportionately impact smaller laboratories performing innovative diagnostic tests.

- Billing complexities may affect beneficiary access to needed laboratory tests and therapies. For example, orders might be delayed until at least 14 days after discharge or even canceled to avoid the DOS policy. This may restrict patient access to tests and reduce efficacy of treatment plans due to hospitals delaying or foregoing patient testing to avoid financial risk.

- The DOS policy may limit access for Medicare beneficiaries under original Medicare fee-for-service (that is, Medicare Part A and Part B) due to the fact that Medicare Advantage Plans under Medicare Part C and private payors allow laboratories to bill directly for tests they perform.

As we stated in the proposed rule (82 FR 33652), we recognize that the current laboratory DOS rule may impose administrative difficulties for hospitals and laboratories that furnish laboratory tests that are excluded from OPSS packaging and therefore paid separately at CLFS payment rates. Hospitals may be reluctant to bill Medicare for laboratory tests they do not perform, which as noted by stakeholders, could lead to delays in patient access to care.

In light of the concerns raised by stakeholders, we stated in the proposed rule that we were considering potential modifications to the DOS policy that would allow laboratories to bill Medicare directly for certain laboratory tests excluded from the OPSS packaging policy. We noted that one approach under consideration would create a new exception to the DOS policy for molecular pathology tests and ADLTs that meet the criteria of section 1834A(5)(A) of the Act and have been granted ADLT status by CMS. As we stated in the CY 2017 OPSS/ASC final rule with comment period (81 FR 79592 through 79594), we believe these tests are relatively new and may have a different pattern of clinical use than more conventional laboratory tests, which may make them generally less tied to a primary service in the hospital outpatient setting than more common and routine laboratory tests that are packaged. In the proposed rule, we sought public comment on whether these tests, by their nature, are appropriately separable from the

hospital stay that preceded the test and therefore should have a DOS that is the date of performance rather than the date of collection.

As an example, we stated that we would consider modifying 42 CFR 414.510(b) by adding a new paragraph (5) to establish that in the case of a molecular pathology test or an ADLT that meets the criteria of section 1834A(d)(5)(A) of the Act, the DOS must be the date the test was performed only if:

- The physician orders the test following the date of a hospital outpatient's discharge from the hospital outpatient department;
- The specimen was collected from a hospital outpatient during an encounter (as both are defined 42 CFR 410.2);
- It would be medically inappropriate to have collected the sample from the hospital outpatient other than during the hospital outpatient encounter;
- The results of the test do not guide treatment provided during the hospital outpatient encounter; and
- The test was reasonable and medically necessary for the treatment of an illness.

We requested specific comments on this potential modification to the current laboratory DOS policy, which would allow laboratories to bill Medicare directly for molecular pathology tests and ADLTs that meet the criteria of section 1834A(d)(5)(A) of the Act and have been granted ADLT status by CMS, when the specimen is collected during a hospital outpatient procedure and the test is ordered after the patient is discharged from the hospital outpatient department. We also noted that we would consider finalizing this modification (82 FR 33653).

Comment: Many commenters supported revising the laboratory DOS policy so that laboratories may bill Medicare and receive payment directly for ADLTs and molecular pathology tests performed on specimens collected from hospital outpatients, which are excluded from the OPSS packaging policy. The commenters indicated that revising the current laboratory DOS policy so that the performing laboratory can bill Medicare directly for molecular pathology tests and ADLTs is consistent with CMS' policy of excluding "precision diagnostics" performed on specimens collected in the hospital outpatient setting from the OPSS packaging policy. In general, commenters urged CMS to finalize a policy that focuses on whether the test was performed outside the hospital after the outpatient encounter, rather than on the date the specimen was collected or the date the test was initially ordered.

These commenters stated that this approach would be consistent with how tests are ordered and billed for under Medicare Advantage plans and commercial insurers, which allow laboratories to bill directly for these tests.

Commenters also reiterated previous concerns regarding administrative and billing complexities resulting from the current DOS policy that may affect timely beneficiary access to necessary molecular pathology tests. These commenters noted that hospitals may be reluctant to order a test that the hospital itself does not perform until at least 14 days following the date the patient is discharged from the hospital outpatient department so that the laboratory performing the test may bill Medicare directly for the test. One commenter explained that, for molecular pathology tests performed by an independent laboratory that is not affiliated with the hospital, the administrative complexity of the current laboratory DOS policy frequently leads hospitals to delay ordering of these tests.

In addition, several commenters recommended specific modifications to the potential revisions to laboratory DOS policy discussed in the CY 2018 OPSS/ASC proposed rule. These suggested modifications are summarized below.

- *Expand the laboratory tests subject to the DOS exception.* Commenters suggested that CMS expand the laboratory tests subject to the potential DOS exception to include *all* ADLTs (that is, both Criterion (A) and Criterion (B) ADLTs) and *all* Multi-Analyte Assays with Algorithmic Analysis (MAAA), Genomic Sequencing Procedures (GSP), and Proprietary Laboratory Analysis (PLA) test codes, even if they are not currently excluded from the OPSS packaging policy. The commenters argued that expanding the potential revision to the DOS policy to include the aforementioned laboratory tests would encompass all laboratory testing that has a different pattern of clinical use from routine testing and therefore is unconnected to the primary hospital outpatient service.

- *Remove the test order date requirement.* Several commenters recommended that CMS not finalize a requirement that the physician must order the test following the date of a hospital outpatient's discharge from the hospital outpatient department because testing on a "liquid-based" specimen is typically ordered before the specimen is collected. These commenters noted that requiring the physician to *order* the test at least 1 day following the date of a patient's discharge from the hospital

outpatient department would exclude a blood-based molecular pathology test from an exception to the laboratory DOS policy.

- *Require that it be “medically appropriate” to have collected the sample during the hospital outpatient encounter.* Several commenters noted that it would be medically appropriate for an independent laboratory that is not associated with the hospital to collect a liquid-based specimen. These commenters suggested that the potential revision to the laboratory DOS policy that specified it would be medically *inappropriate* to have collected the sample from the hospital outpatient other than during the hospital outpatient encounter, applies to tests performed on tissue-based samples, but could inadvertently create incentives for hospitals to require hospital outpatients to go elsewhere for liquid-based specimen collection. These commenters also stated that requiring a patient to travel to a different location for the specimen collection could present access issues for patients with limited mobility. Therefore, these commenters suggested a modification to the potential revised DOS policy to focus on what *is* medically appropriate rather than what is not medically appropriate. To that end, these commenters requested that CMS replace the term “medically inappropriate” with a requirement that it “was medically appropriate to have collected the sample from the hospital outpatient during the hospital outpatient encounter.”

A few additional commenters suggested regulatory language to modify the existing laboratory DOS policy in accordance with the specific recommendations discussed previously. Specifically, these commenters suggested adding a new exception to the DOS policy so that, in the case of a molecular pathology test or an ADLT that meets the criteria of section 1834A(d)(5) of the Act, or a test that is a MAAA, the date of service must be the date the test was performed only if: (1) The specimen was collected from a hospital outpatient during an encounter (as both are defined 42 CFR 410.2); (2) it was medically appropriate to have collected the sample from the hospital outpatient during the hospital outpatient encounter; (3) the results of the test do not guide treatment provided during the hospital outpatient encounter; and (4) the test was reasonable and medically necessary for the diagnosis or treatment of an illness or injury.

Response: We appreciate the support from commenters for our potential revisions to the laboratory DOS policy.

We agree that some of the potential revisions to the laboratory DOS policy that we described in the CY 2018 OPPS/ASC proposed rule may not allow ADLT or molecular pathology testing performed on liquid-based samples to qualify for a DOS exception. In particular, we recognize that a requirement that it would be “medically inappropriate” to have collected the specimen from the hospital outpatient other than during the hospital outpatient encounter is primarily applicable to tissue-based specimens. It would not be applicable to liquid-based samples because it could be medically *appropriate* to collect a liquid-based specimen in settings outside of a hospital outpatient encounter, such as an independent laboratory not associated with the hospital. As such, we believe use of the term “medically inappropriate” would inappropriately exclude laboratory testing performed on liquid-based specimens from qualifying for the proposed exception to the laboratory DOS policy. Therefore, we believe the revision suggested by the commenters, that is, to specify that it “was medically appropriate to have collected the sample from the hospital outpatient during the hospital outpatient encounter,” would address concerns that the DOS exception should encompass testing performed on liquid-based samples as well as testing performed on tissue-based samples.

In addition, we agree with the commenters that requiring the physician to order the test following the date of a hospital outpatient’s discharge from the hospital outpatient department (as we described in the proposed rule) could also inappropriately exclude tests performed on liquid-based specimens from the DOS exception, because a blood test is typically ordered before the sample is collected. We proposed including the order date requirement for the same reason we included such a requirement in the 14-day rule: Because we believe it is more difficult to determine that a test ordered before discharge is appropriately separable from the hospital stay that preceded the test (71 FR 69706). However, as discussed more fully below, we believe the ADLTs and molecular pathology tests excluded from the OPPS packaging policy are, by their nature, tests that are used to determine posthospital care, and therefore can be legitimately distinguished from the care the patient receives in the hospital even if they are ordered prior to the patient’s discharge. Therefore, we do not believe it is necessary to include an order date requirement as part of this exception.

However, to help ensure that only tests that are not related to the care provided in the hospital fall under this provision, we will specify that the tests must be *performed* following the hospital outpatient’s discharge. That is, in order for the DOS to be the date the test was performed, instead of the date the sample was collected, the test must be performed following a hospital outpatient’s discharge from the hospital outpatient department. We understand this is standard practice for these types of tests and, therefore, we would not expect this provision to change current laboratory practices or have any adverse effect on patient care.

We note that some of the commenters’ suggested modifications to our potential DOS revisions are inconsistent with the current OPPS packaging policy and would result in allowing the laboratory to bill Medicare directly for a test that is not paid at the CLFS rate but paid under the hospital OPPS bundled rate. In the proposed rule (82 FR 33652), we specifically discussed creating an exception to the current DOS policy for ADLTs approved by CMS under section 1834A(d)(5)(A) of the Act and molecular pathology tests because we have already recognized that these tests may have a different pattern of clinical use than more conventional laboratory tests, which may make them generally less tied to a primary service in the hospital outpatient setting than the more common and routine tests that are packaged. In addition, these tests are already paid separately outside of the OPPS at CLFS payment rates. We note that laboratory tests granted ADLT status under section 1834A(d)(5)(B) of the Act³³ currently are not excluded from the OPPS packaging policy. Likewise, GSP testing, PLA tests, and protein-based MAAAs that are not considered molecular pathology tests are also conditionally packaged under the OPPS at this time. In the proposed rule, we did not specifically discuss expanding the laboratory tests that may qualify for a DOS exception beyond the ADLTs and molecular pathology tests that are currently excluded from OPPS packaging, and therefore we are not including ADLTs under Criterion (B), GSP tests, PLA tests, or protein-based MAAAs in the revised DOS policy at this time. We intend to study this issue

³³ Under section 1834A(d)(5)(B) of the Act, an ADLT is a CDLT covered under Medicare Part B that is offered and furnished only by a single laboratory and not sold for use by a laboratory other than the original developing laboratory (or a successor owner) and . . . “[t]he test is cleared or approved by the Food and Drug Administration.” CMS has established a regulatory definition for this type of ADLT in 42 CFR 414.502.

and, if warranted, consider proposing changes to the laboratory tests subject to a DOS exception in future rulemaking.

As noted previously in this section, we believe the current laboratory DOS policy creates administrative complexities for hospitals and laboratories with regard to molecular pathology tests and laboratory tests expected to be designated by CMS as ADLTs that meet the criteria of section 1834A(d)(5)(A) of the Act. Under the current laboratory DOS policy, if the tests are ordered less than 14 days following a hospital outpatient's discharge from the hospital outpatient department, laboratories generally cannot bill Medicare directly for the molecular pathology test or ADLT. In those circumstances, the hospital must bill Medicare for the test, and the laboratory must seek payment from the hospital. We have heard from commenters that because ADLTs are performed by only a single laboratory and molecular pathology tests are often performed by only a few laboratories, and hospitals may not have the technical ability to perform these complex tests, the hospital may be reluctant to bill Medicare for a test it would not typically (or never) perform. As a result, the hospital might delay ordering the test until at least 14 days after the patient is discharged from the hospital outpatient department or even cancel the order to avoid the DOS policy, which may restrict a patient's timely access to these tests. In addition, we have heard from commenters that the current laboratory DOS policy may disproportionately limit access for Medicare beneficiaries under original Medicare fee-for-service (that is, Medicare Part A and Part B) because Medicare Advantage plans under Medicare Part C and other private payors allow laboratories to bill directly for tests they perform.

We also recognize that greater consistency between the laboratory DOS rules and the current OPPTS packaging policy would be beneficial and would address some of the administrative and billing issues created by the current DOS policy. As noted previously, we exclude all molecular pathology tests and ADLTs under section 1834A(d)(5)(A) of the Act from the OPPTS packaging policy because we believe these tests may have a different pattern of clinical use, which may make them generally less tied to a primary service in the hospital outpatient setting than the more common and routine laboratory tests that are packaged. Under the current DOS policy, we have established exceptions that permit the DOS to be the date of performance for

certain tests that we believe are not related to the hospital treatment and are used to determine posthospital care. We believe a similar exception is justified for the molecular pathology tests and ADLTs excluded from the OPPTS packaging policy, which we understand are used to guide and manage the patient's care after the patient is discharged from the hospital outpatient department. We believe that, like the other tests currently subject to DOS exceptions, these tests can legitimately be distinguished from the care the patient receives in the hospital, and thus we would not be unbundling services that are appropriately associated with hospital treatment. Moreover, as noted previously, these tests are already paid separately outside of the OPPTS at CLFS payment rates. Therefore, we agree with the commenters that the laboratory performing the test should be permitted to bill Medicare directly for these tests, instead of relying on the hospital to bill Medicare on behalf of the laboratory under arrangements.

For these reasons and in light of the commenters' suggestions, we are revising the current laboratory DOS policy at 42 CFR 414.510(b) for tests granted ADLT status by CMS under section 1834A(d)(5)(A) of the Act and molecular pathology tests that are excluded from the OPPTS packaging policy under 42 CFR 419.2(b), so that the performing laboratory may bill and be paid by Medicare directly for these tests under the circumstances described below. The revision will provide an exception to the general laboratory DOS rule—that is, the DOS is the date the specimen was collected—so that the DOS for these tests is the date the laboratory test was performed. This exception to the current laboratory DOS policy will only apply to tests granted ADLT status by CMS under paragraph (1) of the definition of “advanced diagnostic laboratory test” in 42 CFR 414.502, which CMS promulgated to implement section 1834A(d)(5)(A) of the Act, and molecular pathology tests excluded from the OPPTS packaging policy as defined in 42 CFR 419.2(b). By adding an exception to the current laboratory DOS policy at 42 CFR 414.510(b) for molecular pathology tests and ADLTs that are excluded from the OPPTS packaging policy under 42 CFR 419.2(b), the performing laboratory will be required to bill Medicare directly for tests that meet this exception. The hospital will no longer bill Medicare for these tests, and the laboratory will no longer have to seek payment from the

hospital for these tests, if all of the conditions are met.

We note that this new exception to the laboratory DOS policy will *not* apply to tests granted ADLT status by CMS under section 1834A(d)(5)(A) of the Act and molecular pathology tests when performed on a specimen collected from a hospital inpatient. As discussed more fully below, we believe adding a laboratory DOS exception for hospital inpatients would have policy and ratesetting implications under the IPPS diagnosis related group (DRG) payment, and we did not solicit comments on potential revisions to our current laboratory DOS policy specific to the hospital inpatient setting.

In order to allow a laboratory to bill Medicare directly for an ADLT or molecular pathology test excluded from the OPPTS packaging policy, we are modifying 42 CFR 414.510(b) by adding a new paragraph (5) to establish that, in the case of a molecular pathology test or a test designated by CMS as an ADLT under paragraph (1) of the definition of advanced diagnostic laboratory test in 42 CFR 414.502, the DOS of the test must be the date the test was performed only if—

- The test was performed following a hospital outpatient's discharge from the hospital outpatient department;
- The specimen was collected from a hospital outpatient during an encounter (as both are defined in 42 CFR 410.2);
- It was medically appropriate to have collected the sample from the hospital outpatient during the hospital outpatient encounter;
- The results of the test do not guide treatment provided during the hospital outpatient encounter; and
- The test was reasonable and medically necessary for the treatment of an illness.

We intend to continue to study the laboratory DOS policy and determine whether any additional changes are warranted. In particular, we will consider whether there should be any changes to the current 14-day rule, including whether to address any inconsistencies with our new exception, and any changes to the “under arrangements” provisions, including with respect to the hospital inpatient setting. We expect to propose any future changes to the laboratory DOS policy through notice-and-comment rulemaking.

Comment: A few commenters requested that any changes to the laboratory DOS policy apply to ADLTs and molecular pathology tests performed on specimens collected from both hospital inpatients and hospital outpatients. These commenters stated

that it would be an administrative burden on hospitals that collect specimens, and laboratories that furnish and bill for ADLTs and molecular pathology tests, to track tests ordered for hospital outpatients in a way that is inconsistent with those performed on specimens obtained from hospital inpatients.

One commenter stated that consistency between the DOS for hospital inpatients and hospital outpatients is important for evaluating data on patient outcomes. For example, the commenter noted that laboratory tests ordered for hospital inpatients do not have the tests' HCPCS code(s) on the inpatient claim. As a result, CMS cannot track patients who have received these tests using claims data, or evaluate how advanced testing contributes to cancer care and other advanced treatments, or evaluate the total cost of care. To that end, a few commenters suggested that CMS use coding modifiers to identify ADLTs and molecular pathology tests that do not guide treatment during an inpatient hospital stay so that separate payment can be made at the HCPCS code level for these laboratory tests.

In contrast to the commenters suggesting a laboratory DOS revision for both hospital outpatients and hospital inpatients, one commenter requested that CMS limit revisions to the laboratory DOS policy to outpatient laboratory tests that are excluded from the OPPTS packaging policy and separately payable at CLFS rates because it would merely change which entity bills for the laboratory test. The commenter noted that because all laboratory testing ordered on specimens obtained from hospital *inpatients* less than 14 days after discharge are currently bundled into the hospital IPPS rates, a change in the laboratory DOS policy for hospital inpatients would entail many other policy changes.

Response: As discussed previously, we believe an exception to the DOS policy that is limited to the hospital outpatient setting is warranted for Criterion (A) ADLTs and molecular pathology tests excluded from the OPPTS packaging policy because these tests are already paid at CLFS rates and not paid under the OPPTS, among other reasons. We did not discuss or propose an analogous DOS exception for tests performed on specimens collected from hospital inpatients in the CY 2018 OPPTS/ASC proposed rule, and we agree with the commenter who stated that such an exception would have broader policy implications for the IPPS that need to be carefully considered. We acknowledge that there could be an administrative burden for hospitals and

laboratories to track the DOS for ADLTs and molecular pathology tests ordered for hospital outpatients in a way that is different from those ordered for hospital inpatients. However, because laboratories will no longer need to seek payment from the hospital outpatient department for these tests if all requirements in new § 414.510(b)(5) are met, we believe that some of the additional burden mentioned by the commenters is likely to be offset by the revised DOS policy. With regard to the comments on evaluating data on patient outcomes, we note that, in the CY 2018 OPPTS/ASC proposed rule, we focused only on potential revisions to the laboratory DOS policy for Criterion (A) ADLTs and molecular pathology tests excluded from the OPPTS packaging policy that are performed on a specimen collected from a hospital outpatient during a hospital outpatient encounter to enable the laboratory to bill Medicare directly for those tests. We did not discuss revising the laboratory DOS policy to improve CMS' ability to evaluate patient outcomes. As noted previously, we intend to continue studying this issue and, if warranted, consider changes to the laboratory DOS policy for laboratory tests performed on specimens collected during an inpatient hospital stay in future rulemaking.

Comment: A few commenters suggested that any changes to the DOS rule also apply to "referred nonpatient specimens." The commenters explained that hospitals receive tissue and/or blood samples for testing from physician's offices or other locations in circumstances in which no hospital encounter occurs. The commenters recommended that CMS allow this type of testing to be billed separately and not be required to be billed with other outpatient hospital services.

Response: In the situation described by the commenters, the laboratory would be performing the test as a hospital outreach laboratory. A hospital outreach laboratory is a hospital-based laboratory that furnishes laboratory tests to patients who are not admitted hospital inpatients or registered outpatients of the hospital. As discussed previously, the new exception to the laboratory DOS policy will apply to tests granted ADLT status under Criterion (A) by CMS and molecular pathology tests excluded from the OPPTS packaging policy that are performed on a specimen collected from a hospital outpatient during a hospital outpatient encounter. Because hospital outreach laboratories perform laboratory tests on specimens collected from beneficiaries who are not patients of the hospital, a revision to the laboratory DOS policy is

not necessary to allow a hospital outreach laboratory to bill Medicare separately for the test.

Comment: One commenter requested clarification as to whether an exception to the laboratory DOS policy would allow a hospital to continue billing for ADLTs or molecular pathology tests excluded from the OPPTS packaging policy or whether the policy change would require a laboratory to bill Medicare directly for these tests. Another commenter recommended that any change to laboratory DOS policy or the "under arrangements" provisions should allow either the hospital or the laboratory that performed the test to bill the Medicare program directly. The commenter indicated that, in some circumstances, other laboratory tests in addition to ADLTs and or molecular pathology tests are ordered following the patient's discharge from the hospital outpatient department and that it may be less of a burden on the laboratory to allow the hospital to bill for all laboratory tests ordered rather than require some tests to be billed by the hospital and other tests to be billed by the laboratory.

Response: If a test meets all requirements for the new exception to the DOS policy in § 414.510(b)(5), the DOS of the test must be the date the test was performed, which means the laboratory performing the test must bill Medicare for the test. The hospital would no longer be permitted to bill for these tests unless the hospital laboratory actually performed the test. That is, if the hospital laboratory performed the ADLT or molecular pathology test, the hospital laboratory would bill Medicare for the test. We believe the potential administrative burden on the laboratory to bill for some of the tests performed on a specimen collected from a hospital outpatient during a hospital outpatient encounter will be offset, to some degree, because the laboratory would no longer need to seek payment from the hospital outpatient department for those tests, if all requirements in § 414.510(b)(5) are met.

Comment: A few commenters requested that CMS clarify that the date of performance is the date of a laboratory's final report. They suggested this clarification would avoid any ambiguity regarding the date of performance of the test. One commenter urged CMS to define the DOS as the date of final report for all laboratory tests.

Response: We considered the commenters' suggestion to use the date of final report as the DOS for ADLTs and molecular pathology tests excluded from the OPPTS packaging policy that are

performed on a specimen collected from a hospital outpatient during a hospital outpatient encounter. However, we have concerns with this approach because we believe there is no clear and consistent definition of “final report” that applies to all laboratories and all types of specimens collected; that is, liquid-based, cellular, or tissue samples. Regarding the comment requesting a revision to the DOS policy for all laboratory tests, we note that we focused on potential revisions regarding Criterion (A) ADLTs and molecular pathology tests excluded from the OPSS packaging policy in the CY 2018 OPSS/ASC proposed rule, and did not discuss potential revisions to the DOS policy for all laboratory tests.

Comment: A few commenters requested that CMS modify the 14-day rule requirement for all laboratory tests because it is operationally complicated and may result in delays in testing until after the 14-day window has passed.

Response: As discussed previously in this section, the discussion in the CY 2018 OPSS/ASC proposed rule was primarily focused on potential modifications to the DOS policy for Criterion (A) ADLTs and molecular pathology tests excluded from the OPSS packaging policy. We did not address potential modifications to the DOS policy that would apply to all laboratory tests, so we will not make such changes in this rule. However, as noted previously, we intend to continue studying this issue and, if warranted, will consider proposing further changes to the DOS policy in future rulemaking.

(a) Limiting the DOS Rule Exception to ADLTs

In the CY 2018 OPSS/ASC proposed rule (82 FR 33653), we also indicated that we were considering potentially revising the DOS rule to create an exception only for ADLTs that meet the criteria in section 1834A(d)(5)(A) of the Act. This exception would not cover molecular pathology tests. We stated that we were considering this approach because ADLTs approved by CMS under Criterion (A), like all ADLTs, are offered and furnished only by a single laboratory (as defined in 42 CFR 414.502). The hospital, or another laboratory, that is not the single laboratory (as defined in 42 CFR 414.502), cannot furnish the ADLT. Therefore, we noted in the proposed rule that there may be additional beneficiary access concerns for these ADLTs that may not apply to molecular pathology tests, and that could be addressed by allowing the laboratories to bill Medicare directly for these tests. For example, a hospital may not have an

arrangement with the single laboratory that furnishes a particular ADLT, which could lead the hospital to delay the order for the ADLT until 14 days after the patient's discharge to avoid financial risk and thus potentially delay medically necessary care for the beneficiary.

We stated in the proposed rule that we believe the circumstances may be different for molecular pathology tests, which are not required to be furnished by a single laboratory. In particular, we understood there may be “kits” for certain molecular pathology tests that a hospital can purchase, allowing the hospital to perform the test. Therefore, we stated that molecular pathology tests may not present the same concerns of delayed access to medically necessary care as ADLTs, which *must* be performed by a single laboratory.

Thus, in the proposed rule, we requested specific comments on potentially creating an exception to the DOS policy that is limited to ADLTs that meet the criteria in section 1834A(d)(5)(A) of the Act and have been granted ADLT status by CMS. We also requested public comments on how the current laboratory DOS policy may affect billing for other separately payable laboratory test codes that are not packaged under the OPSS, such as a laboratory test that is the only service provided to a beneficiary on a claim or molecular pathology tests.

Comment: Many commenters supported revising the current laboratory DOS policy for both Criterion (A) ADLTs and molecular pathology tests. They did not support an exception to the current laboratory DOS policy that would be limited only to ADLTs that meet the criteria in section 1834A(d)(5)(A) of the Act and have been granted ADLT status by CMS (and therefore exclude molecular pathology tests from the DOS exception). Several commenters noted that creating an exception for only ADLTs would not be consistent with current OPSS packaging policy, which excludes both Criterion (A) ADLTs and molecular pathology tests.

In addition, a few commenters indicated that beneficiary access issues similar to those for ADLTs, which are furnished by a single laboratory, may also exist for molecular pathology tests because molecular pathology testing is highly specialized and may be performed by only a few laboratories. The commenters also noted that a coverage policy for a given molecular pathology test may have only been issued by a MAC in the jurisdiction in which the laboratory is located. This could be problematic if the hospital that

is billing for the test is located in a different MAC jurisdiction from the laboratory, and the MAC processing claims for the jurisdiction in which the hospital is located has not made a coverage determination for the test.

A few other commenters explained that molecular pathology tests are important tools that guide patient treatment plans and that many hospitals currently lack the in-house technical expertise and Clinical Laboratory Improvement Amendments (CLIA) licensure to perform these tests and, therefore, send them out to a performing laboratory. The commenters noted that molecular pathology “kits” (as referenced by CMS in the CY 2018 OPSS/ASC proposed rule) are different from those used for other CDLTs. For example, the commenters explained that molecular pathology test kits require the hospital to have the highest licensure level under CLIA, as well as obtain specialized training for correct use and interpretation of the results, and that most hospitals are unlikely to have either the expertise or the technology to use these kits. To ensure appropriate access to molecular pathology tests by rural and community hospitals, as well as academic and specialty hospitals, the commenters requested that the revisions to the current laboratory DOS policy apply to both ADLTs and molecular pathology tests.

Response: We agree with commenters that limiting the new laboratory DOS exception to include only ADLTs (and not molecular pathology tests) would be inconsistent with the OPSS packaging policy, which currently excludes tests granted ADLT status by CMS under section 1834A(d)(5)(A) of the Act and molecular pathology tests. As noted by the commenters, relatively few laboratories may perform certain molecular pathology testing. We also acknowledge that hospitals may not have the technical expertise or certification requirements necessary to perform molecular pathology testing and therefore must rely on independent laboratories to perform the test. Therefore, we believe similar beneficiary access concerns that apply to ADLTs may also apply to molecular pathology tests. As indicated previously, after consideration of the public comments received on this issue, in this final rule with comment period, we are revising the current laboratory DOS policy to create a new exception for tests granted ADLT status by CMS under Criterion (A) and molecular pathology tests excluded from the OPSS packaging policy.

(b) Other Alternative Approaches

Finally, in the CY 2018 OPPS/ASC proposed rule (82 FR 33653), we invited public comments on alternative approaches to addressing stakeholders' concerns regarding the DOS policy, such as potentially modifying the "under arrangements" provisions in 42 CFR 410.42 and 411.15(m). Specifically, we requested comments on whether an exception should be added to § 410.42(b) and/or § 411.15(m)(3) for molecular pathology tests and ADLTs that are excluded from the OPPS packaging policy under 42 CFR 419.2(b) and how such an exception should be framed.

Comment: Several commenters preferred modifications to the "under arrangements" provisions to a laboratory DOS revision. They stated that modifying the "under arrangements" provisions could be a more direct approach for permitting a performing laboratory to bill Medicare directly for ADLTs and molecular pathology tests. Therefore, the commenters requested that CMS add another exception to the "under arrangements" provisions so that a revision to the laboratory DOS policy would not be necessary. They suggested that changes to the "under arrangements" provisions could be made in lieu of modifying the laboratory DOS rules and asserted that this approach would only revise the "billing regulation" for tests performed on hospital outpatient specimens to align with CMS' existing exclusions from the OPPS packaging policy.

In addition, a few commenters noted that certain practitioner services, such as physician services and nurse practitioner services, are not performed by the hospital outpatient department and paid under a separate fee schedule, and therefore, are currently excluded from the "under arrangements" provisions. They contended that adding an exception to the "under arrangements" provisions for nonpackaged laboratory tests which are paid at the CLFS rates would be consistent with the exceptions for other services (for example, physician services) paid separately from the hospital service.

A few commenters also provided specific recommendations on how CMS should revise the "under arrangements" regulations at §§ 410.42(b) and 411.15(m). Similar to their recommendations for revising the laboratory DOS policy, the commenters suggested adding an exception to the "under arrangements" provisions for molecular pathology tests, *all* ADLTs,

and *all* MAAAs, irrespective of whether these tests are currently excluded from the OPPS packaging policy.

Response: We appreciate the feedback that commenters provided in response to our request for comments on potential modifications to the "under arrangements" provisions. As discussed previously, in this final rule with comment period, we are finalizing a revision to the current laboratory DOS policy so that laboratories performing Criterion (A) ADLTs and molecular pathology tests excluded from the OPPS packaging policy can bill Medicare directly for those tests, instead of seeking payment from the hospital outpatient department. We believe including this revision as part of § 414.510 is more consistent with how we have historically addressed laboratory DOS issues and, at this stage, is the appropriate way to address stakeholders' administrative and billing concerns regarding these tests. As noted previously, we intend to continue to study this issue and specifically consider whether further revisions to the "under arrangements" provisions are warranted. If we believe revisions to the "under arrangements" provisions may be warranted, we expect we would propose those changes through notice-and-comment rulemaking.

In summary, after considering the public comments we received, we are adding an additional exception to our current laboratory DOS regulations at § 414.510(b)(5) so that the DOS for molecular pathology tests and tests designated by CMS as Criterion (A) ADLTs is the date the test was performed only if: (1) The test was performed following a hospital outpatient's discharge from the hospital outpatient department; (2) the specimen was collected from a hospital outpatient during an encounter (as both are defined in § 410.2); (3) it was medically appropriate to have collected the sample from the hospital outpatient during the hospital outpatient encounter; (4) the results of the test do not guide treatment provided during the hospital outpatient encounter; and (5) the test was reasonable and medically necessary for the treatment of an illness. This new exception to the laboratory DOS policy will enable laboratories performing Criterion (A) ADLTs and molecular pathology tests excluded from the OPPS packaging policy to bill Medicare directly for those tests, instead of requiring them to seek payment from the hospital outpatient department.

XI. CY 2018 OPPS Payment Status and Comment Indicators**A. CY 2018 OPPS Payment Status Indicator Definitions**

Payment status indicators (SIs) that we assign to HCPCS codes and APCs serve an important role in determining payment for services under the OPPS. They indicate whether a service represented by a HCPCS code is payable under the OPPS or another payment system and also whether particular OPPS policies apply to the code.

In the CY 2018 OPPS/ASC proposed rule (82 FR 33653), for CY 2018, we did not propose to make any changes to the definitions of status indicators that were listed in Addendum D1 to the CY 2017 OPPS/ASC final rule with comment period available on the CMS Web site at: <https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/HospitalOutpatientPPS/Hospital-Outpatient-Regulations-and-Notices-Items/CMS-1656-FC.html?DLPage=1&DLEntries=10&DLSort=2&DLSortDir=descending>.

We requested public comments on the proposed definitions of the OPPS status indicators for CY 2018. We did not receive any public comments. We believe that the existing CY 2017 definitions of the OPPS status indicators continue to be appropriate for CY 2018. Therefore, we are finalizing our proposed CY 2018 definitions of the OPPS status indicators without modifications.

The complete list of the payment status indicators and their definitions that apply for CY 2018 is displayed in Addendum D1 to this final rule with comment period, which is available on the CMS Web site at: <https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/HospitalOutpatientPPS/index.html>.

The CY 2018 payment status indicator assignments for APCs and HCPCS codes are shown in Addendum A and Addendum B, respectively, to this final rule with comment period, which are available on the CMS Web site at: <https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/HospitalOutpatientPPS/index.html>.

B. CY 2018 Comment Indicator Definitions

In the CY 2018 OPPS/ASC proposed rule (82 FR 33654), we proposed to use four comment indicators for the CY 2018 OPPS. These comment indicators, "CH", "NC", "NI", and "NP", are in effect for CY 2017 and we proposed to continue their use in CY 2018. The proposed CY 2018 OPPS comment indicators are as follows:

- “CH”—Active HCPCS code in current and next calendar year, status indicator and/or APC assignment has changed; or active HCPCS code that will be discontinued at the end of the current calendar year.

- “NC”—New code for the next calendar year or existing code with substantial revision to its code descriptor in the next calendar year as compared to current calendar year for which we requested comments in the proposed rule, final APC assignment; comments will *not* be accepted on the final APC assignment for the new code.

- “NI”—New code for the next calendar year or existing code with substantial revision to its code descriptor in the next calendar year as compared to current calendar year, interim APC assignment; comments will be accepted on the interim APC assignment for the new code.

- “NP”—New code for the next calendar year or existing code with substantial revision to its code descriptor in the next calendar year as compared to current calendar year, proposed APC assignment; comments will be accepted on the proposed APC assignment for the new code.

We requested public comments on our proposed use of comment indicators for CY 2018. We did not receive any public comments. We believe that the CY 2017 definitions of the OPSS comment indicators continue to be appropriate for CY 2018. Therefore, we are continuing to use those definitions without modification for CY 2018.

The definitions of the final OPSS comment indicators for CY 2018 are listed in Addendum D2 to this final rule with comment period, which is available on the CMS Web site at: <https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/HospitalOutpatientPPS/index.html>.

XII. Updates to the Ambulatory Surgical Center (ASC) Payment System

A. Background

1. Legislative History, Statutory Authority, and Prior Rulemaking for the ASC Payment System

For a detailed discussion of the legislative history and statutory authority related to payments to ASCs under Medicare, we refer readers to the CY 2012 OPSS/ASC final rule with comment period (76 FR 74377 through 74378) and the June 12, 1998 proposed rule (63 FR 32291 through 32292). For a discussion of prior rulemaking on the ASC payment system, we refer readers to the CYs 2012, 2013, 2014, 2015, 2016, and 2017 OPSS/ASC final rules with comment period (76 FR 74378 through

74379; 77 FR 68434 through 68467; 78 FR 75064 through 75090; 79 FR 66915 through 66940; 80 FR 70474 through 70502; and 81 FR 79732 through 79753, respectively).

2. Policies Governing Changes to the Lists of Codes and Payment Rates for ASC Covered Surgical Procedures and Covered Ancillary Services

Under 42 CFR 416.2 and 416.166 of the Medicare regulations, subject to certain exclusions, covered surgical procedures in an ASC are surgical procedures that are separately paid under the OPSS, that would not be expected to pose a significant risk to beneficiary safety when performed in an ASC, and for which standard medical practice dictates that the beneficiary would not typically be expected to require active medical monitoring and care at midnight following the procedure (“overnight stay”). We adopted this standard for defining which surgical procedures are covered under the ASC payment system as an indicator of the complexity of the procedure and its appropriateness for Medicare payment in ASCs. We use this standard only for purposes of evaluating procedures to determine whether or not they are appropriate to be furnished to Medicare beneficiaries in ASCs. We define surgical procedures as those described by Category I CPT codes in the surgical range from 10000 through 69999 as well as those Category III CPT codes and Level II HCPCS codes that directly crosswalk or are clinically similar to procedures in the CPT surgical range that we have determined do not pose a significant safety risk, that we would not expect to require an overnight stay when performed in ASCs, and that are separately paid under the OPSS (72 FR 42478).

In the August 2, 2007 final rule (72 FR 42495), we also established our policy to make separate ASC payments for the following ancillary items and services when they are provided integral to ASC covered surgical procedures: (1) Brachytherapy sources; (2) certain implantable items that have pass-through payment status under the OPSS; (3) certain items and services that we designate as contractor-priced, including, but not limited to, procurement of corneal tissue; (4) certain drugs and biologicals for which separate payment is allowed under the OPSS; and (5) certain radiology services for which separate payment is allowed under the OPSS. In the CY 2015 OPSS/ASC final rule with comment period (79 FR 66932 through 66934), we expanded the scope of ASC covered ancillary services to include certain diagnostic

tests within the medicine range of CPT codes for which separate payment is allowed under the OPSS when they are provided integral to an ASC covered surgical procedure. Covered ancillary services are specified in § 416.164(b) and, as stated previously, are eligible for separate ASC payment. Payment for ancillary items and services that are not paid separately under the ASC payment system is packaged into the ASC payment for the covered surgical procedure.

We update the lists of, and payment rates for, covered surgical procedures and covered ancillary services in ASCs in conjunction with the annual proposed and final rulemaking process to update the OPSS and the ASC payment system (§ 416.173; 72 FR 42535). We base ASC payment and policies for most covered surgical procedures, drugs, biologicals, and certain other covered ancillary services on the OPSS payment policies, and we use quarterly change requests (CRs) to update services covered under the OPSS. We also provide quarterly update CRs for ASC covered surgical procedures and covered ancillary services throughout the year (January, April, July, and October). We release new and revised Level II HCPCS codes and recognize the release of new and revised CPT codes by the AMA and make these codes effective (that is, the codes are recognized on Medicare claims) via these ASC quarterly update CRs. We recognize the release of new and revised Category III CPT codes in the July and January CRs. These updates implement newly created and revised Level II HCPCS and Category III CPT codes for ASC payments and update the payment rates for separately paid drugs and biologicals based on the most recently submitted ASP data. New and revised Category I CPT codes, except vaccine codes, are released only once a year, and are implemented only through the January quarterly CR update. New and revised Category I CPT vaccine codes are released twice a year and are implemented through the January and July quarterly CR updates. We refer readers to Table 41 in the CY 2012 OPSS/ASC proposed rule for an example of how this process, which we finalized in the CY 2012 OPSS/ASC final rule with comment period, is used to update HCPCS and CPT codes (76 FR 42291; 76 FR 74380 through 74381).

In our annual updates to the ASC list of, and payment rates for, covered surgical procedures and covered ancillary services, we undertake a review of excluded surgical procedures (including all procedures newly proposed for removal from the OPSS

inpatient list), new codes, and codes with revised descriptors, to identify any that we believe meet the criteria for designation as ASC covered surgical procedures or covered ancillary services. Updating the lists of ASC covered surgical procedures and covered ancillary services, as well as their payment rates, in association with the annual OPSS rulemaking cycle is particularly important because the OPSS relative payment weights and, in some cases, payment rates, are used as the basis for the payment of many covered surgical procedures and covered ancillary services under the revised ASC payment system. This joint update process ensures that the ASC updates occur in a regular, predictable, and timely manner.

3. Definition of ASC Covered Surgical Procedures

Since the implementation of the ASC prospective payment system, we have defined a “surgical” procedure under the payment system as any procedure described within the range of Category I CPT codes that the CPT Editorial Panel of the American Medical Association (AMA) defines as “surgery” (CPT codes 10000 through 69999) (72 FR 42478). We also have included as “surgical,” procedures that are described by Level II HCPCS codes or by Category III CPT codes that directly crosswalk or are clinically similar to procedures in the CPT surgical range that we have determined do not pose a significant safety risk, would not expect to require an overnight stay when performed in an ASC, and are separately paid under the OPSS (72 FR 42478).

As we noted in the CY 2008 final rule that implemented the revised ASC payment system, using this definition of surgery would exclude from ASC payment certain invasive, “surgery-like” procedures, such as cardiac catheterization or certain radiation treatment services that are assigned codes outside the CPT surgical range (72 FR 42477). We stated in that final rule that we believed continuing to rely on the CPT definition of surgery is administratively straightforward, is logically related to the categorization of services by physician experts who both establish the codes and perform the procedures, and is consistent with a policy to allow ASC payment for all outpatient surgical procedures (72 FR 42477).

Recently, some stakeholders have suggested that certain procedures that are outside the CPT surgical range but that are similar to surgical procedures currently covered in an ASC setting should be ASC covered surgical

procedures. For example, these stakeholders stated that certain cardiac catheterization services, cardiac device programming services, and electrophysiology services should be added to the covered surgical procedures list. While we continue to believe that using the CPT code range to define surgery represents a logical, appropriate, and straightforward approach to defining a surgical procedure, we also believe it may be appropriate for us to use the CPT surgical range as a guide rather than a requirement as to whether a procedure is surgical, which would give us more flexibility to include “surgery-like” procedures on the ASC Covered Procedures List (CPL). We are cognizant of the dynamic nature of ambulatory surgery and the continued shift of services from the inpatient setting to the outpatient setting over the past decade. Therefore, in the CY 2018 OPSS/ASC proposed rule (82 FR 33655), we solicited public comments regarding services that are described by Category I CPT codes outside of the surgical range, or Level II HCPCS codes or Category III CPT codes that do not directly crosswalk and are not clinically similar to procedures in the CPT surgical range, but that nonetheless may be appropriate to include as covered surgical procedures that are payable when furnished in the ASC setting. In particular, we stated our interest in the public’s views regarding additional criteria we might use to consider when a procedure that is surgery-like could be included on the ASC CPL. We requested that commenters on this issue take into consideration whether each individual procedure can be safely and appropriately performed in an ASC, as required by the regulations at 42 CFR 416.166 (including that standard medical practice dictates that the beneficiary would not typically be expected to require active medical monitoring and care at midnight following the procedure), and whether the procedure requires the resources, staff, and equipment typical of an ASC. We also indicated that we were interested in the public’s views on whether and how, if we were to include such services as ASC covered surgical procedures, we would need to revise our definition of ASC covered surgical procedures.

Comment: Some commenters suggested that revising the definition of ASC covered surgical procedures would inappropriately move procedures from a hospital setting to an ASC setting and place Medicare patients in greater risk. Some commenters also suggested that

revising the definition could further stress hospitals in isolated rural care settings because many ASCs are located in rural areas.

Other commenters suggested that CMS develop and solicit comments on a clear definition and criteria for surgical site selection. Commenters also suggested patient selection and risk stratification protocols that would harmonize the different criteria of hospital outpatient departments and ASCs. In addition, they recommended that further clinical evaluation of the consequences to the Medicare population be performed before revising the definition of ASC covered surgical procedures.

Many commenters supported revising the definition of ASC covered surgical procedures. Commenters supporting the revision of the definition of ASC covered surgical procedures suggested that the CPT surgical code range (10000–69999) has not properly accounted for technical advances in treatment and does not include invasive procedures that do not pose a significant safety risk, do not require an overnight stay for Medicare patients, and would otherwise be appropriate procedures to be added to the ASC list of covered surgical procedures. For example, some commenters believed that several catheter-based procedures would be appropriately performed in the ASC setting. Further, commenters stated that CMS has relied on alternative definitions of a surgical procedure in other operations of the Medicare program that are broader than the current definition of an ASC covered surgical procedure.

Response: We appreciate the feedback we received from commenters. We acknowledge the importance of having clear criteria for covered surgical procedures that account for advances in surgical treatment in an ASC setting that also do not expose Medicare patients to significant safety risks. In the CY 2018 OPSS/ASC proposed rule (82 FR 33654 through 33655), we did not propose any revisions to our current definition of ASC covered surgical procedures. For CY 2018, we will continue to define “surgical” procedures under the payment system as those procedures described by Category I CPT codes within the range the CPT Editorial Panel of the AMA defines as “surgery” (CPT codes 10000 through 69999), or Level II HCPCS codes or Category III CPT codes that directly crosswalk or are clinically similar to procedures in the CPT surgical range that we have determined do not pose a significant safety risk, would not be expected to require an overnight stay when performed in an

ASC, and are separately paid under the OPPS. However, we will take these comments into consideration in future rulemaking.

B. Treatment of New and Revised Codes

1. Background on Current Process for Recognizing New and Revised Category I and Category III CPT Codes and Level II HCPCS Codes

Category I CPT, Category III CPT, and Level II HCPCS codes are used to report procedures, services, items, and supplies under the ASC payment system. Specifically, we recognize the following codes on ASC claims:

- Category I CPT codes, which describe surgical procedures and vaccine codes;
- Category III CPT codes, which describe new and emerging technologies, services, and procedures; and
- Level II HCPCS codes, which are used primarily to identify items, supplies, temporary procedures, and services not described by CPT codes.

We finalized a policy in the August 2, 2007 final rule (72 FR 42533 through 42535) to evaluate each year all new and revised Category I and Category III CPT codes and Level II HCPCS codes that describe surgical procedures, and to

make preliminary determinations during the annual OPPS/ASC rulemaking process regarding whether or not they meet the criteria for payment in the ASC setting as covered surgical procedures and, if so, whether or not they are office-based procedures. In addition, we identify new and revised codes as ASC covered ancillary services based upon the final payment policies of the revised ASC payment system. In prior rulemakings, we refer to this process as recognizing new codes. However, this process has always involved the recognition of new and revised codes. We consider revised codes to be new when they have substantial revision to their code descriptors that necessitate a change in the current ASC payment indicator. To clarify, we refer to these codes as new and revised in this CY 2018 OPPS/ASC final rule with comment period.

We have separated our discussion below based on when the codes are released and whether we propose to solicit public comments in the CY 2018 OPPS/ASC proposed rule (and respond to those comments in the CY 2018 OPPS/ASC final rule with comment period) or whether we are soliciting public comments in this CY 2018 OPPS/ASC final rule with comment period

(and responding to those comments in the CY 2019 OPPS/ASC final rule with comment period).

We note that we sought public comments in the CY 2017 OPPS/ASC final rule with comment period (81 FR 79735 through 79736) on the new and revised Level II HCPCS codes effective October 1, 2016, or January 1, 2017. These new and revised codes, with an effective date of October 1, 2016, or January 1, 2017, were flagged with comment indicator “NI” in Addenda AA and BB to the CY 2017 OPPS/ASC final rule with comment period to indicate that we were assigning them an interim payment status and payment rate, if applicable, which were subject to public comment following publication of the CY 2017 OPPS/ASC final rule with comment period. We are responding to public comments and finalize the treatment of these codes under the ASC payment system in this CY 2018 OPPS/ASC final rule with comment period.

In Table 79 below, we summarize our process for updating codes through our ASC quarterly update CRs, seeking public comments, and finalizing the treatment of these new codes under the OPPS.

TABLE 79—COMMENT AND FINALIZATION TIMEFRAMES FOR NEW OR REVISED HCPCS CODES

ASC quarterly update CR	Type of code	Effective date	Comments sought	When finalized
April 1, 2017 ..	Level II HCPCS Codes	April 1, 2017 ..	CY 2018 OPPS/ASC proposed rule.	CY 2018 OPPS/ASC final rule with comment period.
July 1, 2017 ...	Level II HCPCS Codes	July 1, 2017 ...	CY 2018 OPPS/ASC proposed rule.	CY 2018 OPPS/ASC final rule with comment period.
	Category I (certain vaccine codes) and III CPT codes.	July 1, 2017 ...	CY 2018 OPPS/ASC proposed rule.	CY 2018 OPPS/ASC final rule with comment period.
October 1, 2017.	Level II HCPCS Codes	October 1, 2017.	CY 2018 OPPS/ASC final rule with comment period.	CY 2019 OPPS/ASC final rule with comment period.
January 1, 2018.	Level II HCPCS Codes	January 1, 2018.	CY 2018 OPPS/ASC final rule with comment period.	CY 2019 OPPS/ASC final rule with comment period.
	Category I and III CPT Codes	January 1, 2018.	CY 2018 OPPS/ASC proposed rule.	CY 2018 OPPS/ASC final rule with comment period.

Note: In the CY 2015 OPPS/ASC final rule with comment period (79 FR 66841 through 66844), we finalized a revised process of assigning APC and status indicators for new and revised Category I and III CPT codes that would be effective January 1. We refer readers to section III.A.3. of this CY 2018 OPPS/ASC final rule with comment period for further discussion of this issue.

2. Treatment of New and Revised Level II HCPCS Codes Implemented in April 2017 for Which We Solicited Public Comments in the CY 2018 OPPS/ASC Proposed Rule

In the April 2017 ASC quarterly update (Transmittal 3726, CR 9998, dated March 03, 2017), we added six new drug and biological Level II HCPCS codes to the list of covered ancillary services. Table 31 of the proposed rule listed the new Level II HCPCS codes that were implemented April 1, 2017,

along with their payment indicators for CY 2018.

We invited public comments on these proposed payment indicators and the proposed payment rates for the new Level II HCPCS codes that were recognized as ASC covered ancillary services in April 2017 through the quarterly update CRs, as listed in Table 31 of the proposed rule. We proposed to finalize their payment indicators and their payment rates in the CY 2018 OPPS/ASC final rule with comment period.

We did not receive any public comments regarding the proposed ASC payment indicators and payment rates. Therefore, we are adopting as final the CY 2018 proposed payment indicators for these codes, as indicated in Table 80. We note that several of the HCPCS C-codes have been replaced with HCPCS J-codes, effective January 1, 2018. Their replacement codes are listed in Table 80. The final payment rates for these codes can be found in Addendum BB to this final rule with comment period (which is available via the Internet on

the CMS Web site). In addition, the payment indicator meanings can be

found in Addendum DD1 to this final rule with comment period (which is

available via the Internet on the CMS Web site).

TABLE 80—NEW LEVEL II HCPCS CODES FOR COVERED ANCILLARY SERVICES EFFECTIVE ON APRIL 1, 2017

CY 2017 HCPCS code	CY 2018 HCPCS code	CY 2018 long descriptor	CY 2018 payment indicator
C9484	J1428	Injection, eteplirsen, 10 mg	K2
C9485	J9285	Injection, olaratumab, 10 mg	K2
C9486	J1627	Injection, granisetron extended release, 0.1 mg	K2
C9487*	J3358	Ustekinumab, for intravenous injection, 1 mg	K2
C9488	C9488	Injection, conivaptan hydrochloride, 1 mg	K2
J7328	J7328	Hyaluronan or derivative, gelsyn-3, for intra-articular injection, 0.1 mg	K2

* HCPCS code C9487, which was effective April 1, 2017, was deleted June 30, 2017 and replaced with HCPCS code Q9989 (Ustekinumab, for intravenous injection, 1 mg) effective July 1, 2017 through December 31, 2017.

3. Treatment of New and Revised Level II HCPCS Codes Implemented in July 2017 for Which We Solicited Public Comments in the CY 2018 OPPS/ASC Proposed Rule

In the July 2017 ASC quarterly update (Transmittal 3792, CR 10138, dated June 9, 2017), we added seven new Level II HCPCS codes to the list of covered surgical procedures and ancillary services. Table 32 of the proposed rule listed the new Level II HCPCS codes that are effective July 1, 2017. The proposed payment rates, where applicable, for these July codes were included in Addendum BB to the proposed rule (which is available via the Internet on the CMS Web site).

Through the July 2017 quarterly update CR, we also implemented ASC payment for one new Category III CPT code as an ASC covered surgical procedure, effective July 1, 2017. This code was listed in Table 33 of the proposed rule, along with its proposed payment indicator. The proposed payment rate for this new Category III CPT code was included in Addendum AA to the proposed rule (which is available via the Internet on the CMS Web site).

We invited public comments on these proposed payment indicators and the proposed payment rates for the new Category III CPT code and Level II HCPCS codes that were or are expected to be newly recognized as ASC covered surgical procedures or covered ancillary services in July 2017 through the

quarterly update CRs, as listed in Tables 32 and 33 of the proposed rule. We proposed to finalize their payment indicators and their payment rates in the CY 2018 OPPS/ASC final rule with comment period.

Comment: One commenter supported the assignment of HCPCS code Q9986 (Injection, hydroxyprogesterone caproate (Makena), 10 mg) to payment indicator “K2”. However, the commenter requested that CMS review the calculated payment rate for the new HCPCS code Q9986, as it appeared to the commenter to be inaccurate. The commenter pointed out the following: The July 2017 OPPS and ASC Update indicates that this new HCPCS code is “per 10 mg” with a payment rate of \$2.72 (as indicated in the July 2017 Addendum B/BB and in Addendum B and Addendum BB to the CY 2018 OPPS/ASC proposed rule). Prior to July 1, 2017, Makena® (NDC #64011–0247–02 and NDC #64011–0243–01) was reported under HCPCS code J1725, which had a dose and measure of “per 1 mg” and a payment rate of \$2.74 (April 2017 Addendum B/BB). Makena® also has a WAC price of \$30.57 per 10 mg. The commenter believed that when the new HCPCS code was added with a description of 10 mg instead of the prior 1 mg, the payment rate was not appropriately adjusted to reflect the dosage change.

Response: We agree with the commenter. The July 2017 and October 2017 OPPS and ASC addenda

incorrectly reflected a price for HCPCS code Q9986 based on a 1 mg dose rather than the revised 10 mg dose descriptor. We intend to correct the price for HCPCS code Q9986 retroactive to July 1, 2017, in the respective January 2018 updates to the OPPS and ASC payment systems. Applicable program instructions will be posted to the CMS Web site at: <https://www.cms.gov/Regulations-and-Guidance/Guidance/Transmittals/2017-Transmittals.html>.

After consideration of the public comment we received, we are finalizing the proposed payment indicators for the new Category III CPT code and Level II HCPCS codes that were newly recognized as ASC covered surgical procedures or covered ancillary services in July 2017 through the quarterly update CRs, as indicated in Table 81 below. We note that several of the HCPCS C- and Q-codes have been replaced with HCPCS J-codes, effective January 1, 2018. Their replacement codes are listed in Table 81 below. The CY 2018 final payment rates, where applicable, for these July codes can be found in Addendum BB to this final rule with comment period rule (which is available via the Internet on the CMS Web site). Table 82 below lists Category III CPT code 0474T, along with its final payment indicator. The CY 2018 final payment rate for this new Category III CPT code can be found in Addendum AA to the final rule with comment period (which is available via the Internet on the CMS Web site).

TABLE 81—NEW LEVEL II HCPCS CODES FOR COVERED SURGICAL PROCEDURES AND ANCILLARY SERVICES EFFECTIVE ON JULY 1, 2017

CY 2017 HCPCS code	CY 2018 HCPCS code	CY 2018 long descriptor	CY 2018 payment indicator
C9489	J2326	Injection, nusinersen, 0.1 mg	K2
C9490	J0565	Injection, bezlotoxumab, 10 mg	K2
C9745	C9745	Nasal endoscopy, surgical; balloon dilation of eustachian tube	J8

TABLE 81—NEW LEVEL II HCPCS CODES FOR COVERED SURGICAL PROCEDURES AND ANCILLARY SERVICES EFFECTIVE ON JULY 1, 2017—Continued

CY 2017 HCPCS code	CY 2018 HCPCS code	CY 2018 long descriptor	CY 2018 payment indicator
C9746	C9746	Transperineal implantation of permanent adjustable balloon continence device, with cystourethroscopy, when performed and/or fluoroscopy, when performed.	J8
C9747	C9747	Ablation of prostate, transrectal, high intensity focused ultrasound (HIFU), including imaging guidance.	J8
Q9986	J1726	Injection, hydroxyprogesterone caproate (Makena), 10 mg	K2
Q9989 *	J3358	Ustekinumab, for intravenous injection, 1 mg	K2

* HCPCS code C9487, which was effective April 1, 2017, was replaced with HCPCS code Q9989 (Ustekinumab, for intravenous injection, 1 mg) effective July 1, 2017.

TABLE 82—NEW CATEGORY III CPT CODE FOR COVERED SURGICAL PROCEDURE EFFECTIVE ON JULY 1, 2017

CY 2017 CPT code	CY 2018 CPT code	CY 2018 long descriptor	CY 2018 payment indicator
0474T	0474T	Insertion of anterior segment aqueous drainage device, with creation of intraocular reservoir, internal approach, into the supraciliary space.	J8

4. Process for New and Revised Level II HCPCS Codes That Are Effective October 1, 2017 and January 1, 2018 for Which We Are Soliciting Public Comments in This CY 2018 OPPS/ASC Final Rule With Comment Period

As has been our practice in the past, we incorporate those new and revised Level II HCPCS codes that are effective January 1 in the final rule with comment period, thereby updating the OPPS and the ASC payment system for the following calendar year. These codes are released to the public via the CMS HCPCS Web site, and also through the January OPPS quarterly update CRs. In the past, we also released new and revised Level II HCPCS codes that are effective October 1 through the October OPPS quarterly update CRs and incorporated these new codes in the final rule with comment period.

In the CY 2018 OPPS/ASC proposed rule (82 FR 33657), for CY 2018, consistent with our established policy, we proposed that the Level II HCPCS codes that will be effective October 1, 2017, and January 1, 2018, would be flagged with comment indicator “NI” in Addendum B to the CY 2018 OPPS/ASC final rule with comment period to indicate that we have assigned the codes an interim OPPS payment status for CY 2018. We did not receive any public comments on our proposal. As we stated we would do in the proposed rule, we are inviting public comments in this CY 2018 OPPS/ASC final rule with comment period on the interim payment indicators and payment rates for these codes that will be finalized in the CY 2019 OPPS/ASC final rule with comment period.

5. Process for Recognizing New and Revised Category I and Category III CPT Codes That Are Effective January 1, 2018 for Which We Are Soliciting Public Comments in This CY 2018 OPPS/ASC Final Rule With Comment Period

For new and revised CPT codes effective January 1, 2018, that were received in time to be included in the CY 2018 OPPS/ASC proposed rule, we proposed APC and status indicator assignments (82 FR 33657). We stated in the proposed rule that we would accept comments and finalize the APC and status indicator assignments in the CY 2018 OPPS/ASC final rule with comment period. For those new/revised CPT codes that were received too late for inclusion in the CY 2018 OPPS/ASC proposed rule, we stated that we may either make interim final assignments in the final rule with comment period or possibly use HCPCS G-codes that mirror the predecessor CPT codes and retain the current APC and status indicator assignments for a year until we can propose APC and status indicator assignments in the following year’s rulemaking cycle.

We stated in the proposed rule that, for the CY 2018 ASC update, the new and revised CY 2018 Category I and III CPT codes will be effective on January 1, 2018, and were included in ASC Addendum AA and Addendum BB to the proposed rule (which are available via the Internet on the CMS Web site). The new and revised CY 2018 Category I and III CPT codes were assigned to comment indicator “NP” to indicate that the code is new for the next calendar year or the code is an existing

code with substantial revision to its code descriptor in the next calendar year, as compared to the current calendar year, and that comments will be accepted on the proposed payment indicator. Further, in the proposed rule, we reminded readers that the CPT code descriptors that appear in Addendum AA and Addendum BB are short descriptors and do not fully describe the complete procedure, service, or item described by the CPT code. Therefore, we included the 5-digit placeholder codes and their long descriptors for the new and revised CY 2018 CPT codes in Addendum O to the proposed rule (which is available via the Internet on the CMS Web site) so that the public can have time to adequately comment on our proposed payment indicator assignments. We stated in the proposed rule that the 5-digit placeholder codes can be found in Addendum O, specifically under the column labeled “CY 2018 OPPS/ASC Proposed Rule 5-Digit Placeholder Code,” to the proposed rule. We stated that the final CPT code numbers would be included in the CY 2018 OPPS/ASC final rule with comment period. We noted that not every code listed in Addendum O is subject to comment. For the new/revised Category I and III CPT codes, we requested comments on only those codes that are assigned to comment indicator “NP”.

In summary, we solicited public comments on the proposed CY 2018 payment indicators for the new and revised Category I and III CPT codes that will be effective January 1, 2018. The CPT codes were listed in Addendum AA and Addendum BB to the proposed rule with short descriptors only. We

listed them again in Addendum O to the proposed rule with long descriptors. We also proposed to finalize the payment indicator for these codes (with their final CPT code numbers) in the CY 2018 OPPS/ASC final rule with comment period. The proposed payment indicators for these codes were included in Addendum AA and Addendum BB to the proposed rule (which are available via the Internet on the CMS Web site).

Comment: Some commenters addressed the proposed establishment of HCPCS G-codes under the MPFS to report the insertion and removal of buprenorphine hydrochloride, formulated as a 4-rod, 80 mg, long-acting subdermal drug implant for the treatment of opioid addiction (82 FR 34011 through 34012). Specifically, the commenters requested that the MPFS proposal also apply to the OPPS and ASC payment systems. In addition, the commenters recommended that CMS assign the HCPCS G-codes to payment indicator “P3” (Office-based surgical procedure added to ASC list in CY 2008 or later with MPFS nonfacility Practice Expense Relative Value Units (PE RVUs); payment based on MPFS nonfacility PE RVUs).

Response: As discussed in section III.D. (OPPS APC-Specific Policies) of this final rule with comment period, we are establishing these HCPCS G-codes in the OPPS, effective January 1, 2018, with status indicator “Q1” (Packaged APC payment if billed on the same claim as a HCPCS code assigned status indicator “S”, “T”, or “V”). However, because these services are conditionally packaged under the OPPS, they are unconditionally packaged under the ASC payment system (payment indicator “N1”). Therefore, we are not accepting the commenters’ request to assign payment indicator “P3” to these HCPCS G-codes.

Comment: One commenter disagreed with the proposed payment rate for four new CPT codes (31XX2, 31XX3, 31XX4, and 31XX5) that describe endoscopic sinus surgery services. The commenter noted that the multiple procedure reduction applies to these procedures when performed in an ASC which results in payment at 100 percent for the highest ranking procedure and 50 percent for each subsequent procedure when performed in the same encounter. Because the commenter believed that these payment rates are inadequate, the commenter requested that CMS consider an ASC payment rate that more closely aligns with ASCs’ costs.

Response: The national unadjusted ASC payment rates are calculated using our standard ASC ratesetting methodology of multiplying the ASC

relative payment weight for the procedure by the ASC conversion factor for that same year. We have no cost data or information to assess whether ASC payments rates calculated using the standard ratesetting methodology align with ASC costs. Therefore, we are not accepting the commenter’s recommendation and we are finalizing payment for proposed CPT codes 31XX2, 31XX3, 31XX4, and 31XX5, as replaced by CPT codes 31253, 31257, 31259, and 31298, respectively, according to our standard ASC ratesetting methodology for CY 2018. We note the OPPS cost data informs ASC payment rates, and as data become available from hospitals paid under the OPPS, we will reassess the APC assignments for these codes.

After consideration of the public comments we received, we are finalizing, without modification, the proposed CY 2018 ASC payment indicator assignments for new and revised CPT codes, effective January 1, 2018. The final CY 2018 payment indicators for the new and revised Category I and III CPT codes (with their final CPT code numbers) that will be effective January 1, 2018 are listed in Addendum AA and Addendum BB to this final rule with comment period with short descriptors only. We list them again in Addendum O to the final rule with comment period with long descriptors.

C. Update to the List of ASC Covered Surgical Procedures and Covered Ancillary Services

1. Covered Surgical Procedures

a. Covered Surgical Procedures Designated as Office-Based

(1) Background

In the August 2, 2007 ASC final rule, we finalized our policy to designate as “office-based” those procedures that are added to the ASC list of covered surgical procedures in CY 2008 or later years that we determine are performed predominantly (more than 50 percent of the time) in physicians’ offices based on consideration of the most recent available volume and utilization data for each individual procedure code and/or, if appropriate, the clinical characteristics, utilization, and volume of related codes. In that rule, we also finalized our policy to exempt all procedures on the CY 2007 ASC list from application of the office-based classification (72 FR 42512). The procedures that were added to the ASC list of covered surgical procedures beginning in CY 2008 that we determined were office-based were

identified in Addendum AA to that rule by payment indicator “P2” (Office-based surgical procedure added to ASC list in CY 2008 or later with MPFS nonfacility PE RVUs; payment based on OPPS relative payment weight); “P3” (Office-based surgical procedures added to ASC list in CY 2008 or later with MPFS nonfacility PE RVUs; payment based on MPFS nonfacility PE RVUs); or “R2” (Office-based surgical procedure added to ASC list in CY 2008 or later without MPFS nonfacility PE RVUs; payment based on OPPS relative payment weight), depending on whether we estimated the procedure would be paid according to the standard ASC payment methodology based on its OPPS relative payment weight or at the MPFS nonfacility PE RVU-based amount.

Consistent with our final policy to annually review and update the list of covered surgical procedures eligible for payment in ASCs, each year we identify covered surgical procedures as either temporarily office-based (these are new procedure codes with little or no utilization data that we have determined are clinically similar to other procedures that are permanently office-based), permanently office-based, or nonoffice-based, after taking into account updated volume and utilization data.

(2) Changes for CY 2018 to Covered Surgical Procedures Designated as Office-Based

In developing the CY 2018 OPPS/ASC proposed rule and this final rule with comment period, we followed our policy to annually review and update the covered surgical procedures for which ASC payment is made and to identify new procedures that may be appropriate for ASC payment, including their potential designation as office-based. We reviewed CY 2016 volume and utilization data and the clinical characteristics for all covered surgical procedures that are assigned payment indicator “G2” (Nonoffice-based surgical procedure added in CY 2008 or later; payment based on OPPS relative payment weight) in CY 2016, as well as for those procedures assigned one of the temporary office-based payment indicators, specifically “P2”, “P3”, or “R2” in the CY 2017 OPPS/ASC final rule with comment period (81 FR 79736 through 79738).

As discussed in the CY 2018 OPPS/ASC proposed rule, our review of the CY 2016 volume and utilization data resulted in our identification of two covered surgical procedures, CPT code 37241 (Vascular embolize/occlude venous) and CPT code 67227

(Destruction extensive retinopathy), that we believe meet the criteria for designation as office-based. The data indicate that these procedures are performed more than 50 percent of the

time in physicians' offices, and we believe that the services are of a level of complexity consistent with other procedures performed routinely in physicians' offices. The CPT codes that

we proposed to permanently designate as office-based for CY 2018 were listed in Table 34 of the proposed rule.

TABLE 83—ASC COVERED SURGICAL PROCEDURES NEWLY DESIGNATED AS PERMANENTLY OFFICE-BASED FOR CY 2018

CY 2018 CPT code	CY 2018 long descriptor	CY 2017 ASC payment indicator	CY 2018 ASC payment indicator*
37241	Vascular embolization or occlusion, inclusive of all radiological supervision and interpretation, intraprocedural roadmapping, and imaging guidance necessary to complete the intervention; venous, other than hemorrhage (eg, congenital or acquired venous malformations, venous and capillary hemangiomas, varices, varicoceles).	G2	P3
67227	Destruction of extensive or progressive retinopathy (eg, diabetic retinopathy), cryotherapy, diathermy.	G2	P3

* Payment indicators are based on a comparison of the final rates according to the ASC standard ratesetting methodology and the MPFS final rates. Current law specifies a 0.5 percent update to the MPFS payment rates for CY 2018. For a discussion of the MPFS rates, we refer readers to the CY 2018 MPFS final rule with comment period.

We also reviewed CY 2016 volume and utilization data and other information for 10 procedures designated as temporary office-based in Tables 48 and 49 in the CY 2017 OPFS/ASC final rule with comment period (81 FR 79736 through 79738). Of these 10 procedures, there were very few claims in our data and no claims data for 8 procedures: CPT code 0402T (Collagen cross-linking of cornea (including removal of the corneal epithelium and intraoperative pachymetry when performed)); CPT code 10030 (Image-guided fluid collection drainage by catheter (eg, abscess, hematoma, seroma, lymphocele, cyst), soft tissue (eg, extremity, abdominal wall, neck), percutaneous); CPT code 36473 (Endovenous ablation therapy of incompetent vein, extremity, inclusive of all imaging guidance and monitoring, percutaneous, mechanochemical; first vein treated); CPT code 36901 (Introduction of needle(s) and/or catheter(s), dialysis circuit, with diagnostic angiography of the dialysis circuit, including all direct puncture(s) and catheter placement(s), injection(s) of contrast, all necessary imaging from the arterial anastomosis and adjacent artery through entire venous outflow including the inferior or superior vena cava, fluoroscopic guidance, radiological supervision and interpretation and image documentation and report); CPT code 64461 (Paravertebral block (PVB) (paraspinal block), thoracic; single injection site (includes imaging guidance, when performed)); CPT code 64463 (Paravertebral block (PVB) (paraspinal block), thoracic; continuous infusion by

catheter (includes imaging guidance, when performed)); CPT code 65785 (Implantation of intrastromal corneal ring segments); and CPT code 67229 (Treatment of extensive or progressive retinopathy, one or more sessions; preterm infant (less than 37 weeks gestation at birth), performed from birth up to 1 year of age (for example, retinopathy of prematurity), photocoagulation or cryotherapy). Consequently, we proposed to maintain the temporary office-based designations for these eight codes for CY 2018. We listed all of these codes for which we proposed to maintain the temporary office-based designations for CY 2018 in Table 35 of the proposed rule. The procedures for which the proposed office-based designations for CY 2018 are temporary also were indicated by asterisks in Addendum AA to the proposed rule (which is available via the Internet on the CMS Web site). The volume and utilization data for one procedure that has a temporary office-based designation for CY 2017, HCPCS code G0429 (Dermal injection procedure(s) for facial lipodystrophy syndrome (LDS) and provision of Radiesse or Sculptra dermal filler, including all items and supplies), is sufficient to indicate that this procedure is performed predominantly in physicians' offices and, therefore, should be assigned an office-based payment indicator in CY 2018. Consequently, we proposed to assign payment indicator "P2/P3" to this covered surgical procedure code in CY 2018. HCPCS code 0299T (Extracorporeal shock wave for integumentary wound

healing, high energy, including topical application and dressing care; initial wound) was finalized for temporary office-based status in the CY 2017 OPFS/ASC final rule with comment period. However, this code will be deleted by the AMA, effective December 31, 2017. We invited public comment on our proposals. *Comment:* One commenter objected to the proposal to designate CPT codes 10030, 36473, and 36901 as temporarily office-based procedures for CY 2018. The commenter did not provide a clinical rationale but stated that, in the absence of data to examine site of service, it is premature to designate these CPT codes as temporarily office-based. *Response:* In consultation with our medical advisors, we reviewed the clinical characteristics, utilization, and volume of related codes and determined that the procedures described by CPT codes 10030, 36473, and 36901 would be predominantly performed in physicians' offices. However, because we do not have utilization data for these CPT codes, we made the office-based designation temporary rather than permanent for CY 2018. We will reevaluate office-based status for CPT codes 10030, 36473, and 36901 in the CY 2019 rulemaking. After consideration of the public comment we received, for CY 2018 we are finalizing our proposal, without modification, to designate the procedures listed in Table 84 below as temporary office-based.

TABLE 84—CY 2018 PAYMENT INDICATORS FOR ASC COVERED SURGICAL PROCEDURES DESIGNATED AS TEMPORARY OFFICE-BASED IN THE CY 2018 OPPS/ASC FINAL RULE WITH COMMENT PERIOD

CY 2018 CPT code	CY 2018 long descriptor	CY 2017 ASC payment indicator*	CY 2018 ASC payment indicator**
0299T	Extracorporeal shock wave for integumentary wound healing, high energy, including topical application and dressing care; initial wound.	R2*	NA
0402T	Collagen cross-linking of cornea (including removal of the corneal epithelium and intraoperative pachymetry when performed).	R2*	R2**
10030	Image-guided fluid collection drainage by catheter (e.g., abscess, hematoma, seroma, lymphocele, cyst), soft tissue (e.g., extremity abdominal wall, neck), percutaneous.	P2*	P2**
36473	Endovenous ablation therapy of incompetent vein, extremity, inclusive of all imaging guidance and monitoring, percutaneous, mechanochemical; first vein treated.	P2*	P2**
36901	Introduction of needle(s) and/or catheter(s), dialysis circuit, with diagnostic angiography of the dialysis circuit, including all direct puncture(s) and catheter placement(s), injection(s) of contrast, all necessary imaging from the arterial anastomosis and adjacent artery through entire venous outflow, including the inferior or superior vena cava, fluoroscopic guidance, radiological supervision and interpretation and image documentation and report.	P2*	P2**
64461	Paravertebral block (PVB) (paraspinous block), thoracic; single injection site (includes imaging guidance, when performed).	P3*	P3**
64463	Continuous infusion by catheter (includes imaging guidance, when performed)	P3*	P3**
65785	Implantation of intrastromal corneal ring segments	R2*	P2**
67229	Treatment of extensive or progressive retinopathy, one or more sessions; preterm infant (less than 37 weeks gestation at birth), performed from birth up to 1 year of age (e.g., retinopathy of prematurity), photocoagulation or cryotherapy.	R2*	R2**
G0429	Dermal injection procedure(s) for facial lipodystrophy syndrome (LDS) and provision of Radiesse or Sculptra dermal filler, including all items and supplies.	P3*	P3**

* If designation is temporary.

** Payment indicators are based on a comparison of the final rates according to the ASC standard ratesetting methodology and the MPFS final rates. Current law specifies a 0.5 percent update to the MPFS payment rates for CY 2018. For a discussion of the MPFS rates, we refer readers to the CY 2018 MPFS final rule with comment period.

In the CY 2018 OPPS/ASC proposed rule (82 FR 33660), for CY 2018, we proposed to designate one new CY 2018 CPT code for ASC covered surgical procedures as temporary office-based, as displayed in Table 36 of the proposed rule. After reviewing the clinical characteristics, utilization, and volume of related procedure codes, we determined that the procedure described by this new CPT code would be predominantly performed in physicians' offices. However, because

we had no utilization data for the procedure specifically described by this new CPT code, we proposed to make the office-based designation temporary rather than permanent, and we stated that we will reevaluate the procedure when data become available. The procedure for which the proposed office-based designation for CY 2018 is temporary was indicated by asterisks in Addendum AA to the proposed rule (which is available via the Internet on the CMS Web site).

We did not receive any public comments on our proposal. Therefore, for CY 2018, we are finalizing our proposal, without modification, to designate CPT code 38222 as temporary office-based for CY 2018 as displayed in Table 85 of this final rule with comment period. The procedure for which the office-based designation for CY 2018 is temporary is indicated by asterisks in Addendum AA to this final rule with comment period (which is available via the Internet on the CMS Web site).

TABLE 85—CY 2018 PAYMENT INDICATORS FOR NEW CY 2018 CPT CODES FOR ASC COVERED SURGICAL PROCEDURES DESIGNATED AS TEMPORARY OFFICE-BASED

CY 2017 OPPS/ASC proposed rule 5-digit CMS placeholder code	CY 2018 CPT code	CY 2018 long descriptor	CY 2018 ASC payment indicator**
382X3	38222	Diagnostic bone marrow; biopsy(ies) and aspiration(s)	P3*

* If designation is temporary.

** Payment indicators are based on a comparison of the final rates according to the ASC standard ratesetting methodology and the MPFS final rates. Current law specifies a 0.5 percent update to the MPFS payment rates for CY 2018. For a discussion of the MPFS rates, we refer readers to the CY 2018 MPFS final rule with comment period.

b. ASC Covered Surgical Procedures To Be Designated as Device-Intensive

(1) Background

As discussed in the CY 2017 OPPS/ASC final rule with comment period (81 FR 79739 through 79740), we implemented a payment methodology for calculating the ASC payment rates for covered surgical procedures that are designated as device-intensive. Under § 416.171(b)(2) of the regulations, we define an ASC device-intensive procedure as a procedure with a HCPCS code-level device offset of greater than 40 percent when calculated according to the standard OPPS APC ratesetting methodology.

According to this ASC payment methodology, we apply the device offset percentage based on the standard OPPS APC ratesetting methodology to the OPPS national unadjusted payment to determine the device cost included in the OPPS payment rate for a device-intensive ASC covered surgical procedure, which we then set as equal to the device portion of the national unadjusted ASC payment rate for the procedure. We calculate the service portion of the ASC payment for device-intensive procedures by applying the uniform ASC conversion factor to the service (non-device) portion of the OPPS relative payment weight for the device-intensive procedure. Finally, we sum the ASC device portion and ASC service portion to establish the full payment for the device-intensive procedure under the revised ASC payment system.

We also finalized that device-intensive procedures will be subject to all of the payment policies applicable to procedures designated as an ASC device-intensive procedure under our established methodology, including our policies on device credits and discontinued procedures.

In addition, in the CY 2017 OPPS/ASC final rule with comment period, we adopted a policy for new HCPCS codes describing procedures involving the implantation of medical devices that do not yet have associated claims data, to designate these procedures as device-intensive with a default device offset set at 41 percent until claims data are available to establish the HCPCS code-level device offset for the procedures (81 FR 79739 through 79740). This default device offset amount of 41 percent would not be calculated from claims data; instead, it would be applied as a default until claims data are available upon which to calculate an actual device offset for the new code. The purpose of applying the 41-percent default device offset to new codes that

describe procedures that involve the implantation of medical devices would be to ensure ASC access for new procedures until claims data become available. However, in certain rare instances, for example, in the case of a very expensive implantable device, we may temporarily assign a higher offset percentage if warranted by additional information, such as pricing data from a device manufacturer. Once claims data are available for a new procedure involving the implantation of a medical device, the device-intensive designation will be applied to the code if the HCPCS code device offset is greater than 40 percent, according to our policy of determining device-intensive status, by calculating the HCPCS code-level device offset.

(2) Changes to List of ASC Covered Surgical Procedures Designated as Device-Intensive for CY 2018

In the CY 2018 OPPS/ASC proposed rule, for CY 2018, we proposed to update the ASC list of covered surgical procedures that are eligible for payment according to our device-intensive procedure payment methodology, reflecting the proposed individual HCPCS code device-offset percentages based on CY 2016 OPPS claims and cost report data available for the proposed rule (82 FR 33660).

The ASC covered surgical procedures that we proposed to designate as device-intensive, and therefore subject to the device-intensive procedure payment methodology for CY 2018, are assigned payment indicator “J8” and were included in Addendum AA to the proposed rule (which is available on the CMS Web site). The CPT code, the CPT code short descriptor, the proposed CY 2018 ASC payment indicator, and an indication of whether the full credit/partial credit (FB/FC) device adjustment policy would apply also were included in Addendum AA to the proposed rule.

We invited public comments on the proposed list of ASC device-intensive procedures.

Comment: A few commenters requested that CMS lower the ASC device offset threshold to 30 percent to qualify a larger number of ASC procedures as device-intensive.

Response: We did not propose to change to lower the ASC device offset threshold and, therefore, are not accepting this request. We note that we addressed a similar comment in the CY 2017 OPPS/ASC final rule with comment period, and we refer readers to our response (81 FR 79739).

Comment: One commenter requested that CMS designate CPT code 55X87 (which is replaced by CPT code 55874

in this final rule with comment period and effective January 1, 2018) as a device-intensive procedure in the ASC. The commenter stated that the procedure described by CPT code 55874 requires the implantation of an expensive device which represents an approximate range of 80 to 87 percent of the procedure cost.

Response: When claims data are available for a new procedure requiring the implantation of a medical device, device-intensive status will be applied to the code if the HCPCS code level device offset is greater than 40 percent, according to our finalized policy of determining device-intensive status by calculating the HCPCS code-level device offset (81 FR 79658). With respect to CPT code 55874, although the CPT code is new, the procedure itself was previously described by two predecessor codes, HCPCS code C9743 and CPT code 0438T, for which we have claims data. Therefore, based on our analysis of the OPPS claims data used to determine the packaged device costs attributed to the predecessor HCPCS codes, CPT code 55874 is not eligible for device-intensive status because the device offset for its predecessor codes are below the 40 percent threshold. For more information on how codes are designated as device-intensive status, we refer readers to section IV.B. (Device-Intensive Procedures) of this final rule with comment period.

Comment: Commenters requested that CMS designate CPT code 0275T, a procedure described as percutaneous image guided lumbar decompression (PILD) for lumbar spinal stenosis, as a device-intensive procedure until claims data become available. Commenters stated that, beginning in CY 2017, PILD is the only procedure reported with CPT code 0275T. In addition, to ensure CMS collects robust data on the cost of the device, one commenter requested that CMS establish a specific device code.

Response: As discussed in section IV.B.2 of this final rule with comment period, claims data for CPT code 0275T shows that the percentage of packaged device cost is below the 40 percent threshold; therefore, it is not eligible for designation as a device-intensive procedure. CPT code 0275T was implemented as a payable code in the OPPS and ASC settings on July 1, 2011 (July 2011 OPPS Update, Transmittal 2234, Change Request 7443). We are unclear why a separate device code is needed if PILD is the only procedure reported with CPT code 0275T.

Comment: One commenter requested that CMS designate CPT code 67027 (Implant eye drug system) as a device-intensive procedure in the ASC.

Response: CPT code 67027 does not have a device offset that is greater than 40 percent. Accordingly, it is not device-intensive under current policy.

After consideration of the public comments we received, we are designating the ASC covered surgical procedures displayed in Addendum AA as device-intensive and subject to the device-intensive procedure payment methodology for CY 2018. The CPT code, the CPT code short descriptor, the final CY 2018 ASC payment indicator, and an indication of whether the full credit/partial credit (FB/FC) device adjustment policy will apply are included in the ASC policy file labeled “CY 2018 ASC Procedures to which the No Cost/Full Credit and Partial Credit Device Adjustment Policy Applies,” which is available via the Internet on the CMS Web site at: <https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/ASCPayment/ASC-Policy-Files.html>.

c. Adjustment to ASC Payments for No Cost/Full Credit and Partial Credit Devices

Our ASC payment policy for costly devices implanted in ASCs at no cost/full credit or partial credit, as set forth in § 416.179 of our regulations, is consistent with the OPPS policy that was in effect until CY 2014. Specifically, the OPPS policy that was in effect through CY 2013 provided a reduction in OPPS payment by 100 percent of the device offset amount when a hospital furnishes a specified device without cost or with a full credit and by 50 percent of the device offset amount when the hospital receives partial credit in the amount of 50 percent or more of the cost for the specified device (77 FR 68356 through 68358). The established ASC policy reduces payment to ASCs when a specified device is furnished without cost or with full credit or partial credit for the cost of the device for those ASC covered surgical procedures that are assigned to APCs under the OPPS to which this policy applies. We refer readers to the CY 2009 OPPS/ASC final rule with comment period for a full discussion of the ASC payment adjustment policy for no cost/full credit and partial credit devices (73 FR 68742 through 68744).

As discussed in section IV.B. of the CY 2014 OPPS/ASC final rule with comment period (78 FR 75005 through 75006), we finalized our proposal to modify our former policy of reducing OPPS payment for specified APCs when a hospital furnishes a specified device without cost or with a full or partial credit. Formerly, under the OPPS, our

policy was to reduce OPPS payment by 100 percent of the device offset amount when a hospital furnished a specified device without cost or with a full credit and by 50 percent of the device offset amount when the hospital received partial credit in the amount of 50 percent or more (but less than 100 percent) of the cost for the specified device. For CY 2014, we finalized our proposal to reduce OPPS payment for applicable APCs by the full or partial credit a provider receives for a replaced device, capped at the device offset amount.

Although we finalized our proposal to modify the policy of reducing payments when a hospital furnishes a specified device without cost or with full or partial credit under the OPPS, in that final rule with comment period (78 FR 75076 through 75080), we finalized our proposal to maintain our ASC policy for reducing payments to ASCs for specified device-intensive procedures when the ASC furnishes a device without cost or with full or partial credit. Unlike the OPPS, there is currently no mechanism within the ASC claims processing system for ASCs to submit to CMS the actual amount received when furnishing a specified device at full or partial credit. Therefore, under the ASC payment system, we finalized our proposal for CY 2014 to continue to reduce ASC payments by 100 percent or 50 percent of the device offset amount when an ASC furnishes a device without cost or with full or partial credit, respectively.

In the CY 2018 OPPS/ASC proposed rule (82 FR 33661), we proposed to update the list of ASC covered device-intensive procedures that would be subject to the no cost/full credit and partial credit device adjustment policy for CY 2018. Specifically, when a device-intensive procedure is subject to the no cost/full credit or partial credit device adjustment policy and is performed to implant a device that is furnished at no cost or with full credit from the manufacturer, the ASC would append the HCPCS “FB” modifier on the line in the claim with the procedure to implant the device. The contractor would reduce payment to the ASC by the device offset amount that we estimate represents the cost of the device when the necessary device is furnished without cost or with full credit to the ASC. We continue to believe that the reduction of ASC payment in these circumstances is necessary to pay appropriately for the covered surgical procedure furnished by the ASC.

For partial credit, we proposed to reduce the payment for implantation

procedures that are subject to the no cost/full credit or partial credit device adjustment policy by one-half of the device offset amount that would be applied if a device was provided at no cost or with full credit, if the credit to the ASC is 50 percent or more (but less than 100 percent) of the cost of the new device. The ASC would append the HCPCS “FC” modifier to the HCPCS code for a device-intensive surgical procedure that is subject to the no cost/full credit or partial credit device adjustment policy, when the facility receives a partial credit of 50 percent or more (but less than 100 percent) of the cost of a device. To report that the ASC received a partial credit of 50 percent or more (but less than 100 percent) of the cost of a new device, ASCs would have the option of either: (1) Submitting the claim for the device replacement procedure to their Medicare contractor after the procedure’s performance, but prior to manufacturer acknowledgment of credit for the device, and subsequently contacting the contractor regarding a claim adjustment, once the credit determination is made; or (2) holding the claim for the device implantation procedure until a determination is made by the manufacturer on the partial credit and submitting the claim with the “FC” modifier appended to the implantation procedure HCPCS code if the partial credit is 50 percent or more (but less than 100 percent) of the cost of the replacement device. Beneficiary coinsurance would be based on the reduced payment amount. As finalized in the CY 2015 OPPS/ASC final rule with comment period (79 FR 66926), to ensure our policy covers any situation involving a device-intensive procedure where an ASC may receive a device at no cost/full credit or partial credit, we apply our FB/FC policy to all device-intensive procedures.

We invited public comments on our proposals to adjust ASC payments for no cost/full credit and partial credit devices.

We did not receive any public comment on these proposals. Therefore, we are finalizing these proposals without modification. Specifically, we will apply the HCPCS “FB”/“FC” modifier policy to all device-intensive procedures in CY 2018. For CY 2018, we will reduce the payment for the procedures listed in the ASC device adjustment file by the full device offset amount if a device is furnished without cost or with full credit. ASCs must append the HCPCS modifier “FB” to the HCPCS code for a surgical procedure listed in the ASC device adjustment file previously mentioned when the device

is furnished without cost or with full credit. In addition, for CY 2018, we will reduce the payment for the procedures listed in the ASC device adjustment file by one-half of the device offset amount if a device is provided with partial credit, if the credit to the ASC is 50 percent or more (but less than 100 percent) of the device cost. The ASC must append the HCPCS "FC" modifier to the HCPCS code for a surgical procedure listed in the ASC device adjustment file when the facility receives a partial credit of 50 percent or more (but less than 100 percent) of the cost of a device.

d. Additions to the List of ASC Covered Surgical Procedures

As discussed in the CY 2018 OPPTS/ASC proposed rule (82 FR 33661), we conducted a review of HCPCS codes that currently are paid under the OPPTS, but not included on the ASC list of covered surgical procedures, to determine if changes in technology and/or medical practice affected the clinical appropriateness of these procedures for the ASC setting. Based on this review, we proposed to update the list of ASC covered surgical procedures by adding three procedures to the list for CY 2018. These procedures included procedures described by CPT codes 22856, 22858, and 58572. We determined that these three procedures are separately paid under the OPPTS, would not be expected to pose a significant risk to beneficiary safety when performed in an ASC, and would not be expected to require active medical monitoring and care of the beneficiary at midnight following the procedure. Therefore, we proposed to include these three procedures on the

list of ASC covered surgical procedures for CY 2018.

The procedures that we proposed to add to the ASC list of covered surgical procedures, including the HCPCS code long descriptors and the proposed CY 2018 payment indicators, were displayed in Table 37 of the proposed rule. We invited public comments on our proposals.

Comment: Some commenters supported adding the three procedures described by CPT codes 22856, 22858, and 58572 to the ASC list of covered surgical procedures. These commenters believed that all three procedures met the criteria to be added to the ASC list of covered surgical procedures.

Response: We appreciate the commenters' support. As indicated later in this section, we are finalizing our proposal to add these procedures to the ASC list of covered surgical procedures.

Comment: One commenter suggested that including the procedures described by CPT codes 22856, 22858, and 58572 on the ASC list of covered surgical procedures would allow physicians to inappropriately direct patients to receive these procedures in an ASC setting with which they have a financial relationship rather than an inpatient hospital setting, and thereby jeopardize patient access to these procedures in an inpatient setting.

Response: We do not believe that including the procedures described by CPT codes 22856, 22858, and 58572 on the ASC list of covered surgical procedures would lead to inappropriate shifting of patients to the ASC setting or jeopardize access to these procedures in an inpatient hospital setting. We believe the decision regarding the most

appropriate care setting for a given surgical procedure is made by the physician based on the beneficiary's individual clinical needs and preferences. In addition, as discussed in the CY 2012 OPPTS/ASC final rule with comment period (76 FR 74377 and 74378), section 1832(a)(2)(F)(i) of the Act provides that benefits under Medicare Part B include payment for facility services furnished in connection with surgical procedures specified by the Secretary that are performed in an ASC. Under 42 CFR 416.2 and 416.166 of the Medicare regulations, subject to certain exclusions, we define covered surgical procedures as those procedures which are separately paid under the OPPTS, would not be expected to pose a significant risk to beneficiary safety when performed in an ASC, and for which standard medical practice dictates that the beneficiary would not typically be expected to require active medical monitoring and care at midnight following the procedure. We believe it is appropriate and necessary to include procedures that meet these criteria on the list of ASC covered surgical procedures for Medicare patients who may be suitable candidates to undergo these procedures in an ASC setting.

After consideration of the public comments we received, we are finalizing our proposal to add the three procedures described by CPT codes 22856, 22858, and 58572 to the ASC list of covered surgical procedures. The procedures that we are adding to the ASC list of covered surgical procedures, including the code long descriptors and the final CY 2018 payment indicators, are displayed in Table 86 below.

TABLE 86—ADDITIONS TO THE LIST OF ASC COVERED SURGICAL PROCEDURES FOR CY 2018

CY 2018 CPT code	CY 2018 long descriptor	CY 2018 ASC payment indicator
22856	Total disc arthroplasty (artificial disc), anterior approach, including discectomy with end plate preparation (includes osteophylectomy for nerve root or spinal cord decompression and microdissection); single interspace, cervical.	J8
22858	Total disc arthroplasty (artificial disc), anterior approach, including discectomy with end plate preparation (includes osteophylectomy for nerve root or spinal cord decompression and microdissection); second level, cervical (list separately in addition to code for primary procedure).	N1
58572	Laparoscopy, surgical, with total hysterectomy, for uterus greater than 250g	G2

e. Discussion of Comment Solicitation on Adding Additional Procedures to the ASC Covered Procedures List

As we discussed in the CY 2009 OPPTS/ASC final rule with comment period (73 FR 68724), we adopted a policy to include, in our annual evaluation of the ASC list of covered

surgical procedures, a review of the procedures that are being proposed for removal from the OPPTS IPO list for possible inclusion on the ASC list of covered surgical procedures.

In the CY 2017 OPPTS/ASC proposed rule (81 FR 45679 through 45681), we solicited comments regarding whether

the TKA procedure described by CPT code 27447 should be removed from the OPPTS IPO list. During the comment period, some stakeholders requested that CMS also add the TKA procedure to the list of surgical procedures covered in an ASC setting. In the CY 2017 OPPTS/ASC proposed rule, we solicited public

comments on removing the TKA procedure from the OPPS IPO list for CY 2017. However, in the CY 2018 OPPS/ASC proposed rule (82 FR 33643 through 33644), we proposed to remove the TKA procedure from the OPPS IPO list for CY 2018, as discussed in section IX. of both the proposed rule and this final rule with comment period. In light of the public comments we received on the CY 2017 OPPS/ASC proposed rule (81 FR 79697 through 79699) and our proposal to remove the TKA procedure from the OPPS IPO list for CY 2018, in the CY 2018 OPPS/ASC proposed rule, we solicited public comments on whether the TKA procedure should also be added to the ASC list of covered surgical procedures. We also invited public comments on our proposed continued exclusion of CPT code 55866 (Laparoscopy, surgical prostatectomy, retropubic radical, including nerve sparing, includes robotic assistance, when performed) from the list of ASC covered surgical procedures.

In considering whether or not the TKA procedure should be added to the ASC list of covered surgical procedures, we requested that commenters take into consideration the regulations at 42 CFR 416.2 and 416.166. We indicated that commenters should assess, for example, whether this procedure would be expected to pose a significant risk to beneficiary safety when performed in an ASC, whether standard medical practice dictates that the beneficiary would typically be expected to require active medical monitoring and care at midnight following the procedure (“overnight stay”), and whether this procedure would fall under our general exclusions for covered surgical procedures at 42 CFR 416.166(c) (for example, would it generally result in extensive blood loss, require major or prolonged invasion of body cavities, directly involve major blood vessels, among others).

As discussed in the CY 2018 OPPS/ASC proposed rule, we evaluated each of the procedures described by CPT codes 27447 and 55866 that we proposed to remove from the OPPS IPO list for CY 2018 according to the criteria for inclusion on the list of ASC covered surgical procedures, and considered whether they should be added to the list of ASC covered surgical procedures for CY 2018. We stated that, because our understanding is that these procedures typically require more than 24 hours of active medical care following the procedure, we believed they should continue to be excluded from the list of ASC covered surgical procedures.

In addition, in the CY 2018 OPPS/ASC proposed rule, we solicited

comments on whether CPT codes 27125 (Hemiarthroplasty, hip, partial (eg, femoral stem prosthesis, bipolar arthroplasty)) and 27130 (Arthroplasty, acetabular and proximal femoral prosthetic replacement (total hip arthroplasty), with or without autograft or allograft) meet the criteria to be removed from the OPPS IPO list, as discussed in section IX. of the proposed rule. As noted in that section, we also solicited comments on whether these two procedures meet the criteria to be added to the ASC covered surgical procedures list.

Comment: In addition to the comments CMS received as to whether CPT codes 27447, 27125, 27130, and 55866 should be removed from the OPPS IPO list, several commenters suggested that these procedures should be added to the ASC covered surgical procedures list. The commenters argued that many ASCs are equipped to perform these procedures and orthopedic surgeons in ASCs are increasingly performing these procedures safely and effectively on non-Medicare patients and appropriate Medicare patients. They also noted that CPT code 27446 (Arthroplasty, knee, condyle and plateau; medial or lateral compartment) is a similar procedure that is currently included on the list of ASC covered surgical procedures. In addition, the commenters also stated that adding TKA and partial and total hip arthroplasty procedures to the ASC covered surgical procedures list allows for greater choices in care settings for Medicare patients and would provide a more patient-centered approach to joint arthroplasty procedures. Further, commenters stated that, in some cases, it may be safer to have joint arthroplasty procedures performed in an outpatient setting to prevent certain hospital-acquired infections.

Some commenters suggested a stepwise approach to transitioning TKA to the ASC setting and recommended allowing performance of 1 to 2 years in the hospital outpatient department setting before adding TKA to the ASC covered surgical procedures list. Other commenters recommended that ASCs obtain enhanced certification from a national accrediting organization that certifies an ASC meets higher quality standards to safely perform joint arthroplasty procedures.

Some commenters opposed adding procedures described by CPT codes 27447, 27125, 27130, and 55866 to the ASC covered surgical procedures list. These commenters believed that the vast majority of ASCs are not equipped to safely perform these procedures on patients and that the vast majority of

Medicare patients are not suitable candidates to receive “overnight” joint arthroplasty procedures in an ASC setting.

Response: We appreciate the feedback we received as to whether TKA, partial and total hip replacement procedures meet the criteria to be added to the ASC covered surgical procedures list. For CY 2018, we are not removing CPT codes 27125 and 27130 from the OPPS IPO list. While we are finalizing our proposal to remove CPT codes 27447 and 55866 from the OPPS IPO list for CY 2018, we are not adding these procedures to the ASC covered surgical procedures list for CY 2018. We solicited comments on whether to add these procedures to the ASC list of covered surgical procedures, and we will take the suggestions and recommendations into consideration for future rulemaking.

Comment: Many commenters requested that CMS add certain CPT codes that are outside of the 10000–69999 CPT code surgical range. These codes are shown in Table 87 below and included gastrointestinal diagnostic procedures, chemotherapy, cardiac catheterization procedures, and cardiac diagnostic procedures, as well as other cardiology procedures.

TABLE 87—PROCEDURES REQUESTED BY COMMENTERS FOR ADDITION TO THE CY 2018 LIST OF ASC COVERED SURGICAL PROCEDURES

CY 2018 CPT/HCPCS code	CY 2018 short descriptor
23470	Reconstruct shoulder joint.
23472	Reconstruct shoulder joint.
27702	Reconstruct ankle joint.
27703	Reconstruction ankle joint.
91010	Esophagus motility study.
91013	Esophgl motil w/stim/perfus.
91020	Gastric motility studies.
91022	Duodenal motility study.
91030	Acid perfusion of esophagus.
91034	Gastroesophageal reflux test.
91035	G-esoph reflx tst w/electrod.
91037	Esoph impeded function test.
91038	Esoph impeded funct test > 1hr.
91040	Esoph balloon distension tst.
91110	Gi tract capsule endoscopy.
91111	Esophageal capsule endoscopy.
91112	Gi wireless capsule measure.
91117	Colon motility 6 hr study.
91120	Rectal sensation test.
91122	Anal pressure record.
92920	Prq cardiac angioplast 1 art.
92921	Prq cardiac angio addl art.
92924	Prq card angio/athrect 1 art.
92925	Prq card angio/athrect addl.
92928	Prq card stent w/angio 1 vsl.
92929	Prq card stent w/angio addl.
92937	Prq revasc byp graft 1 vsl.
92938	Prq revasc byp graft addl.

TABLE 87—PROCEDURES REQUESTED BY COMMENTERS FOR ADDITION TO THE CY 2018 LIST OF ASC COVERED SURGICAL PROCEDURES—Continued

CY 2018 CPT/ HCPCS code	CY 2018 short descriptor
92960	Cardioversion electric ext.
92973	Prq coronary mech thrombect.
92978	Endoluminl ivus oct c 1st.
92979	Endoluminl ivus oct c ea.
93312	Echo transesophageal.
93313	Echo transesophageal.
93315	Echo transesophageal.
93316	Echo transesophageal.
93451	Right heart cath.
93452	Left hrt cath w/ventrclgrphy.
93453	R&l hrt cath w/ventrclgrphy.
93454	Coronary artery angio s&i.
93455	Coronary art/grft angio s&i.
93456	R hrt coronary artery angio.
93457	R hrt art/grft angio.
93458	L hrt artery/ventricle angio.
93459	L hrt art/grft angio.
93460	R&l hrt art/ventricle angio.
93461	R&l hrt art/ventricle angio.
93462	L hrt cath trnsptl puncture.
93463	Drug admin & hemodynamic meas.
93505	Biopsy of heart lining.
93530	Rt heart cath congenital.
93531	R & l heart cath congenital.
93532	R & l heart cath congenital.
93533	R & l heart cath congenital.
93563	Inject congenital card cath.
93564	Inject hrt congntl art/grft.
93565	Inject l ventr/atrial angio.
93566	Inject r ventr/atrial angio.
93567	Inject suprvlv aortography.
93568	Inject pulm art hrt cath.
93600	Bundle of his recording.
93602	Intra-atrial recording.
93603	Right ventricular recording.
93612	Intraventricular pacing.
93613	Electrophys map 3d add-on.
93620	Electrophysiology evaluation.
93621	Electrophysiology evaluation.
93622	Electrophysiology evaluation.
93623	Stimulation pacing heart.
93624	Electrophysiologic study.
93650	Ablate heart dysrhythm focu.
93653	Ep & ablate supravent arrhyt.
93654	Ep & ablate ventric tachy.
93655	Ablate arrhythmia add on.
93656	Tx atrial fib pulm vein isol.
93657	Tx l/r atrial fib addl.
96413	Chemo iv infusion 1 hr.
96415	Chemo iv infusion addl hr.
0237T	Trluml perip athrc brchiocph.
0398T	Mrgfus strctc les abltj.
C9600	Perc drug-el cor stent sing.
C9601	Perc drug-el cor stent bran.
C9602	Perc d-e cor stent ather s.
C9603	Perc d-e cor stent ather br.
C9604	Perc d-e cor revasc t cabg s.
C9605	Perc d-e cor revasc t cabg b.

Response: We reviewed all of the codes that commenters requested for addition to the ASC list of covered surgical procedures. Of the codes requested for addition to the ASC list,

we did not consider procedures that are reported by CPT codes that are on the OPSS IPO list. Codes that are on the OPSS IPO list for CY 2018 are not eligible for addition to the ASC list of covered surgical procedures.

As we discussed in section XII.A.3. of this final rule with comment period, we solicited public comments regarding our definition of a surgical procedures and whether services described by Category I CPT codes outside of the surgical range (10000–69999), or Level II HCPCS codes or Category III CPT codes that do not directly crosswalk and are not clinically similar to procedures in the CPT surgical range, may nonetheless be appropriate to include as covered surgical procedures that are payable when furnished in the ASC setting. We did not propose any revisions to our definition of covered surgical procedures, and, for CY 2018, we continue to use the current definition of surgical procedure.

We appreciate the commenters' recommendations for procedures that may be suitable candidates to include on the list of ASC covered surgical procedures. We acknowledge that some of the procedures may be "surgery-like." However, we remain concerned that these procedures may impose a significant safety risk to the Medicare population in an ASC setting. For CY 2018, we continue to rely on defining surgical procedures as those that are described by Category I CPT codes within the surgical range, or Level II HCPCS codes or Category III CPT codes that directly crosswalk or are clinically similar to procedures in the CPT surgical range. Therefore, we do not believe that the remaining codes should be added to the list of ASC covered surgical procedures for CY 2018 because they do not meet our criteria for inclusion on the list. However, we will take these comments into consideration in future rulemakings.

D. ASC Payment for Covered Surgical Procedures and Covered Ancillary Services

1. ASC Payment for Covered Surgical Procedures

a. Background

Our ASC payment policies for covered surgical procedures under the revised ASC payment system are fully described in the CY 2008 OPSS/ASC final rule with comment period (72 FR 66828 through 66831). Under our established policy, we use the ASC standard ratesetting methodology of multiplying the ASC relative payment weight for the procedure by the ASC conversion factor for that same year to

calculate the national unadjusted payment rates for procedures with payment indicators "G2" and "A2". Payment indicator "A2" was developed to identify procedures that were included on the list of ASC covered surgical procedures in CY 2007 and, therefore, were subject to transitional payment prior to CY 2011. Although the 4-year transitional period has ended and payment indicator "A2" is no longer required to identify surgical procedures subject to transitional payment, we retained payment indicator "A2" because it is used to identify procedures that are exempted from the application of the office-based designation.

The rate calculation established for device-intensive procedures (payment indicator "J8") is structured so that the packaged device payment amount is the same as under the OPSS, and only the service portion of the rate is subject to the ASC standard ratesetting methodology. In the CY 2017 OPSS/ASC final rule with comment period (81 FR 79732 through 79753), we updated the CY 2016 ASC payment rates for ASC covered surgical procedures with payment indicators of "A2", "G2", and "J8" using CY 2015 data, consistent with the CY 2017 OPSS update. We also updated payment rates for device-intensive procedures to incorporate the CY 2017 OPSS device offset percentages calculated under the standard APC ratesetting methodology, as discussed earlier in this section.

Payment rates for office-based procedures (payment indicators "P2", "P3", and "R2") are the lower of the MPFS nonfacility PE RVU-based amount (we refer readers to the CY 2018 MPFS proposed and final rules) or the amount calculated using the ASC standard rate setting methodology for the procedure. In the CY 2017 OPSS/ASC final rule with comment period, we updated the payment amounts for office-based procedures (payment indicators "P2", "P3", and "R2") using the most recent available MPFS and OPSS data. We compared the estimated CY 2017 rate for each of the office-based procedures, calculated according to the ASC standard rate setting methodology, to the MPFS nonfacility PE RVU-based amount to determine which was lower and, therefore, would be the CY 2017 payment rate for the procedure under our final policy for the revised ASC payment system (§ 416.171(d)).

In the CY 2014 OPSS/ASC final rule with comment period (78 FR 75081), we finalized our proposal to calculate the CY 2014 payment rates for ASC covered surgical procedures according to our established methodologies, with the exception of device removal procedures.

For CY 2014, we finalized a policy to conditionally package payment for device removal codes under the OPSS. Under the OPSS, a conditionally packaged code (status indicators “Q1” and “Q2”) describes a HCPCS code where the payment is packaged when it is provided with a significant procedure but is separately paid when the service appears on the claim without a significant procedure. Because ASC services always include a covered surgical procedure, HCPCS codes that are conditionally packaged under the OPSS are always packaged (payment indicator “N1”) under the ASC payment system. Under the OPSS, device removal procedures are conditionally packaged and, therefore, would be packaged under the ASC payment system. There would be no Medicare payment made when a device removal procedure is performed in an ASC without another surgical procedure included on the claim; therefore, no Medicare payment would be made if a device was removed but not replaced. To address this concern, for the device removal procedures that are conditionally packaged in the OPSS (status indicator “Q2”), we assigned the current ASC payment indicators associated with these procedures and continued to provide separate payment since CY 2014.

b. Update to ASC Covered Surgical Procedure Payment Rates for CY 2018

In the CY 2018 OPSS/ASC proposed rule (82 FR 33663), we proposed to update ASC payment rates for CY 2018 and subsequent years using the established rate calculation methodologies under § 416.171 and using our definition of device-intensive procedures, as discussed in section XII.C.1.b. of the proposed rule. Because the proposed OPSS relative payment weights are based on geometric mean costs, the ASC system would use geometric means to determine proposed relative payment weights under the ASC standard methodology. We proposed to continue to use the amount calculated under the ASC standard ratesetting methodology for procedures assigned payment indicators “A2” and “G2”.

We proposed to calculate payment rates for office-based procedures (payment indicators “P2”, “P3”, and “R2”) and device-intensive procedures (payment indicator “J8”) according to our established policies and, for device-intensive procedures, using our modified definition of device-intensive procedures, as discussed in section XII.C.1.b. of the proposed rule. Therefore, we proposed to update the payment amount for the service portion

of the device-intensive procedures using the ASC standard rate setting methodology and the payment amount for the device portion based on the proposed CY 2018 OPSS device offset percentages that have been calculated using the standard OPSS APC ratesetting methodology. Payment for office-based procedures would be at the lesser of the proposed CY 2018 MPFS nonfacility PE RVU-based amount or the proposed CY 2018 ASC payment amount calculated according to the ASC standard ratesetting methodology.

As we did for CYs 2014 through 2017, for CY 2018, we proposed to continue our policy for device removal procedures, such that device removal procedures that are conditionally packaged in the OPSS (status indicators “Q1” and “Q2”) would be assigned the current ASC payment indicators associated with these procedures and would continue to be paid separately under the ASC payment system.

We invited public comments on these proposals.

Comment: A few commenters objected to the proposed payment indicator of “G2” (Non-office-based surgical procedure) for CPT code 0465T (Suprachoroidal injection of a pharmacologic agent (does not include supply of medication)) and requested that CMS designate it an office-based procedure. The commenters noted CMS’ recognition of CPT code 0465T as an office-based procedure in the CY 2017 OPSS/ASC final rule with comment period (81 FR 79735).

Response: We agree with the commenters that CPT code 0465T is an office-based procedure. Therefore, we are modifying our proposal to assign CPT code 0465T to payment indicator “R2” for CY 2018.

Comment: One commenter requested that CMS use the CY 2016 ASC payment rates for six procedures to set the CY 2018 ASC payment rate for the same procedures. The specific procedures include:

- CPT 62321 (Cervicothoracic epidural);
- CPT 62323 (Lumbosacral epidural);
- CPT 64490 (Cervicothoracic facet joint injection);
- CPT 64493 (Lumbosacral facet joint injection);
- CPT G0620 (Sacroiliac joint injection); and
- CPT 62264 (Percutaneous adhesiolysis).

Response: We are required by law to review and update the data on which we establish payment rates on an annual basis. The ASC payment is dependent upon the APC assignment for the procedure. Based on our analysis of the

latest hospital outpatient and ASC claims data used for this final rule with comment period, we are updating ASC payment rates for CY 2018 using the established rate calculation methodologies under § 416.171 and using our finalized modified definition of device-intensive procedures, as discussed in section XII.C.1.b. of this final rule with comment period. We do not generally make additional payment adjustments to specific procedures.

After consideration of the public comments we received, we are finalizing our proposed policies, without modification, to calculate the CY 2018 payment rates for ASC covered surgical procedures according to our established methodologies using the modified definition of device-intensive procedures. For those covered office-based surgical procedures where the payment rate is the lower of the final rates under the ASC standard ratesetting methodology and the MPFS nonfacility PE RVU-based amount, the final payment indicators and rates set forth in this final rule with comment period are based on a comparison using the MPFS PE RVUs and conversion factor effective January 1, 2018. For a discussion of the MPFS rates, we refer readers to the CY 2018 MPFS final rule with comment period.

2. Payment for Covered Ancillary Services

a. Background

Our payment policies under the ASC payment system for covered ancillary services vary according to the particular type of service and its payment policy under the OPSS. Our overall policy provides separate ASC payment for certain ancillary items and services integrally related to the provision of ASC covered surgical procedures that are paid separately under the OPSS and provides packaged ASC payment for other ancillary items and services that are packaged or conditionally packaged (status indicators “N”, “Q1”, and “Q2”) under the OPSS. In the CY 2013 OPSS/ASC rulemaking (77 FR 45169 and 77 FR 68457 through 68458), we further clarified our policy regarding the payment indicator assignment of codes that are conditionally packaged in the OPSS (status indicators “Q1” and “Q2”). Under the OPSS, a conditionally packaged code describes a HCPCS code where the payment is packaged when it is provided with a significant procedure but is separately paid when the service appears on the claim without a significant procedure. Because ASC services always include a surgical procedure, HCPCS codes that are

conditionally packaged under the OPSS are always packaged (payment indicator “N1”) under the ASC payment system (except for device removal codes, as discussed in section IV. of the CY 2018 OPSS/ASC proposed rule). Thus, our policy generally aligns ASC payment bundles with those under the OPSS (72 FR 42495). In all cases, in order for those ancillary services also to be paid, ancillary items and services must be provided integral to the performance of ASC covered surgical procedures for which the ASC bills Medicare.

Our ASC payment policies provide separate payment for drugs and biologicals that are separately paid under the OPSS at the OPSS rates. We generally pay for separately payable radiology services at the lower of the MPFS nonfacility PE RVU-based (or technical component) amount or the rate calculated according to the ASC standard ratesetting methodology (72 FR 42497). However, as finalized in the CY 2011 OPSS/ASC final rule with comment period (75 FR 72050), payment indicators for all nuclear medicine procedures (defined as CPT codes in the range of 78000 through 78999) that are designated as radiology services that are paid separately when provided integral to a surgical procedure on the ASC list are set to “Z2” so that payment is made based on the ASC standard ratesetting methodology rather than the MPFS nonfacility PE RVU amount (“Z3”), regardless of which is lower.

Similarly, we also finalized our policy to set the payment indicator to “Z2” for radiology services that use contrast agents so that payment for these procedures will be based on the OPSS relative payment weight using the ASC standard ratesetting methodology and, therefore, will include the cost for the contrast agent (42 CFR 416.171(d)(2)).

ASC payment policy for brachytherapy sources mirrors the payment policy under the OPSS. ASCs are paid for brachytherapy sources provided integral to ASC covered surgical procedures at prospective rates adopted under the OPSS or, if OPSS rates are unavailable, at contractor-priced rates (72 FR 42499). Since December 31, 2009, ASCs have been paid for brachytherapy sources provided integral to ASC covered surgical procedures at prospective rates adopted under the OPSS.

Our ASC policies also provide separate payment for: (1) Certain items and services that CMS designates as contractor-priced, including, but not limited to, the procurement of corneal tissue; and (2) certain implantable items that have pass-through payment status

under the OPSS. These categories do not have prospectively established ASC payment rates according to ASC payment system policies (72 FR 42502 and 42508 through 42509; 42 CFR 416.164(b)). Under the ASC payment system, we have designated corneal tissue acquisition and hepatitis B vaccines as contractor-priced. Corneal tissue acquisition is contractor-priced based on the invoiced costs for acquiring the corneal tissue for transplantation. Hepatitis B vaccines are contractor-priced based on invoiced costs for the vaccine.

Devices that are eligible for pass-through payment under the OPSS are separately paid under the ASC payment system and are contractor-priced. Under the revised ASC payment system (72 FR 42502), payment for the surgical procedure associated with the pass-through device is made according to our standard methodology for the ASC payment system, based on only the service (non-device) portion of the procedure’s OPSS relative payment weight if the APC weight for the procedure includes other packaged device costs. We also refer to this methodology as applying a “device offset” to the ASC payment for the associated surgical procedure. This ensures that duplicate payment is not provided for any portion of an implanted device with OPSS pass-through payment status.

In the CY 2015 OPSS/ASC final rule with comment period (79 FR 66933 through 66934), we finalized that, beginning in CY 2015, certain diagnostic tests within the medicine range of CPT codes for which separate payment is allowed under the OPSS are covered ancillary services when they are integral to an ASC covered surgical procedure. We finalized that diagnostic tests within the medicine range of CPT codes include all Category I CPT codes in the medicine range established by CPT, from 90000 to 99999, and Category III CPT codes and Level II HCPCS codes that describe diagnostic tests that crosswalk or are clinically similar to procedures in the medicine range established by CPT. In the CY 2015 OPSS/ASC final rule with comment period, we also finalized our policy to pay for these tests at the lower of the MPFS nonfacility PE RVU-based (or technical component) amount or the rate calculated according to the ASC standard ratesetting methodology (79 FR 66933 through 66934). We finalized that the diagnostic tests for which the payment is based on the ASC standard ratesetting methodology be assigned to payment indicator “Z2” and revised the definition of payment indicator “Z2” to

include a reference to diagnostic services and those for which the payment is based on the MPFS nonfacility PE RVU-based amount be assigned payment indicator “Z3,” and revised the definition of payment indicator “Z3” to include a reference to diagnostic services.

b. Payment for Covered Ancillary Services for CY 2018

In the CY 2018 OPSS/ASC proposed rule (82 FR 33663), for CY 2018 and subsequent years, we proposed to update the ASC payment rates and to make changes to ASC payment indicators, as necessary, to maintain consistency between the OPSS and ASC payment system regarding the packaged or separately payable status of services and the proposed CY 2018 OPSS and ASC payment rates and subsequent year payment rates. We also proposed to continue to set the CY 2018 ASC payment rates and subsequent year payment rates for brachytherapy sources and separately payable drugs and biologicals equal to the OPSS payment rates for CY 2018 and subsequent year payment rates.

Covered ancillary services and their proposed payment indicators for CY 2018 were listed in Addendum BB to the proposed rule (which is available via the Internet on the CMS Web site). For those covered ancillary services where the payment rate is the lower of the proposed rates under the ASC standard rate setting methodology and the MPFS proposed rates, the proposed payment indicators and rates set forth in the proposed rule were based on a comparison using the proposed MPFS rates effective January 1, 2018. For a discussion of the MPFS rates, we referred readers to the CY 2018 MPFS proposed rule that is available on the CMS Web site at: <https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/PhysicianFeeSched/PFS-Federal-Regulation-Notices.html>.

We did not receive public comments on our proposals regarding payment for covered ancillary services. Therefore, we are finalizing these policies as proposed for CY 2018.

E. New Technology Intraocular Lenses (NTIOLs)

1. NTIOL Application Cycle

Our process for reviewing applications to establish new classes of NTIOLs is as follows:

- Applicants submit their NTIOL requests for review to CMS by the annual deadline. For a request to be considered complete, we require submission of the information that is

found in the guidance document entitled “Application Process and Information Requirements for Requests for a New Class of New Technology Intraocular Lenses (NTIOLs) or Inclusion of an IOL in an Existing NTIOL Class” posted on the CMS Web site at: <http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/ASCPayment/NTIOLs.html>.

- We announce annually, in the proposed rule updating the ASC and OPSS payment rates for the following calendar year, a list of all requests to establish new NTIOL classes accepted for review during the calendar year in which the proposal is published. In accordance with section 141(b)(3) of Public Law 103–432 and our regulations at 42 CFR 416.185(b), the deadline for receipt of public comments is 30 days following publication of the list of requests in the proposed rule.

- In the final rule updating the ASC and OPSS payment rates for the following calendar year, we—

- ++ Provide a list of determinations made as a result of our review of all new NTIOL class requests and public comments;

- ++ When a new NTIOL class is created, identify the predominant characteristic of NTIOLs in that class that sets them apart from other IOLs (including those previously approved as members of other expired or active NTIOL classes) and that is associated with an improved clinical outcome.

- ++ Set the date of implementation of a payment adjustment in the case of approval of an IOL as a member of a new NTIOL class prospectively as of 30 days after publication of the ASC payment update final rule, consistent with the statutory requirement.

- ++ Announce the deadline for submitting requests for review of an application for a new NTIOL class for the following calendar year.

2. Requests To Establish New NTIOL Classes for CY 2018

We did not receive any requests for review to establish a new NTIOL class for CY 2018 by March 1, 2017, the due date published in the CY 2017 OPSS/ASC final rule with comment period (81 FR 79748).

3. Payment Adjustment

The current payment adjustment for a 5-year period from the implementation date of a new NTIOL class is \$50 per lens. Since implementation of the process for adjustment of payment amounts for NTIOLs in 1999, we have not revised the payment adjustment amount, and we did not propose to revise the payment adjustment amount

for CY 2018. The final ASC payment adjustment amount for NTIOLs for CY 2018 is \$50.

4. Announcement of CY 2019 Deadline for Submitting Requests for CMS Review of Applications for a New Class of NTIOLs

In accordance with § 416.185(a) of our regulations, CMS announces that in order to be considered for payment effective beginning in CY 2019, requests for review of applications for a new class of new technology IOLs must be received at CMS by 5:00 p.m. EST, on March 1, 2018. Send requests to ASC/NTIOL, Division of Outpatient Care, Mailstop C4–05–17, Centers for Medicare and Medicaid Services, 7500 Security Boulevard, Baltimore, MD 21244–1850. To be considered, requests for NTIOL reviews must include the information requested on the CMS Web site at: <https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/ASCPayment/NTIOLs.html>.

F. ASC Payment and Comment Indicators

1. Background

In addition to the payment indicators that we introduced in the August 2, 2007 final rule, we created final comment indicators for the ASC payment system in the CY 2008 OPSS/ASC final rule with comment period (72 FR 66855). We created Addendum DD1 to define ASC payment indicators that we use in Addenda AA and BB to provide payment information regarding covered surgical procedures and covered ancillary services, respectively, under the revised ASC payment system. The ASC payment indicators in Addendum DD1 are intended to capture policy-relevant characteristics of HCPCS codes that may receive packaged or separate payment in ASCs, such as whether they were on the ASC list of covered services prior to CY 2008; payment designation, such as device-intensive or office-based, and the corresponding ASC payment methodology; and their classification as separately payable ancillary services, including radiology services, brachytherapy sources, OPSS pass-through devices, corneal tissue acquisition services, drugs or biologicals, or NTIOLs.

We also created Addendum DD2 that lists the ASC comment indicators. The ASC comment indicators used in Addenda AA and BB to the proposed rules and final rules with comment period serve to identify, for the revised ASC payment system, the status of a specific HCPCS code and its payment

indicator with respect to the timeframe when comments will be accepted. The comment indicator “NP” is used in the OPSS/ASC proposed rule to indicate new codes for the next calendar year for which the interim payment indicator assigned is subject to comment. The comment indicator “NP” also is assigned to existing codes with substantial revisions to their descriptors, such that we consider them to be describing new services, as discussed in the CY 2010 OPSS/ASC final rule with comment period (74 FR 60622). In the CY 2017 OPSS/ASC final rule with comment period, we responded to public comments and finalized the ASC treatment of all codes that were labeled with comment indicator “NP” in Addenda AA and BB to the CY 2016 OPSS/ASC final rule with comment period (80 FR 70497).

The “CH” comment indicator is used in Addenda AA and BB to the proposed rule (which are available via the Internet on the CMS Web site) to indicate that the payment indicator assignment has changed for an active HCPCS code in the current year and the next calendar year; an active HCPCS code is newly recognized as payable in ASCs; or an active HCPCS code is discontinued at the end of the current calendar year. The “CH” comment indicators that are published in the final rule with comment period are provided to alert readers that a change has been made from one calendar year to the next, but do not indicate that the change is subject to comment.

In the CY 2017 OPSS/ASC final rule with comment period (81 FR 79748 through 79749), for CY 2017 and subsequent years, we finalized our policy to continue using the current comment indicators of “NP” and “CH”.

2. ASC Payment and Comment Indicators

As discussed in the CY 2018 OPSS/ASC proposed rule (82 FR 33665), for CY 2018, there are proposed new and revised Category I and III CPT codes as well as new and revised Level II HCPCS codes. Therefore, proposed Category I and III CPT codes that are new and revised for CY 2017 and any new and existing Level II HCPCS codes with substantial revisions to the code descriptors for CY 2018 compared to the CY 2017 descriptors that were included in ASC Addenda AA and BB to the proposed rule are labeled with proposed new comment indicator “NP” to indicate that these CPT and Level II HCPCS codes were open for comment as part of the proposed rule. Comment indicator “NP” in the proposed rule meant a new code for the next calendar

year or an existing code with substantial revision to its code descriptor in the next calendar year, as compared to current calendar year; and denotes that comments will be accepted on the proposed ASC payment indicator for the new code.

We stated in the proposed rule that we will respond to public comments on ASC payment and comment indicators and finalize their ASC assignment in the CY 2018 OPPTS/ASC final rule with comment period. We referred readers to Addenda DD1 and DD2 to the proposed rule (which are available via the Internet on the CMS Web site) for the complete list of ASC payment and comment indicators proposed for the CY 2018 update.

We did not receive any public comments on the ASC payment and comment indicators. Therefore, we are finalizing their use as proposed without modification. Addenda DD1 and DD2 to this final rule with comment period (which are available via the Internet on the CMS Web site) contain the complete list of ASC payment and comment indicators for the CY 2018 update.

G. Calculation of the ASC Conversion Factor and the ASC Payment Rates

1. Background

In the August 2, 2007 final rule (72 FR 42493), we established our policy to base ASC relative payment weights and payment rates under the revised ASC payment system on APC groups and the OPPTS relative payment weights. Consistent with that policy and the requirement at section 1833(i)(2)(D)(ii) of the Act that the revised payment system be implemented so that it would be budget neutral, the initial ASC conversion factor (CY 2008) was calculated so that estimated total Medicare payments under the revised ASC payment system in the first year would be budget neutral to estimated total Medicare payments under the prior (CY 2007) ASC payment system (the ASC conversion factor is multiplied by the relative payment weights calculated for many ASC services in order to establish payment rates). That is, application of the ASC conversion factor was designed to result in aggregate Medicare expenditures under the revised ASC payment system in CY 2008 being equal to aggregate Medicare expenditures that would have occurred in CY 2008 in the absence of the revised system, taking into consideration the cap on ASC payments in CY 2007, as required under section 1833(i)(2)(E) of the Act (72 FR 42522). We adopted a policy to make the system budget neutral in subsequent calendar years (72

FR 42532 through 42533; 42 CFR 416.171(e)).

We note that we consider the term “expenditures” in the context of the budget neutrality requirement under section 1833(i)(2)(D)(ii) of the Act to mean expenditures from the Medicare Part B Trust Fund. We do not consider expenditures to include beneficiary coinsurance and copayments. This distinction was important for the CY 2008 ASC budget neutrality model that considered payments across the OPPTS, ASC, and MPFS payment systems. However, because coinsurance is almost always 20 percent for ASC services, this interpretation of expenditures has minimal impact for subsequent budget neutrality adjustments calculated within the revised ASC payment system.

In the CY 2008 OPPTS/ASC final rule with comment period (72 FR 66857 through 66858), we set out a step-by-step illustration of the final budget neutrality adjustment calculation based on the methodology finalized in the August 2, 2007 final rule (72 FR 42521 through 42531) and as applied to updated data available for the CY 2008 OPPTS/ASC final rule with comment period. The application of that methodology to the data available for the CY 2008 OPPTS/ASC final rule with comment period resulted in a budget neutrality adjustment of 0.65.

For CY 2008, we adopted the OPPTS relative payment weights as the ASC relative payment weights for most services and, consistent with the final policy, we calculated the CY 2008 ASC payment rates by multiplying the ASC relative payment weights by the final CY 2008 ASC conversion factor of \$41,401. For covered office-based surgical procedures, covered ancillary radiology services (excluding covered ancillary radiology services involving certain nuclear medicine procedures or involving the use of contrast agents, as discussed in section XII.D.2. of this final rule with comment period), and certain diagnostic tests within the medicine range that are covered ancillary services, the established policy is to set the payment rate at the lower of the MPFS unadjusted nonfacility PE RVU-based amount or the amount calculated using the ASC standard ratesetting methodology. Further, as discussed in the CY 2008 OPPTS/ASC final rule with comment period (72 FR 66841 through 66843), we also adopted alternative ratesetting methodologies for specific types of services (for example, device-intensive procedures).

As discussed in the August 2, 2007 final rule (72 FR 42517 through 42518) and as codified at § 416.172(c) of the regulations, the revised ASC payment

system accounts for geographic wage variation when calculating individual ASC payments by applying the pre-floor and pre-reclassified IPPS hospital wage indexes to the labor-related share, which is 50 percent of the ASC payment amount based on a GAO report of ASC costs using 2004 survey data. Beginning in CY 2008, CMS accounted for geographic wage variation in labor costs when calculating individual ASC payments by applying the pre-floor and pre-reclassified hospital wage index values that CMS calculates for payment under the IPPS, using updated Core Based Statistical Areas (CBSAs) issued by OMB in June 2003.

The reclassification provision in section 1886(d)(10) of the Act is specific to hospitals. We believe that using the most recently available pre-floor and pre-reclassified IPPS hospital wage indexes results in the most appropriate adjustment to the labor portion of ASC costs. We continue to believe that the unadjusted hospital wage indexes, which are updated yearly and are used by many other Medicare payment systems, appropriately account for geographic variation in labor costs for ASCs. Therefore, the wage index for an ASC is the pre-floor and pre-reclassified hospital wage index under the IPPS of the CBSA that maps to the CBSA where the ASC is located.

On February 28, 2013, OMB issued OMB Bulletin No. 13–01, which 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 2010 Census Bureau data. (A copy of this bulletin may be obtained at: <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/bulletins/2013/b13-01.pdf>). In the FY 2015 IPPS/LTCH PPS final rule (79 FR 49951 through 49963), we implemented the use of the CBSA delineations issued by OMB in OMB Bulletin 13–01 for the IPPS hospital wage index beginning in FY 2015. In the CY 2015 OPPTS/ASC final rule with comment period (79 FR 66937), we finalized a 1-year transition policy that we applied in CY 2015 for all ASCs that experienced any decrease in their actual wage index exclusively due to the implementation of the new OMB delineations. This transition does not apply in CY 2018.

Generally, OMB issues major revisions to statistical areas every 10 years, based on the results of the decennial census. However, OMB

occasionally issues minor updates and revisions to statistical areas in the years between the decennial censuses. On July 15, 2015, OMB issued OMB Bulletin No. 15–01, which provides updates to and supersedes OMB Bulletin No. 13–01 that was issued on February 28, 2013. The attachment to OMB Bulletin No. 15–01 provides detailed information on the update to statistical areas since February 28, 2013. The updates provided in OMB Bulletin No. 15–01 are based on the application of the 2010 Standards for Delineating Metropolitan and Micropolitan Statistical Areas to Census Bureau population estimates for July 1, 2012 and July 1, 2013. The complete list of statistical areas incorporating these changes is provided in the attachment to OMB Bulletin No. 15–01. According to OMB, “[t]his bulletin establishes revised delineations for the Nation’s Metropolitan Statistical Areas, Micropolitan Statistical Areas, and Combined Statistical Areas. The bulletin also provides delineations of Metropolitan Divisions as well as delineations of New England City and Town Areas.” A copy of this bulletin may be obtained on the Web site at: <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/bulletins/2015/15-01.pdf>.

OMB Bulletin No. 15–01 made changes that are relevant to the IPPS and ASC wage index. We refer readers to the CY 2017 OPPS/ASC final rule with comment period (81 FR 79750) for a discussion of these changes and our implementation of these revisions.

As discussed in the CY 2018 OPPS/ASC proposed rule (82 FR 33667), for CY 2018, the proposed CY 2018 ASC wage indexes fully reflect the OMB labor market area delineations (including the revisions to the OMB labor market delineations discussed above, as set forth in OMB Bulletin No. 15–01).

We note that, in certain instances, there might be urban or rural areas for which there is no IPPS hospital that has wage index data that could be used to set the wage index for that area. For these areas, our policy has been to use the average of the wage indexes for CBSAs (or metropolitan divisions as applicable) that are contiguous to the area that has no wage index (where “contiguous” is defined as sharing a border). For example, for CY 2014, we applied a proxy wage index based on this methodology to ASCs located in CBSA 25980 (Hinesville-Fort Stewart, GA) and CBSA 08 (Rural Delaware).

When all of the areas contiguous to the urban CBSA of interest are rural and there is no IPPS hospital that has wage

index data that could be used to set the wage index for that area, we determine the ASC wage index by calculating the average of all wage indexes for urban areas in the State (75 FR 72058 through 72059). (In other situations, where there are no IPPS hospitals located in a relevant labor market area, we continue our current policy of calculating an urban or rural area’s wage index by calculating the average of the wage indexes for CBSAs (or metropolitan divisions where applicable) that are contiguous to the area with no wage index.)

Comment: A few commenters made the same recommendation that was made in the CY 2010 (74 FR 60625), CY 2011 (75 FR 72059), CY 2012 (76 FR 74446), CY 2013 (77 FR 68463), CY 2014 (78 FR 75086), CY 2015 (79 FR 66937), CY 2016 (80 FR 70499), and CY 2017 (81 FR 79750) OPPS/ASC rulemakings—that is, that CMS adopt for the ASC payment system the same wage index values used for hospital payment under the OPPS.

Response: We have responded to this comment in the prior OPPS/ASC rules mentioned above, and believe our prior rationale for using unadjusted wage indexes is still sound. We continue to believe that the unadjusted hospital wage indexes, which are updated yearly and are used by almost all Medicare payment systems, appropriately account for geographic variance in labor costs for ASCs. We refer readers to our response to this comment in the CY 2011 OPPS/ASC final rule with comment period (75 FR 72059).

2. Calculation of the ASC Payment Rates

a. Updating the ASC Relative Payment Weights for CY 2018 and Future Years

We update the ASC relative payment weights each year using the national OPPS relative payment weights (and MPFS nonfacility PE RVU-based amounts, as applicable) for that same calendar year and uniformly scale the ASC relative payment weights for each update year to make them budget neutral (72 FR 42533). Consistent with our established policy, in the CY 2018 OPPS/ASC proposed rule (82 FR 33667), we proposed to scale the CY 2018 relative payment weights for ASCs according to the following method. Holding ASC utilization, the ASC conversion factor, and the mix of services constant from CY 2016, we proposed to compare the total payment using the CY 2017 ASC relative payment weights with the total payment using the CY 2018 ASC relative payment weights to take into account the changes in the OPPS relative

payment weights between CY 2017 and CY 2018. We proposed to use the ratio of CY 2017 to CY 2018 total payments (the weight scalar) to scale the ASC relative payment weights for CY 2018. The proposed CY 2018 ASC weight scalar was 0.8995 and scaling would apply to the ASC relative payment weights of the covered surgical procedures, covered ancillary radiology services, and certain diagnostic tests within the medicine range of CPT codes, which are covered ancillary services for which the ASC payment rates are based on OPPS relative payment weights.

Scaling would not apply in the case of ASC payment for separately payable covered ancillary services that have a predetermined national payment amount (that is, their national ASC payment amounts are not based on OPPS relative payment weights), such as drugs and biologicals that are separately paid or services that are contractor-priced or paid at reasonable cost in ASCs. Any service with a predetermined national payment amount would be included in the ASC budget neutrality comparison, but scaling of the ASC relative payment weights would not apply to those services. The ASC payment weights for those services without predetermined national payment amounts (that is, those services with national payment amounts that would be based on OPPS relative payment weights) would be scaled to eliminate any difference in the total payment between the current year and the update year.

For any given year’s ratesetting, we typically use the most recent full calendar year of claims data to model budget neutrality adjustments. At the time of the proposed rule, we had available 98 percent of CY 2016 ASC claims data.

To create an analytic file to support calculation of the weight scalar and budget neutrality adjustment for the wage index (discussed below), we summarized available CY 2016 ASC claims by ASC and by HCPCS code. We used the National Provider Identifier for the purpose of identifying unique ASCs within the CY 2016 claims data. We used the supplier zip code reported on the claim to associate State, county, and CBSA with each ASC. This file, available to the public as a supporting data file for the proposed rule, is posted on the CMS Web site at: <http://www.cms.gov/Research-Statistics-Data-and-Systems/Files-for-Order/Limited-Datasets/ASCPaymentSystem.html>.

Comment: Several commenters requested that CMS not scale the ASC relative payment weights when calculating the final CY 2018 ASC

payment rates. Some commenters requested that if CMS must apply a weight scalar, as an alternative, CMS make a one-time adjustment to restore the historical relativity between the OPSS and ASC setting at 65 percent.

Response: We note that applying the weight scalar in calculation of ASC payment rates ensures that the ASC payment system remains budget neutral. For a more detailed discussion on why we apply a budget neutrality adjustment to the ASC ratesetting methodology, we refer readers to the August 2, 2007 final rule (72 FR 42531 through 42533). We refer the commenters to that discussion for our detailed response in promulgating the scaling policy that was initially applied in CY 2009 to maintain budget neutrality of the ASC payment system. The ASC weight scaling methodology is consistent with the OPSS methodology for scaling the relative payment weights and the increased payment differentials between the ASC and OPSS payments for the same services are not, for the most part, attributable to scaling ASC relative payment weights. With respect to the relativity between the OPSS and the ASC payment system, we recognize that the relativity has declined from 65 percent in 2008 to 56 percent in 2017. We believe this change in relativity is based on a number of factors, including the addition of new surgical procedures in both payment settings, packaged payment policies, device-intensive policies, and the advent of the C-APC policy, which was implemented under the OPSS effective January 1, 2015, but could not be implemented in the ASC system, given systems limitations in ASC claims processing because ASC claims are submitted on the professional claim and are not processed by the same system as hospital claims. Further, the absence of cost data from ASCs makes it difficult to determine what an appropriate relativity between the two payment systems would be. That is, without cost data from ASCs, we are unable to determine precisely how ASC costs compare to those of hospitals paid under the OPSS. We note that the commenters did not provide any empirical evidence to support increasing ASC payment rates relative to OPSS payment rates.

b. Updating the ASC Conversion Factor

Under the OPSS, we typically apply a budget neutrality adjustment for provider level changes, most notably a change in the wage index values for the upcoming year, to the conversion factor. Consistent with our final ASC payment policy, for the CY 2017 ASC payment system and subsequent years, in the CY

2017 OPSS/ASC final rule with comment period (81 FR 79751 through 79753), we finalized our policy to calculate and apply a budget neutrality adjustment to the ASC conversion factor for supplier level changes in wage index values for the upcoming year, just as the OPSS wage index budget neutrality adjustment is calculated and applied to the OPSS conversion factor. For CY 2018, we calculated the proposed adjustment for the ASC payment system by using the most recent CY 2016 claims data available and estimating the difference in total payment that would be created by introducing the proposed CY 2018 ASC wage indexes. Specifically, holding CY 2016 ASC utilization, service-mix, and the proposed CY 2018 national payment rates after application of the weight scalar constant, we calculated the total adjusted payment using the CY 2017 ASC wage indexes (which would fully reflect the new OMB delineations) and the total adjusted payment using the proposed CY 2018 ASC wage indexes. We used the 50-percent labor-related share for both total adjusted payment calculations. We then compared the total adjusted payment calculated with the CY 2017 ASC wage indexes to the total adjusted payment calculated with the proposed CY 2018 ASC wage indexes and applied the resulting ratio of 1.0004 (the proposed CY 2018 ASC wage index budget neutrality adjustment) to the CY 2017 ASC conversion factor to calculate the proposed CY 2018 ASC conversion factor.

Section 1833(i)(2)(C)(i) of the Act requires that, if the Secretary has not updated amounts established under the revised ASC payment system in a calendar year, the payment amounts shall be increased by the percentage increase in the Consumer Price Index for all urban consumers (CPI-U), U.S. city average, as estimated by the Secretary for the 12-month period ending with the midpoint of the year involved. Therefore, the statute does not mandate the adoption of any particular update mechanism, but it requires the payment amounts to be increased by the CPI-U in the absence of any update. Because the Secretary updates the ASC payment amounts annually, we adopted a policy, which we codified at 42 CFR 416.171(a)(2)(ii), to update the ASC conversion factor using the CPI-U for CY 2010 and subsequent calendar years. Therefore, the annual update to the ASC payment system is the CPI-U (referred to as the CPI-U update factor).

Section 3401(k) of the Affordable Care Act amended section 1833(i)(2)(D) of the Act by adding a new clause (v), which

requires that any annual update under the ASC payment system for the year, after application of clause (iv), shall be reduced by the productivity adjustment described in section 1886(b)(3)(B)(xi)(II) of the Act, effective with the calendar year beginning January 1, 2011. The statute defines the productivity adjustment to be equal to the 10-year moving average of changes in annual economy-wide private nonfarm business multifactor productivity (MFP) (as projected by the Secretary for the 10-year period ending with the applicable fiscal year, year, cost reporting period, or other annual period) (the "MFP adjustment"). Clause (iv) of section 1833(i)(2)(D) of the Act authorizes the Secretary to provide for a reduction in any annual update for failure to report on quality measures. Clause (v) of section 1833(i)(2)(D) of the Act states that application of the MFP adjustment to the ASC payment system may result in the update to the ASC payment system being less than zero for a year and may result in payment rates under the ASC payment system for a year being less than such payment rates for the preceding year.

In the CY 2012 OPSS/ASC final rule with comment period (76 FR 74516), we finalized a policy that ASCs begin submitting data on quality measures for services beginning on October 1, 2012 for the CY 2014 payment determination under the ASC Quality Reporting (ASCQR) Program. In the CY 2013 OPSS/ASC final rule with comment period (77 FR 68499 through 68500), we finalized a methodology to calculate reduced national unadjusted payment rates using the ASCQR Program reduced update conversion factor that would apply to ASCs that fail to meet their quality reporting requirements for the CY 2014 payment determination and subsequent years. The application of the 2.0 percentage point reduction to the annual update factor, which currently is the CPI-U, may result in the update to the ASC payment system being less than zero for a year for ASCs that fail to meet the ASCQR Program requirements. We amended §§ 416.160(a)(1) and 416.171 to reflect these policies.

In accordance with section 1833(i)(2)(C)(i) of the Act, before applying the MFP adjustment, the Secretary first determines the "percentage increase" in the CPI-U, which we interpret cannot be a negative percentage. Thus, in the instance where the percentage change in the CPI-U for a year is negative, we would hold the CPI-U update factor for the ASC payment system to zero. For the CY 2014 payment determination and subsequent years, under section

1833(i)(2)(D)(iv) of the Act, we would reduce the annual update by 2.0 percentage points for an ASC that fails to submit quality information under the rules established by the Secretary in accordance with section 1833(i)(7) of the Act. Section 1833(i)(2)(D)(v) of the Act, as added by section 3401(k) of the Affordable Care Act, requires that the Secretary reduce the annual update factor, after application of any quality reporting reduction, by the MFP adjustment, and states that application of the MFP adjustment to the annual update factor after application of any quality reporting reduction would result in an MFP-adjusted update factor that is less than zero, the resulting update to the ASC payment rates would be negative and payments would decrease relative to the prior year. We refer readers to the CY 2011 OPSS/ASC final rule with comment period (75 FR 72062 through 72064) for examples of how the MFP adjustment is applied to the ASC payment system.

For the proposed rule, based on IHS Global Inc.'s (IGI's) 2017 first quarter forecast with historical data through the fourth quarter of 2016, for the 12-month period ending with the midpoint of CY 2018, the CPI-U update was projected to be 2.3 percent. Also, based on IGI's 2017 first quarter forecast, the MFP adjustment for the period ending with the midpoint of CY 2018 was projected to be 0.4 percent. We finalized the methodology for calculating the MFP adjustment in the CY 2011 MPFS final rule with comment period (75 FR 73394 through 73396) and revised it in the CY 2012 MPFS final rule with comment period (76 FR 73300 through 73301) and the CY 2016 OPSS/ASC final rule with comment period (80 FR 70500 through 70501).

In the CY 2018 OPSS/ASC proposed rule (82 FR 33668), for CY 2018, we proposed to reduce the CPI-U update of 2.3 percent by the MFP adjustment of 0.4 percentage point, resulting in an MFP-adjusted CPI-U update factor of 1.9 percent for ASCs meeting the quality reporting requirements. Therefore, we proposed to apply a 1.9 percent MFP-adjusted CPI-U update factor to the CY 2017 ASC conversion factor for ASCs meeting the quality reporting requirements. The ASCQR Program affected payment rates beginning in CY 2014 and, under this program, there is a 2.0 percentage point reduction to the CPI-U for ASCs that fail to meet the ASCQR Program requirements. We

proposed to reduce the CPI-U update of 2.3 percent by 2.0 percentage points for ASCs that do not meet the quality reporting requirements and then apply the 0.4 percentage point MFP adjustment. Therefore, we proposed to apply a -0.1 percent MFP-adjusted CPI-U update factor to the CY 2017 ASC conversion factor for ASCs not meeting the quality reporting requirements. We also proposed that if more recent data are subsequently available (for example, a more recent estimate of the CY 2018 CPI-U update and MFP adjustment), we would use such data, if appropriate, to determine the CY 2018 ASC update for the final rule with comment period.

For CY 2018, we proposed to adjust the CY 2017 ASC conversion factor (\$45.003) by the proposed wage index budget neutrality factor of 1.0004 in addition to the MFP-adjusted CPI-U update factor of 1.9 percent discussed above, which resulted in a proposed CY 2018 ASC conversion factor of \$45.876 for ASCs meeting the quality reporting requirements. For ASCs not meeting the quality reporting requirements, we proposed to adjust the CY 2017 ASC conversion factor (\$45.003) by the proposed wage index budget neutrality factor of 1.0004 in addition to the quality reporting/MFP-adjusted CPI-U update factor of -0.1 percent discussed above, which resulted in a proposed CY 2018 ASC conversion factor of \$44.976.

We invited public comments on these proposals.

Comment: Numerous commenters urged CMS to update ASC payment rates using the same update factor as hospital outpatient departments, which is the IPSS hospital market basket. Commenters argued that because the ASC relative weights are derived from the OPSS weights, the same annual update factor that is used for the OPSS should also be used for ASCs. Commenters stated that the use of different update indices has contributed to the divergence in payments between the HOPD and ASC setting. Several commenters cited findings from a 2013 Ambulatory Surgery Center Association (ASCA) study (with cost savings analysis produced by the University of California-Berkeley) that found ASCs saved the Medicare program and its beneficiaries \$7.5 billion during the 4-year period from 2008 to 2011 over what would have been paid if care had been provided in other settings. The study also projected that ASCs have the potential to save the Medicare system an additional \$57.6 billion over the next decade "if policymakers take steps to encourage the use of these innovative

healthcare facilities within the Medicare system."³⁴

One commenter, a trade association representing several ASCs noted that surgical care in too many markets continues to be provided predominantly in hospitals, which the commenter attributed to Medicare's failure to pay competitive rates to ASCs. The commenter asserted that this lack of migration comes at a high price to the Medicare program, the taxpayers who fund it, and the beneficiaries who needlessly incur higher out-of-pocket expenses. This commenter also noted that the hospital market basket is comprised of data that reflects the cost of items and services necessary to furnish an outpatient surgical procedure, such as compensation, utilities, labor-related services and non-labor related services. In addition, in response to the comment solicitation on ASC payment reform (including the collection of cost data), described later in this section, this commenter stated its willingness to work with the Secretary to collaborate on ideas and asserted its belief that that the same types of costs that apply to the hospital outpatient department are also present in the ASC, but that it did not know if they are weighted the same. This commenter welcomed the opportunity to discuss how ASCs might potentially use a simple, cost-effective survey, perhaps voluntary in nature, that calculates expense categories as a percentage of total expenses to help determine the appropriate weights and price proxies for the ASC setting. The commenter noted that "a complicating factor, however, remains the heterogeneity of the ASC model—the range of size and specialty care varies greatly from one ASC to the next."

Commenters also made the following arguments in support of replacing the CPI-U with the hospital market basket:

- The CPI-U does not accurately represent the costs borne by ASC facilities to furnish surgical services. Approximately 8.5 percent of the CPI-U inputs are directly related to health care, yet the CPI-U is based on consumer experience purchasing health care rather than a provider's experience necessary to furnish a health care service.

³⁴ ASCA. Medicare Cost Savings Tied to Ambulatory Surgery Centers with Cost Analysis done by Nicholas C. Petris University of California-Berkeley Center on Health Care Markets and Consumer Welfare. September 2013. Available at: <http://www.ascassociation.org/HigherLogic/System/DownloadDocumentFile.aspx?DocumentFileKey=7b33b916-f3f1-42e5-a646-35cc2f38fe4d&forceDialog=0>.

- ASCs are one of few remaining Medicare payment systems tied to the CPI-U. Most other systems use indices derived from the basket of goods those providers purchase (for example, ESRD PPS uses ESRD bundled market basket; FQHC PPS uses Medicare Economic Index; IPPS and OPSS uses the hospital market basket).

- The hospital market basket is a more accurate reflection of ASC costs because it is comprised of data that reflects the cost of items and services necessary to furnish an outpatient surgical procedure, such as compensation, utilities, labor-related services and nonlabor-related services.

MedPAC objected to the proposed 1.9 percent update based on CPI-U and recommended that CMS not update payments to ASCs in 2018, consistent with its recommendation to Congress in the March 2017 Report to the Congress. MedPAC contended that, because indicators of payment adequacy for ASCs—capacity and supply of providers, volume of services, access to capital, payment to providers per fee-for-service beneficiary—are positive, and in light of the importance of maintaining financial pressure on providers to constrain costs, the proposed 1.9 percent update is unnecessarily high. While MedPAC acknowledged that the CPI-U likely does not reflect ASC's cost structure because the CPI-U is heavily weighted for factors that have a relatively small effect on ASCs such as housing and transportation, it commented that it understood that the method for arriving at the proposed 1.9 percent CPI-U update is mandated by law. MedPAC strongly urged CMS to collect cost data from ASCs to better assess payment adequacy to ASCs.

Response: As we have stated in response to similar comments in the past (for example, 77 FR 68465; 78 FR 75088 through 75089; 79 FR 66939; 80 FR 70501; and 81 FR 79752), we continue to believe that, while commenters believed that the items included in the CPI-U index may not adequately measure inflation for the goods and services provided by ASCs, the hospital market basket may also not be well aligned with the cost structures of ASCs. While there are some similarities between the cost structure of hospitals and ASCs, hospitals provide a wider range of services, such as room and board and emergency services, and the costs associated with providing these services do not appear to be part of the ASC cost structure. Therefore, at this time, we do not believe that it is appropriate to use the hospital market basket for the ASC annual update.

Nonetheless, we recognize that ASCs may incur some of the same costs that hospitals incur and share the commenters' concern that the disparity in payments between the OPSS and ASC payment systems may affect migration from the HOPD setting to the less costly ASC setting. To the extent that it is clinically appropriate for a beneficiary to receive services in a lower cost setting, we believe it would be appropriate to continue to develop payment incentives and remove payment disincentives to facilitate this choice. We will continue to monitor access to services, such as by reviewing utilization in different settings and soliciting stakeholder input, to ascertain the degree to which choices are available. While there are several factors that contribute to the divergence in payment between the two systems, certain of which are identified in the comment solicitation on ASC payment reform, we believe that an alternative update factor could be a mitigating step to address the differential between OPSS and ASC payment. In other words, to the extent that the CPI-U has been lower than the hospital market basket, we believe this difference or gap has contributed to the difference between payments for services when they are provided by an ASC or a HOPD. Additionally, we believe that, in response to our proposal and comment solicitation, commenters have raised an important issue that merits consideration given the Administration's priorities, particularly those seeking to promote and improve affordability and accessibility of care. For example, under Executive Order 13813 (issued October 12, 2017), entitled "Presidential Executive Order Promoting Healthcare Choice and Competition Across the United States," "it shall be the policy of the executive branch, to the extent consistent with law, to facilitate . . . the development and operation of a healthcare system that provides high-quality care at affordable prices for the American people" and the Administration shall "continue to focus on promoting competition in healthcare markets and limiting excessive consolidation throughout the healthcare system."³⁵

While MedPAC recommends a zero percent update, we do not believe that such update would serve to promote competition in health care markets and it could hinder ASCs' ability to provide services to Medicare beneficiaries at a lower cost than HOPDs. We know that the differential in payments between

hospitals paid under the OPSS and the ASC has increased from approximately 65 percent in 2008 to approximately 56 percent in 2017. Accordingly, we plan to study this issue further to ensure ASCs can continue to offer lower cost surgical services to Medicare beneficiaries.

With respect to MedPAC's comment about collecting cost data and comments from ASCs expressing a willingness to work with CMS to share data in a way that balances administrative risk with the benefit of collecting such data, we will take these comments under advisement for future consideration, as discussed in greater detail in the comment solicitation section below. For the reasons stated above, we are finalizing our proposal to use the CPI-U update factor to update ASC rates for CY 2018. However, given the many comments supporting alternative update methodologies, such as the hospital market basket, and given our interest in site neutrality and the efficiency of care in the ASC setting, we intend to explore this issue further.

After consideration of the public comments we received, we are finalizing our proposal to apply our established methodology for determining the final CY 2018 ASC conversion factor. Using more complete CY 2016 data for this final rule with comment period than were available for the proposed rule, we calculated a wage index budget neutrality adjustment of 1.0007. Based on IGI's 2017 third quarter forecast, the CPI-U for the 12-month period ending with the midpoint of CY 2018 is now projected to be 1.7 percent, while the MFP adjustment (as discussed in the CY 2011 MPFS final rule with comment period (75 FR 73394 through 73396), and revised in the CY 2012 MPFS final rule with comment period (76 FR 73300 through 73301) and in the CY 2016 OPSS/ASC final rule with comment period (80 FR 70500 through 70501)) is 0.5 percent, resulting in an MFP-adjusted CPI-U update factor of 1.2 percent for ASCs that meet the quality reporting requirements. The final ASC conversion factor of \$45.575, for ASCs that meet the quality reporting requirements, is the product of the CY 2017 conversion factor of \$45.003 multiplied by the wage index budget neutrality adjustment of 1.0007 and the MFP-adjusted CPI-U payment update of 1.2 percent. For ASCs that do not meet the quality reporting requirements, we are reducing the CPI-U update of 1.7 percent by 2.0 percentage points and then we are applying the 0.5 percentage point MFP adjustment, resulting in a -0.8 percent MFP adjusted CPI-U update factor for CY 2018. The final

³⁵ Available at: <https://www.gpo.gov/fdsys/pkg/FR-2017-10-17/pdf/2017-22677.pdf>.

ASC conversion factor of \$44.663 for ASCs that do not meet the quality reporting requirements is the product of the CY 2017 conversion factor of \$45.003 multiplied by the wage index budget neutrality adjustment of 1.0007 and the MFP-adjusted CPI-U payment update of -0.8 percent.

3. Discussion of Comment Solicitation on ASC Payment Reform

a. Historical Perspective

In 1982, Medicare implemented the ASC benefit to provide payment to ASCs to perform certain covered surgical procedures.³⁶ ASCs were recognized by Medicare as a less costly alternative to hospital inpatient care given differences in patient acuity and specialization of services, which promotes efficient and cost-effective delivery of care. Medicare's initial payment rates to ASCs were based on ASC historical cost and charge data from 1979 and 1980 collected from approximately 40 ASCs and used to establish four facility payment rate groups (55 FR 4527).

The ASC facility payment rate was set as a standard overhead amount based on CMS' (known then as the Health Care Financing Administration (HCFA)) estimate of a fair fee, taking into account the costs incurred by ASCs generally in providing facility services in connection with the performance of a specific procedure. The Report of the Conference Committee accompanying section 934 of the Omnibus Budget Reconciliation Act of 1980 (Pub. L. 96-499), which enacted the ASC benefit in December 1980, states, "This overhead factor is expected to be calculated on a prospective basis . . . utilizing sample survey and similar techniques to establish reasonable estimated overhead allowances for each of the listed procedures which take account of volume (within reasonable limits)" (H.R. Rep. No 7479, 96th Cong., 2nd Sess. 134 (1980)).

In 1987, we updated the ASC facility payment rates for the first time since 1982. The updated rates were based on the projected increase in the CPI-U from September 1982 to January 1988. CMS (then, HCFA) rebased payments to ASCs in 1990, relying on a survey of 1986 ASC cost, charge, and utilization data. The ASC payments were updated annually based on the 1986 cost data until implementation of the revised ASC payment system in 2008.

Congress directed the GAO to conduct a study comparing the relative costs of procedures furnished in ASCs to those

furnished in HOPDs paid under the OPSS, including examining the accuracy of the APC codes, with respect to surgical procedures furnished in ASCs. On November 30, 2006, the GAO published the statutorily mandated report entitled, "Medicare: Payment for Ambulatory Surgical Centers Should Be Based on the Hospital Outpatient Payment System" (GAO-07-86).³⁷ As directed by section 626(d) of Public Law 108-173, the report included recommendations on the following issues:

1. Appropriateness of using groups of covered services and relative weights established for the OPSS as the basis of payment for ASCs.

2. If the OPSS relative weights are appropriate for this purpose, whether the ASC payments should be based on a uniform percentage of the payment rates or weights under the OPSS, or should vary, or the weights should be revised based on specific procedures or types of services.

3. Whether a geographic adjustment should be used for ASC payment and, if so, the labor and nonlabor shares of such payment.

We refer readers to the CY 2008 OPSS/ASC final rule with comment period (71 FR 42474) for a detailed summary of the GAO's methodology, results, and recommendations. Notably, based on the findings from the study, the GAO recommended that CMS implement a payment system for procedures performed in ASCs based on the OPSS, taking into account the lower relative costs of procedures performed in ASCs compared to HOPDs in determining ASC payment rates.

We considered the report's methodology, findings, and recommendations implementing the current ASC payment system, effective in 2008 (71 FR 42474). Consistent with statutory requirements and the GAO's recommendations, we finalized policies to implement a revised ASC payment system based on the OPSS resource costs and relativity of service offerings.

The payment system for ASC facility services was designed as a prospective payment system to pay all procedures included in an APC a standard rate. Under a prospective payment system, payment is set to reflect the average cost to furnish a service. That is, some cases may be more costly than the average while others may be less costly. This type of payment system inherently provides incentives for each facility to be more efficient.

MedPAC conducts an annual review of the ASC payment system and submits its findings and recommendations in a report to Congress. As part of this review, MedPAC examines indicators such as beneficiaries' access to care, capacity and supply of providers, and volume of services, in part to assess the adequacy of Medicare payments to ASCs. Based on its analysis of indicators of payment adequacy, in its March 2017 Report to Congress, MedPAC found that the number of Medicare-certified ASCs had increased, beneficiaries' use of ASCs had increased, and access to capital has been adequate. As a result, for CY 2018, MedPAC stated that payments to ASCs are adequate and recommended that no payment update should be given for 2018 (that is, the update factor would be 0 percent). In addition, MedPAC recommended that Congress require ASCs to report cost data to enable the Commission to examine the growth of ASCs' costs over time and analyze Medicare payments relative to the costs of efficient providers, which would help inform decisions about the ASC update. Also, while MedPAC is concerned that the CPI-U may not reflect ASCs' cost structure, until cost information is available from ASCs, MedPAC cannot determine whether an alternative update factor would be more appropriate.³⁸

b. Solicitation of Comments

In the CY 2018 OPSS/ASC proposed rule (82 FR 33668), we stated that we are broadly interested in feedback, including recommendations and ideas for ASC payment system reform. We recognize that ASCs provide a critically important access point to beneficiaries who may be too ill or have the need for too complicated a procedure to be treated in the physician office setting, but for whom hospital care is either not medically necessary or undesirable. The current ASC payment system was implemented in 2008 and major revisions have not been made since that time. Average ASC payment rates have declined relative to OPSS payments rates over the past 10 years, from 65 percent of average OPSS rates in CY 2008 to 56 percent (as proposed) of average OPSS rates in CY 2018. However, in the absence of ASC-specific cost data, it is difficult, if not impossible, to determine whether ASC facility payment rates are in line with

³⁶ Omnibus Reconciliation Act of 1980 (ORA), Public Law 96-499, 934(b), 94 Stat. 2599, 2637 (codified, as amended, at 42 U.S.C. 1395l(i)).

³⁷ Available at: <http://www.gao.gov/assets/260/253992.pdf>.

³⁸ MedPAC, March 2017 Report to Congress, Chapter 5 "Ambulatory Surgical Center Services". Available at: http://www.medpac.gov/docs/default-source/reports/mar17_medpac_ch5.pdf?sfvrsn=0.

ASC facility resource costs and the impact on beneficiary access to care.

With respect to the update factor that is applied to ASC payments, section 1833(i)(2)(C)(i) of the Act requires that, if the Secretary has not updated the payment amounts established under the revised ASC payment system in a calendar year, the payment amounts shall be increased by the percentage increase in the Consumer Price Index for all urban consumers (CPI-U), (U.S. city average), as estimated by the Secretary for the 12-month period ending with the midpoint of the year involved. Therefore, the statute does not mandate the adoption of any particular update mechanism, except in the absence of any update, when it requires the payment amounts to be increased by the increase in the CPI-U.

CMS adopted a policy, codified at 42 CFR 416.171(a)(2)(ii), to update the ASC conversion factor using the CPI-U for CY 2010 and subsequent calendar years. Therefore, the annual update to the ASC payment system is the CPI-U (referred to as the CPI-U update factor). This update factor is adjusted by the productivity adjustment described in section 1886(b)(3)(B)(xi)(II) of the Act, as required by section 1833(i)(2)(D)(v) of the Act. In the CY 2018 OPPI/ASC proposed rule, we solicited comments on the ASC payment system update factor and indicated that we are interested in data from ASCs that would help determine whether the ASC payment system should continue to be updated by the CPI-U, or by an alternative update factor, such as the hospital market basket, the Medicare Economic Index, and a blend of update factors or other mechanism. The hospital market basket update is typically higher than the CPI-U, while the Medicare Economic Index is typically lower. Because the rate update is not applied in a budget neutral manner, applying a higher update factor would be a cost to the Medicare program while applying a lower update factor would result in savings to the Medicare program. As mentioned above, in the absence of an alternative update, the Act requires payments to ASCs to be increased in an amount equal to the percentage increase in the CPI-U.

With respect to the ASC update, in its March 2017 Report to Congress, MedPAC stated that ASCs have a much higher share of expenses for supplies and drugs than do hospitals or physician offices, a much smaller share of employee compensation costs than hospitals, and a smaller share of all other costs (such as rent) than physician offices. In the proposed rule, we sought public comments on information related

to ASC costs for items such as supplies, drugs, employee compensation, rent, and other inputs, as compared to those of hospitals or physician offices, including qualitative and quantitative data from ASCs. We stated that information on the cost structure of ASCs will help to identify an appropriate alternative update factor.

In addition, we sought public comments on whether the Secretary should collect cost data from ASCs to use in determining ASC payment rates. To the extent commenters recommend that ASC cost data should be used in the determination of ASC payment rates, we sought comments on what specific method of cost collection commenters recommend (such as cost reports or a survey). We recognize that the submission of costs may be an administrative burden to ASCs, and we stated that we were interested in comments that detail how we could mitigate the burden of reporting costs on ASCs while also collecting enough data to reliably use such data in the determination of ASC costs. We noted that the ability to calculate ASC-specific costs may obviate the need for tying the ASC payment system to that of the OPPI. In addition, collecting cost data from ASCs could inform whether an alternative input price index would be an appropriate proxy for ASC costs or whether an ASC-specific market basket should be developed.

With respect to the ability to adopt payment policies that exist under the OPPI into the ASC payment system, as discussed in prior rulemaking, due to differences in the systems used to process claims for hospitals and ASCs, we were not able to implement certain OPPI payment policies in the ASC payment system, such as comprehensive APCs, conditional packaging, and the "FD" value modifier for device credits (79 FR 66923). ASC facilities report services on a professional claim (or CMS-1500) rather than an institutional claim (or UB-04) used by hospitals. The ASC claim form is processed in the Medicare Claims System (MCS), the same system used to process claims submitted by physicians and other clinicians, while hospital claims are processed through the Fiscal Intermediary Shared System (FISS). In part, because of differences in the claim form and the claims processing systems, it is not always possible to adopt OPPI payment policies into the ASC payment system. The resulting divergence in payment policies between the two systems may contribute to unintended disparities in payment rates for the same services. In the CY 2018 proposed rule, we stated that we were interested in

stakeholder comments on whether billing on an institutional claim form rather than a professional claim form would address some of the issues affecting ASC payment reform.

As noted earlier in this section, we stated we were broadly interested in feedback from stakeholders and other interested parties on potential reforms to the current ASC payment system, including, but not limited to (1) the rate update factor applied to ASC payments, (2) whether and how ASCs should submit costs, (3) whether ASCs should bill on the institutional claim form rather than the professional claim form, and (4) other ideas to improve payment accuracy for ASCs.

Comment: Many commenters provided detailed comments and their feedback is summarized below.

- *Rate update factor:* The vast majority of commenters were in favor of applying the hospital market basket to update annual ASC payment. Commenters believed that because ASC provide the types of surgical services as hospitals that the hospital market basket is the most appropriate index. As an alternative to the hospital market basket, one commenter noted that there are other indices in the CPI and MEI that would be suitable to both the OPPI and ASC settings; for example, the CPI for medical care.

- *Collection of cost data:* One commenter stated that the same types of costs that apply to HOPDs also apply to ASCs, but they may not be weighted the same. The commenter offered to collaborate with CMS on ways to collect ASC cost information. For example, a simple, cost effective survey, perhaps voluntary, cost collection tool that calculates expense categories as a percentage of total expenses to help determine the appropriate weights and price proxies for the ASC setting. However, the commenter urged CMS to be mindful of imposing an excessive administrative burden. Commenters representing individual ASCs were generally opposed to submitting formal cost reports but expressed a willingness to complete a survey so long as it was not administratively burdensome.

MedPAC recommended that CMS begin collecting new cost data and use that information to examine whether an existing Medicare price index is an appropriate proxy for the cost of ASC facilities or an ASC-specific market basket should be developed. MedPAC suggested that, to minimize burden on ASCs and CMS, CMS could require all ASCs to submit streamlined cost reports or require a random sample of ASCs to respond to annual surveys. For example, MedPAC recommended that CMS

collect cost data for items such as drugs, medical supplies (including costly implantable devices), medical equipment, employee compensation, building expenses (such as rent), and other professional services (such as legal, accounting, and billing services).

- *Billing:* One commenter noted that the major issues affecting the payment differential between the ASC and OPSS would not be fixed by billing on an institutional claim form.

A few ASC facilities expressed support for requiring ASCs to bill on a UB-04 (institutional claim). These commenters stated they currently bill on a UB-04 for commercial payers and would benefit from a consistent claim form across all payers, especially for Medicare crossover claims. One commenter noted that billing on a UB-04 “is not a foreign concept” and that it warranted further exploration by CMS. A few commenters acknowledged that because not all ASCs currently bill on an UB-04, a transition period would be necessary to allow for successful implementation, though a suggested timeframe was not provided.

MedPAC also recommended that CMS transition ASCs to billing on an UB-04. MedPAC stated that because the ASC payment system is closely linked to the OPSS, to fully align OPSS payment policies with the ASC payment system, ASCs and hospitals should use the same claim form. However, MedPAC suggested that implementation of a requirement to bill on an UB-04 and to submit cost data should be staggered.

- *Payment relativity:* Several commenters recommended that CMS discontinue applying the “secondary scaling adjustment” and instead to apply the OPSS relative weights to ASC services. In addition, commenters also recommended that CMS restore the historical relativity between the OPSS and ASC setting. Some commenters suggested a conservative relativity adjustment of 55 percent while others suggested 65 percent (CY 2008 ratio).

Response: We will take the feedback on all of these potential ASC payment reform issues under advisement and consideration for future policymaking.

4. Display of CY 2018 ASC Payment Rates

Addenda AA and BB to this final rule with comment period (which are available on the CMS Web site) display the final updated ASC payment rates for CY 2018 for covered surgical procedures and covered ancillary services, respectively. For those covered surgical procedures and covered ancillary services where the payment rate is the lower of the final rates under the ASC

standard ratesetting methodology and the MPFS final rates, the final payment indicators and rates set forth in this final rule with comment period are based on a comparison using the final MPFS rates that will be effective January 1, 2018. For a discussion of the MPFS rates, we refer readers to the CY 2018 MPFS final rule with comment period.

The final payment rates included in these addenda reflect the full ASC payment update and not the reduced payment update used to calculate payment rates for ASCs not meeting the quality reporting requirements under the ASCQR Program. These addenda contain several types of information related to the final CY 2018 payment rates. Specifically, in Addendum AA, a “Y” in the column titled “To be Subject to Multiple Procedure Discounting” indicates that the surgical procedure will be subject to the multiple procedure payment reduction policy. As discussed in the CY 2008 OPSS/ASC final rule with comment period (72 FR 66829 through 66830), most covered surgical procedures are subject to a 50-percent reduction in the ASC payment for the lower-paying procedure when more than one procedure is performed in a single operative session.

Display of the comment indicator “CH” in the column titled “Comment Indicator” indicates a change in payment policy for the item or service, including identifying discontinued HCPCS codes, designating items or services newly payable under the ASC payment system, and identifying items or services with changes in the ASC payment indicator for CY 2018. Display of the comment indicator “NI” in the column titled “Comment Indicator” indicates that the code is new (or substantially revised) and that comments will be accepted on the interim payment indicator for the new code. Display of the comment indicator “NP” in the column titled “Comment Indicator” indicates that the code is new (or substantially revised) and that comments will be accepted on the ASC payment indicator for the new code.

The values displayed in the column titled “Final CY 2018 Payment Weight” are the final relative payment weights for each of the listed services for CY 2018. The final relative payment weights for all covered surgical procedures and covered ancillary services where the ASC payment rates are based on OPSS relative payment weights were scaled for budget neutrality. Therefore, scaling was not applied to the device portion of the device-intensive procedures, services that are paid at the MPFS nonfacility PE RVU-based amount, separately payable

covered ancillary services that have a predetermined national payment amount, such as drugs and biologicals and brachytherapy sources that are separately paid under the OPSS, or services that are contractor-priced or paid at reasonable cost in ASCs.

To derive the final CY 2018 payment rate displayed in the “Final CY 2018 Payment Rate” column, each ASC payment weight in the “Final CY 2018 Payment Weight” column was multiplied by the final CY 2018 conversion factor of \$45,575. The final conversion factor includes a budget neutrality adjustment for changes in the wage index values and the annual update factor as reduced by the productivity adjustment (as discussed in section XII.G.2.b. of this final rule with comment period).

In Addendum BB, there are no relative payment weights displayed in the “Final CY 2018 Payment Weight” column for items and services with predetermined national payment amounts, such as separately payable drugs and biologicals. The “Final CY 2018 Payment” column displays the final CY 2018 national unadjusted ASC payment rates for all items and services. The final CY 2018 ASC payment rates listed in Addendum BB for separately payable drugs and biologicals are based on ASP data used for payment in physicians’ offices in October 2017.

Addendum EE provides the HCPCS codes and short descriptors for surgical procedures that are to be excluded from payment in ASCs for CY 2018.

XIII. Requirements for the Hospital Outpatient Quality Reporting (OQR) Program

A. Background

1. Overview

CMS seeks to promote higher quality and more efficient healthcare for Medicare beneficiaries. Consistent with these goals, CMS has implemented quality reporting programs for multiple care settings including the quality reporting program for hospital outpatient care, known as the Hospital Outpatient Quality Reporting (OQR) Program, formerly known as the Hospital Outpatient Quality Data Reporting Program (HOP QDRP). The Hospital OQR Program is generally aligned with the quality reporting program for hospital inpatient services known as the Hospital Inpatient Quality Reporting (IQR) Program (formerly known as the Reporting Hospital Quality Data for Annual Payment Update (RHQDAPU) Program).

In addition to the Hospital IQR and Hospital OQR Programs, CMS has

implemented quality reporting programs for other care settings that provide financial incentives for the reporting of quality data to CMS. These additional programs include reporting for care furnished by:

- Physicians and other eligible professionals, under the Physician Quality Reporting System (PQRS, formerly referred to as the Physician Quality Reporting Program Initiative (PQRI)). We note that 2018 is the last year of the PQRS payment adjustment. Beginning in 2019, eligible clinicians may be subject to upward or downward payment adjustments under the Merit-based Incentive Payment System (MIPS) or be able to earn a positive payment incentives through participation in certain advanced alternative payment models (APMs) under the Quality Payment Program (QPP) (81 FR 77008);
- Inpatient rehabilitation facilities, under the Inpatient Rehabilitation Facility Quality Reporting Program (IRF QRP);
- Long-term care hospitals, under the Long-Term Care Hospital Quality Reporting Program (LTCH QRP);
- PPS-exempt cancer hospitals, under the PPS-Exempt Cancer Hospital Quality Reporting (PCHQR) Program;
- Ambulatory surgical centers, under the Ambulatory Surgical Center Quality Reporting (ASCQR) Program;
- Inpatient psychiatric facilities, under the Inpatient Psychiatric Facility Quality Reporting (IPFQR) Program;
- Home health agencies, under the Home Health Quality Reporting Program (HH QRP); and
- Hospices, under the Hospice Quality Reporting Program (HQRP).

In addition, CMS has implemented several value-based purchasing programs that link payment to performance, including the Hospital Value-Based Purchasing (VBP) Program; the Hospital-Acquired Condition (HAC) Reduction Program; and the End-Stage Renal Disease (ESRD) Quality Incentive Program (QIP); and the Quality Payment Program (QPP).

In implementing the Hospital OQR Program and other quality reporting programs, we have focused on measures that have high impact and support national priorities for improved quality and efficiency of care for Medicare beneficiaries as reflected in the National Quality Strategy (NQS) and the CMS Quality Strategy for conditions with reported wide cost and treatment variations despite established clinical treatment guidelines. To the extent possible under various authorizing statutes, our ultimate goal is to align the clinical quality measure requirements of the various quality reporting programs.

As appropriate, we will consider the adoption of measures with electronic specifications to enable the collection of this information for our quality programs.

We refer readers to the CY 2013 OPPS/ASC final rule with comment period (77 FR 68467 through 68469) for a discussion on the principles underlying consideration for future measures that we intend to use in implementing this and other quality reporting programs. We did not propose any changes to these policies.

2. Statutory History of the Hospital OQR Program

We refer readers to the CY 2011 OPPS/ASC final rule with comment period (75 FR 72064 through 72065) for a detailed discussion of the statutory history of the Hospital OQR Program.

3. Regulatory History of the Hospital OQR Program

We refer readers to the CY 2008 through 2017 OPPS/ASC final rules with comment period (72 FR 66860 through 66875; 73 FR 68758 through 68779; 74 FR 60629 through 60656; 75 FR 72064 through 72110; 76 FR 74451 through 74492; 77 FR 68467 through 68492; 78 FR 75090 through 75120; 79 FR 66940 through 66966; 80 FR 70502 through 70526; and 81 FR 79753 through 79797). We have also codified certain requirements under the Hospital OQR Program at 42 CFR 419.46. In the CY 2018 OPPS/ASC proposed rule (82 FR 33671), we proposed editorial changes to 42 CFR 419.46, replacing the terms “Web” and “Web site” with the terms “web” and “website,” respectively.

We did not receive any comments on our proposal. Therefore, we are finalizing our changes to 42 CFR 419.46 as proposed, by replacing the terms “Web” and “Web site” with the terms “web” and “website,” respectively.

B. Hospital OQR Program Quality Measures

1. Considerations in the Selection of Hospital OQR Program Quality Measures

We refer readers to the CY 2012 OPPS/ASC final rule with comment period (76 FR 74458 through 74460) for a detailed discussion of the priorities we consider for the Hospital OQR Program quality measure selection. We did not propose any changes to our measure selection policy.

2. Accounting for Social Risk Factors in the Hospital OQR Program

We understand that social risk factors such as income, education, race and

ethnicity, employment, disability, community resources, and social support (certain factors of which are also sometimes referred to as socioeconomic status (SES) factors or socio-demographic status (SDS) factors) play a major role in health. One of our core objectives is to improve beneficiary outcomes including reducing health disparities, and we want to ensure that all beneficiaries, including those with social risk factors, receive high quality care. In addition, we seek to ensure that the quality of care furnished by providers and suppliers is assessed as fairly as possible under our programs while ensuring that beneficiaries have adequate access to excellent care.

We have been reviewing reports prepared by the Office of the Assistant Secretary for Planning and Evaluation (ASPE)³⁹ and the National Academies of Sciences, Engineering, and Medicine on the issue of measuring and accounting for social risk factors in CMS’ value-based purchasing and quality reporting programs, and considering options on how to address the issue in these programs. On December 21, 2016, ASPE submitted a Report to Congress on a study it was required to conduct under section 2(d) of the Improving Medicare Post-Acute Care Transformation (IMPACT) Act of 2014. The study analyzed the effects of certain social risk factors of Medicare beneficiaries on quality measures and measures of resource use used in one or more of nine Medicare value-based purchasing programs.⁴⁰ The report also included considerations for strategies to account for social risk factors in these programs. In a January 10, 2017 report released by the National Academies of Sciences, Engineering, and Medicine, that body provided various potential methods for measuring and accounting for social risk factors, including stratified public reporting.⁴¹

As noted in the FY 2017 IPPS/LTCH PPS final rule, the NQF has undertaken a 2-year trial period in which new measures, measures undergoing maintenance review, and measures endorsed with the condition that they enter the trial period can be assessed to determine whether risk adjustment for selected social risk factors is appropriate

³⁹ Office of the Assistant Secretary for Planning and Evaluation. 2016. Report to Congress: Social Risk Factors and Performance Under Medicare’s Value-Based Purchasing Programs. Available at: <https://aspe.hhs.gov/pdf-report/report-congress-social-risk-factors-and-performance-under-medicare-value-based-purchasing-programs>.

⁴⁰ Ibid.

⁴¹ National Academies of Sciences, Engineering, and Medicine. 2017. Accounting for social risk factors in Medicare payment. Washington, DC: The National Academies Press.

for these measures. This trial entailed temporarily allowing inclusion of social risk factors in the risk-adjustment approach for these measures. Since publication of the proposed rule, we have learned that the National Quality Forum (NQF) has concluded their initial trial on risk adjustment for quality measures.⁴² Based on the findings from the initial trial, we have been informed that the NQF intends to continue its work to evaluate the impact of social risk factor adjustment on intermediate outcome and outcome measures for an additional three years. We understand that the extension of this work will allow NQF to determine further how to effectively account for social risk factors through risk adjustment and other strategies in quality measurement.

As we continue to consider the analyses and recommendations from these reports and the results of the NQF trial on risk adjustment for quality measures, we are continuing to work with stakeholders in this process. As we have previously communicated, we are concerned about holding providers to different standards for the outcomes of their patients with social risk factors because we do not want to mask potential disparities or minimize incentives to improve the outcomes for disadvantaged populations. Keeping this concern in mind, in the proposed rule we sought public comment on whether we should account for social risk factors in the Hospital OQR Program, and if so, what method or combination of methods would be most appropriate for accounting for social risk factors. Examples of methods include: Confidential reporting to providers of measure rates stratified by social risk factors; public reporting of stratified measure rates; and potential risk adjustment of a particular measure as appropriate based on data and evidence.

In addition, we requested public comment on which social risk factors might be most appropriate for reporting stratified measure scores and/or potential risk adjustment of a particular measure. Examples of social risk factors include, but are not limited to, dual eligibility/low-income subsidy, race and ethnicity, and geographic area of residence. We requested comments on which of these factors, including current

data sources where this information would be available, could be used alone or in combination, and whether other data should be collected to better capture the effects of social risk. We will take commenters' input into consideration as we continue to assess the appropriateness and feasibility of accounting for social risk factors in the Hospital OQR Program.

We look forward to working with stakeholders as we consider the issue of accounting for social risk factors and reducing health disparities in CMS programs. Of note, implementing any of the above methods would be taken into consideration in the context of how this and other CMS programs operate (for example, data submission methods, availability of data, statistical considerations relating to reliability of data calculations, among others), so we also welcome comment on operational considerations. CMS is committed to ensuring that its beneficiaries have access to and receive excellent care, and that the quality of care furnished by providers and suppliers is assessed fairly in CMS programs.

We received extensive comments in response to our request for public comments on whether we should account for social risk factors in the Hospital OQR Program, and if so, what method or combination of methods would be most appropriate for accounting for social risk factors.

Comment: Many commenters supported CMS' effort to address social risk factors in the Hospital OQR Program, noting that social risk factors are powerful drivers of outcomes and requested that CMS adopt risk adjustment methodologies soon. Commenters also noted that lack of risk adjustment can contribute to disparities by diverting resources away from communities in need.

One commenter specifically recommended risk adjustment in quality measurement in the psychiatric setting. Another commenter recommended that when identifying social risk factors, CMS consider the relationship with the outcome of interest, a risk factor's presence at the start of care, and whether it can be modified or manipulated through providers' actions. A third commenter noted that approaches to risk adjustment should be measure-specific.

A few commenters recommended that CMS apply risk adjustment by stratifying providers into groups by proportion of patients that are at risk, noting that this approach does not require measure-level research and recommending that risk adjustment results be shared with providers. One

commenter supported methodologies including providing confidential reporting of stratified measure rates to providers and risk adjustment of measures. Several commenters expressed concern with public reporting of risk adjusted data, while others recommended that publicly reported data specifically be risk adjusted.

A few commenters noted concern that adjusting for social risk factors will not address the underlying disparities that are associated with poor health outcomes and could instead lead to masking these disparities. One commenter noted that using social risk factors may not be appropriate until it is clear how the information is collected and shared. One commenter recommended that any risk adjustment methodology adopted adhere to CMS' previously adopted standards of setting minimum case volumes and using confidence intervals. Some commenters noted that better data sources for socioeconomic status are needed, including patient-level and community-level data sources.

Response: We appreciate all the comments and interest in this topic. As we have previously stated regarding risk adjustment of publicly reported data for these factors, we are concerned about holding providers to different standards for the outcomes of their patients with social risk factors, because we do not want to mask potential disparities or minimize incentives to improve outcomes for disadvantaged populations. With respect to public reporting, while we agree with commenters and believe it is important to avoid a scenario in which underlying disparities are masked rather than addressed, we also agree with commenters who support the public reporting of risk-adjusted data. We appreciate the need to balance risk adjustment as a strategy to account for social risk factors with the concern that risk adjustment could minimize incentives and reduce efforts to address disparities for patients with social risk factors. We believe that the path forward should incentivize improvements in health outcomes for disadvantaged populations while ensuring that beneficiaries have access to excellent care.

As with previous policies, we intend to follow our previously adopted standards for setting case minimums. We refer readers to the CY 2009 OPPI/ASC final rule with comment period (73 FR 68773 through 68775) where we discuss these standards. In addition, we acknowledge that administrative claims data can be limited; we will investigate the feasibility and appropriateness of

⁴² NQF. NQF Initiative to Determine the Impact of Adjusting Healthcare Performance Measures for Social Risk Factors Highlights Successes, Opportunities. Available at: https://www.qualityforum.org/News_And_Resources/Press_Releases/2017/NQF_Initiative_to_Determine_the_Impact_of_Adjusting_Healthcare_Performance_Measures_for_Social_Risk_Factors_Highlights_Successes,_Opportunities.aspx.

additional data sources for obtaining patient and community-level data.

We reiterate that we are committed to ensuring that CMS beneficiaries have access to and receive excellent care and that the quality of care furnished by providers and suppliers is assessed fairly in CMS programs. We thank the commenters, and we will consider their views as we develop further policy regarding social risk factors in the Hospital OQR Program.

Comment: Many commenters recommended many factors to consider including: Body mass index; race; smoking status; age; sex; back pain; pain in non-operative lower extremity joint; health risk status; mental health factors; chronic narcotic use; socioeconomic status; pre-procedure ambulatory status; literacy; marital status; live-in home support; family support structure; home health resources; patient travel distance; homelessness; community distress; unavoidable readmissions; readmission risks; and poverty; as well as access to health care, transportation, and healthy food.

One commenter recommended that the following variables not be used: American Society of Anesthesiologists score; range of motion; or mode of patient-reported outcome measure collection. Several commenters supported the use of dual eligible status as a factor, while one commenter opposed it and noted concern that that it does not reflect the conditions where the hospital is located and that there are variations between States in dual eligibility status.

Response: We appreciate commenters' recommendations regarding specific social risk factor variables and will consider them as we continue exploring options for accounting for social risk factors in the Hospital OQR Program.

Comment: Several commenters recommended empirical testing to prioritize the national collection of data that are most essential for valid risk adjustment methodologies and that CMS focus on factors that have an empirically proven relationship to outcomes or processes of care metrics. Some commenters recommended that CMS consider recommendations from NQF, ASPE, the National Academy of Medicine, and the Agency for Healthcare Research and Quality (AHRQ). One commenter suggested that CMS engage providers and vendors in demonstration projects allowing collection of sociodemographic data elements in electronic health records. A few commenters recommended that testing and methodologies be made transparent. Some commenters also recommended that CMS monitor any

unintended consequences that result from risk adjustment.

Response: We plan to actively perform additional research and monitor for trends to prevent unintended consequences. We intend to conduct further analyses on the impact of different approaches to accounting for social risk factors in quality programs. In addition, we will consider the commenters' suggestion that we conduct empirical testing of risk-adjusted quality metrics, and assess the potential impact of the findings from such testing on the prioritization of national data collection, in relation to risk adjustment methodologies. We look forward to continuing to work with stakeholders such as NQF, ASPE, the National Academy of Medicine, and AHRQ.

We thank commenters for their suggestion that we allow collection of sociodemographic data elements in electronic health records, but note that the Hospital OQR Program does not yet include eQMs. Any testing and methodologies used would be made transparent through future rulemaking, which includes the public notice and comment process. Moreover, any proposals would be made in future rulemaking after further analysis, research, and continued stakeholder engagement.

Comment: Several commenters recommended that CMS align across quality payment programs when accounting for social risk factors.

Response: We thank the commenters for their feedback. We intend to investigate options for adjusting for social risk factors with continued consideration of alignment across programs.

Comment: Several commenters asked that CMS consider the impact of socioeconomic data collection on the patient as well as on provider burden. A few commenters recommended that CMS consider potential administrative complexities as CMS develops social risk factor adjustment processes.

Response: As we consider the feasibility of collecting patient-level data and the impact of strategies to account for social risk factors through further analysis, we will also continue to evaluate the reporting burden on providers and patients.

We thank all of the commenters for their input and will consider all suggestions as we continue to assess the issue of accounting for social risk factors within individual measures, the Hospital OQR Program as a whole, and across CMS quality programs.

3. Retention of Hospital OQR Program Measures Adopted in Previous Payment Determinations

We previously adopted a policy to retain measures from the previous year's Hospital OQR Program measure set for subsequent years' measure sets in the CY 2013 OPPTS/ASC final rule with comment period (77 FR 68471). Quality measures adopted in a previous year's rulemaking are retained in the Hospital OQR Program for use in subsequent years unless otherwise specified. We refer readers to that rule for more information. We did not propose any changes to our retention policy for previously adopted measures.

4. Removal of Quality Measures From the Hospital OQR Program Measure Set

a. Considerations in Removing Quality Measures From the Hospital OQR Program

In the FY 2010 IPPS/LTCH PPS final rule (74 FR 43863), for the Hospital IQR Program, we finalized a process for immediate retirement, which we later termed "removal," of Hospital IQR Program measures based on evidence that the continued use of the measure as specified raised patient safety concerns. We adopted the same immediate measure retirement policy for the Hospital OQR Program in the CY 2010 OPPTS/ASC final rule with comment period (74 FR 60634 through 60635). We refer readers to the CY 2013 OPPTS/ASC final rule with comment period (77 FR 68472 through 68473) for a discussion of our reasons for changing the term "retirement" to "removal" in the Hospital OQR Program. We did not propose any changes to our policy to immediately remove measures as a result of patient safety concerns.

In the CY 2013 OPPTS/ASC final rule with comment period, we finalized a set of criteria for determining whether to remove measures from the Hospital OQR Program. We refer readers to the CY 2013 OPPTS/ASC final rule with comment period (77 FR 68472 through 68473) for a discussion of our policy on removal of quality measures from the Hospital OQR Program. The benefits of removing a measure from the Hospital OQR Program will be assessed on a case-by-case basis (79 FR 66941 through 66942). We note that, under this case-by-case approach, a measure will not be removed solely on the basis of meeting any specific criterion. We refer readers to the CY 2013 OPPTS/ASC final rule with comment period (77 FR 68472 through 68473) for our list of factors considered in removing measures from the Hospital OQR Program. We did not

propose any changes to our measure removal policy.

b. Criteria for Removal of “Topped-Out” Measures

We refer readers to the CY 2015 OPPS/ASC final rule with comment period where we finalized our proposal to refine the criteria for determining when a measure is “topped-out” (79 FR 66942). We did not propose any changes to our “topped-out” criteria policy.

c. Removal of Quality Measures From the Hospital OQR Program Measure Set

In the CY 2018 OPPS/ASC proposed rule (82 FR 33673), we proposed to remove a total of six measures. Specifically, beginning with the CY 2020 payment determination, we proposed to remove: (1) OP–21: Median Time to Pain Management for Long Bone Fracture; and (2) OP–26: Hospital Outpatient Volume Data on Selected Outpatient Surgical Procedures. In addition, beginning with the CY 2021 payment determination, we proposed to remove: (1) OP–1: Median Time to Fibrinolysis; (2) OP–4: Aspirin at Arrival; (3) OP–20: Door to Diagnostic Evaluation by a Qualified Medical Professional; and (4) OP–25: Safe Surgery Checklist. By removing these six measures, our intent is to alleviate the maintenance costs and administrative burden to hospitals associated with retaining them. While we proposed to remove two measures beginning with the CY 2020 payment determination and four measures for the CY 2021 payment determination, in this final rule, we are finalizing removal of all six measures for the CY 2020 payment determination. These are discussed in detail below.

(1) Removal of OP–21: Median Time to Pain Management for Long Bone Fracture Beginning With the CY 2020 Payment Determination

We refer readers to the CY 2011 OPPS/ASC final rule with comment period (75 FR 72088), where we adopted the OP–21: Median Time to Pain Management for Long Bone Fracture measure. This process of care measure assesses the median time from emergency department arrival to time of initial oral, nasal, or parenteral pain medication (opioid and non-opioid) administration for emergency department patients with a principal diagnosis of long bone fracture (LBF).

We have previously finalized a policy to note that the benefits of removing a measure from the Hospital OQR Program will be assessed on a case-by-case basis (79 FR 66941 through 66942). Accordingly, although it does not

exactly meet one of the specific measure removal criteria finalized for the Hospital OQR Program (77 FR 68472 through 68473), it has the potential to lead to negative unintended consequences (removal factor #7). Therefore, we proposed to remove OP–21: Median Time to Pain Management for Long Bone Fracture for the CY 2020 payment determination and subsequent years due to the concerns described in more detail below.

Given the growing body of evidence on the risks of opioid misuse, CMS has developed a strategy to impact the national opioid misuse epidemic by combating nonmedical use of prescription opioids, opioid use disorder, and overdose through the promotion of safe and appropriate opioid utilization, improved access to treatment for opioid use disorders, and evidence-based practices for acute and chronic pain management.⁴³

Due to the potential for a misinterpretation of the intent of the measure, we are concerned that OP–21: Median Time to Pain Management for Long Bone Fracture may create undue pressure for hospital staff to prescribe more opioids. We note that the measure only assesses the time to initial, acute administration of pain medication in a specific acute clinical situation, and does not promote long-term pain medication prescriptions. In fact, this measure assesses an element of appropriate pain management, specifically the time to pain medication administration in the case of long bone fracture. In addition, the measure assesses the use of both opioid and nonopioid pain medications. While we acknowledge that pain control is an important issue for patients and clinical care, and the measure does not call for increased opioid prescriptions, many factors outside the control of CMS quality program requirements may contribute to the perception of a link between the measure and opioid prescribing practices. Although we are not aware of any scientific studies that support an association between this measure and opioid prescribing practices, out of an abundance of caution, we proposed to remove the measure in order to remove any potential ambiguity and to avoid misinterpretation of the intent of the measure. We also note that, in the CY 2017 OPPS/ASC final rule with comment period (81 FR 79856), we removed the Pain Management

dimension of the HCAHPS Survey in the Patient- and Caregiver-Centered Experience of Care/Care Coordination domain beginning with the FY 2018 program year for the Hospital VBP Program for similar reasons. In addition, in the FY 2018 IPPS/LTCH PPS final rule (82 FR 38342), we finalized refinements to the former pain management questions in the HCAHPS Survey measure for the Hospital IQR Program.

We invited public comment on our proposal to remove the OP–21: Median Time to Pain Management for Long Bone Fracture measure for the CY 2020 payment determination and subsequent years as discussed above.

Comment: Many commenters supported the removal of OP–21 for the CY 2020 payment determination noting concern about the potential incentive to over prescribe opioids. One commenter applauded CMS’ efforts to combat the opioid epidemic. A few commenters noted that the measure could be more appropriate or valuable if it were refined, for example to include oral pain medication or to ensure that it does not incentivize prescribing opioids. One commenter recommended that CMS remove the measure for the CY 2019 payment determination.

Response: We disagree that it would be more appropriate to refine this measure. We do not believe that introducing a modified version of the measure would address our main concern regarding potential for misinterpretation of the intent of the measure because whether pain management is initiated, our main concern for misinterpretation, is what this measure is meant to assess. As stated in our proposal, many factors outside the control of CMS quality program requirements may contribute to the perception of a link between the measure and opioid prescribing practices. Although we are not aware of any scientific studies that support an association between this measure and opioid prescribing practices, out of an abundance of caution, we proposed to remove the measure in order to remove any potential ambiguity and to avoid misinterpretation of the intent of the measure. We note that due to operational limitations, we cannot remove the measure for the CY 2019 payment determination. The CY 2020 payment determination (CY 2018 data collection) is the earliest we can remove this measure from the program.

Comment: One commenter did not support the proposal to remove OP–21 and noted that there is a lack of evidence that the measure incentivizes overprescribing of opioids.

⁴³ CMS Opioid Misuse Strategy 2016. Available at: <https://www.cms.gov/Outreach-and-Education/Outreach/Partnerships/Prescription-Drug-Information-for-Partners-Items/CMS-Opioid-Misuse-Strategy-2016.html>.

Response: We acknowledge the commenter's concerns. As stated in our proposal, although we are not aware of any scientific studies that support an association between this measure and opioid prescribing practices, out of an abundance of caution, however, we believe it is important to remove the measure in order to remove any potential ambiguity and to avoid any misinterpretation of the intent of the measure. We want to ensure that the Hospital OQR Program measure set does not create any potential undue pressure for hospital staff to overprescribe opioids.

After consideration of the public comments we received, we are finalizing the proposal to remove OP-21: Median Time to Pain Management for Long Bone Fracture for the CY 2020 payment determination and subsequent years, as proposed.

(2) Removal of OP-26: Hospital Outpatient Volume Data on Selected Outpatient Surgical Procedures Beginning With the CY 2020 Payment Determination

We refer readers to the CY 2012 OPPS/ASC final rule with comment period (76 FR 74468), where we adopted OP-26: Hospital Outpatient Volume Data on Selected Outpatient Surgical Procedures beginning with the CY 2014 payment determination. This measure, which is submitted via a web-based tool, collects surgical procedure volume data on eight categories of procedures frequently performed in the outpatient hospital setting.

We believe there is a lack of evidence to support this measure's link to improved clinical quality. The measure requires hospitals to report on the volumes of surgical procedures performed at the facility.⁴⁴ This information, number of surgical procedures, does not offer insight into the facilities' overall performance or quality improvement in regard to surgical procedures. Accordingly, this measure meets the following measure removal criterion: performance or improvement on a measure does not result in better patient outcomes (79 FR 66941). We believe the burden of this measure, which is submitted via a web-based tool, outweighs the value, and, therefore, we proposed to remove OP-26: Hospital Outpatient Volume Data on Selected Outpatient Surgical Procedures for the CY 2020 payment determination and subsequent years. We also refer

readers to section XIV.B.3.b.(3) of this final rule with comment period, where the ASCQR Program is finalizing the removal of a similar measure.

We invited public comment on our proposal to remove the OP-26: Hospital Outpatient Volume Data on Selected Outpatient Surgical Procedures measure for the CY 2020 payment determination and subsequent years as discussed above.

Comment: Many commenters supported the removal of OP-26 for the CY 2020 payment determination. One commenter recommended that CMS remove the measure for the CY 2019 payment determination.

Response: We thank the commenters for their support and feedback. We note that due to operational limitations, we cannot remove the measure for the CY 2019 payment determination. The CY 2020 payment determination (CY 2018 data collection) is the earliest we can remove this measure from the program.

After consideration of the public comments we received, we are finalizing our proposal to remove OP-26: Hospital Outpatient Volume Data on Selected Outpatient Surgical Procedures for the CY 2020 payment determination and subsequent years, as proposed.

(3) Removal of OP-1: Median Time to Fibrinolysis Beginning With the CY 2020 Payment Determination

We refer readers to the CY 2008 OPPS/ASC final rule with comment period (referred to as "ED-AMI-2—Median Time to Fibrinolysis" in 72 FR 66862 through 66865) where we adopted OP-1: Median Time to Fibrinolysis beginning with services furnished in CY 2009. This chart-abstracted measure assesses the median time from ED arrival to administration of fibrinolytic therapy in ED patients with ST-segment elevation on the ECG performed closest to ED arrival and prior to transfer.

We believe that this measure meets the following measure removal criterion—the availability of a measure that is more strongly associated with desired patient outcomes for the particular topic (79 FR 66941). We note that the currently adopted OP-2: Fibrinolytic Therapy Received Within 30 Minutes of ED Arrival (72 FR 66862 through 66865) has been designed with a threshold that is based on a clinical standard, allows us to measure this topic area, and provides meaningful and clinically relevant data on the receipt of fibrinolytic therapy. National guidelines recommend that fibrinolytic therapy be given within 30 minutes of hospital arrival in patients with ST-segment

elevation myocardial infarction.⁴⁵ Because OP-1: Median Time to Fibrinolysis measures only the median time from door to needle and does not note whether or not that value exceeds the clinical best practice of 30 minutes, we do not believe that reporting of OP-1 improves quality of care or patient outcomes. In addition, we believe that retaining OP-1: Median Time to Fibrinolysis would be redundant with OP-2: Fibrinolytic Therapy Received Within 30 Minutes of ED Arrival. As a result, we proposed to remove OP-1: Median Time to Fibrinolysis for the CY 2021 payment determination and subsequent years. We note that although OP-1: Median Time to Fibrinolysis is a chart-abstracted measure, we do not expect removing this measure would reduce burden, as the data collected for this measure is required to calculate another program measure in the AMI measure set (OP-2: Fibrinolytic Therapy Received Within 30 Minutes of ED Arrival) and will, therefore, continue to be collected even if the proposal to remove OP-1: Median Time to Fibrinolysis is finalized as proposed.

We invited public comment on our proposal to remove OP-1: Median Time to Fibrinolysis for the CY 2021 payment determination and subsequent years as discussed above.

Comment: Several commenters supported the proposal to remove OP-1: Median Time to Fibrinolysis for the CY 2021 payment determination. Some commenters supported the proposal to remove the measure, but recommended that it be removed as soon as possible. Many commenters supported the proposal to remove the measure, but recommended that it be removed beginning with the CY 2020 payment determination, one year earlier than proposed.

Response: We thank the commenters for their support and feedback. While planning for the proposed rule, we did not believe we had the logistical capacity to support successful removal of all six measures at once from our systems. Upon further consideration however, we have determined it is, in fact, operationally feasible to remove OP-1 beginning with the CY 2020 payment determination rather than the

⁴⁴ OP-26 Measure Information Form. Available at: <http://www.qualitynet.org/dcs/ContentServer?c=Page&pagename=QnetPublic%2FPage%2FSpecsManualTemplate&cid=1228775748170>.

⁴⁵ Antman EM, Hand M, Armstrong PW, Bates ER, Green LA, Halasyamani LK, et al. 2007 focused update of the ACC/AHA 2004 Guidelines for the Management of Patients With ST-Elevation Myocardial Infarction: A report of the American College of Cardiology/American Heart Association Task Force on Practice Guidelines (Writing Group to Review New Evidence and Update the ACC/AHA 2004 Guidelines for the Management of Patients With ST-Elevation Myocardial Infarction). Journal of the American College of Cardiology. 2008; 51:210-47.

CY 2021 payment determination as proposed. We believe that removing this measure one year earlier than proposed will reduce hourly and financial burden on hospital. Therefore, we agree that we should remove the measure as soon as possible.

After consideration of the public comments we received, we are finalizing our proposal to remove OP-1: Median Time to Fibrinolysis with modification. Instead of beginning with the CY 2021 payment determination as proposed, we are finalizing the removal of this measure for the CY 2020 payment determination and subsequent years, one year earlier than proposed.

(4) Removal of OP-4: Aspirin at Arrival Beginning With the CY 2020 Payment Determination

We refer readers to the CY 2008 OPPS/ASC final rule with comment period (72 FR 66862 through 66865) where we adopted OP-4: Aspirin at Arrival beginning with services furnished in CY 2009. This chart-abstracted measure assesses the rate of patients with chest pain or possible heart attack who received aspirin within 24 hours of arrival or before transferring from the emergency department.

We previously finalized two criteria for determining when a measure is “topped out” under the Hospital OQR Program: (1) When there is statistically

indistinguishable performance at the 75th and 90th percentiles of national facility performance; and (2) when the measure’s truncated coefficient of variation (COV) is less than or equal to 0.10 (79 FR 66942). Based on our analysis of Hospital OQR Program measure data, we have determined that performance on this measure is so high and unvarying that meaningful distinctions in improvement cannot be made; specifically, our analyses show that there is statistically indistinguishable performance at the 75th and 90th percentiles of national facility performance for this measure. These analyses are captured in the table below.

OP-4—ASPIRIN AT ARRIVAL TOPPED OUT ANALYSIS

Encounters	Number of hospitals	75th percentile	90th percentile	Truncated COV
CY 2014	1,706	100.00	100.00	0.030
CY 2015	1,749	100.00	100.00	0.035
CY 2016	1,803	100.00	100.00	0.042

As displayed in the table above, there is no distinguishable difference in hospital performance between the 75th and 90th percentiles under the OP-4: Aspirin at Arrival measure, and the truncated coefficient of variation has been below 0.10 since 2014. Therefore, this measure meets both “topped out” measure criteria for the ASCQR Program.

Thus, we believe the burden of reporting this chart-abstracted measure is not justified by the value of retaining it in the program and we proposed to remove OP-4: Aspirin at Arrival from the program for the CY 2021 payment determination and subsequent years.

We invited public comment on our proposal to remove the OP-4: Aspirin at Arrival measure for the CY 2021 payment determination and subsequent years as discussed above.

Comment: Several commenters supported the removal of OP-4: Aspirin at Arrival for the CY 2021 payment determination. Some commenters supported the proposal to remove the measure, but recommended that it be removed as soon as possible. Many commenters supported the proposal to remove the measure, but recommended that it be removed beginning with the CY 2020 payment determination, one year earlier than proposed.

Response: We thank the commenters for their support. While planning for the proposed rule, we did not believe we had the logistical capacity to support successful removal of all six measures at once from our systems. Upon further

consideration, we have determined it is, in fact, operationally feasible to remove OP-4 beginning with the CY 2020 payment determination rather than the CY 2021 payment determination as proposed. We believe that removing this measure one year earlier than proposed will reduce hourly and financial burden on hospitals. Therefore, we agree that we should remove the measure as soon as possible.

After consideration of the public comments we received, we are finalizing our proposal to remove OP-4: Aspirin at Arrival measure with modification. Instead of beginning with the CY 2021 payment determination as proposed, we are finalizing the removal of this measure for the CY 2020 payment determination and subsequent years, one year earlier than proposed.

(5) Removal of OP-20: Door to Diagnostic Evaluation by a Qualified Medical Professional Beginning With the CY 2020 Payment Determination

We refer readers to the CY 2011 OPPS/ASC final rule with comment period (75 FR 72087 through 72088) where we adopted OP-20: Door to Diagnostic Evaluation by a Qualified Medical Professional for the CY 2013 payment determination. This chart-abstracted measure assesses the time from ED arrival to provider contact for Emergency Department patients.

During regular measure maintenance, specific concerns about OP-20: Door to Diagnostic Evaluation by a Qualified Medical Professional were raised by a

Technical Expert Panel (TEP), comprised of experts representing a variety of stakeholders and was convened by a CMS contractor. These concerns include: (1) Limited evidence linking the measure to improved patient outcomes; (2) validity concerns related to wait times and the accuracy of door-to-door time stamps; and (3) potential for skewed measure performance due to disease severity and institution-specific confounders. After our own analysis, we agree with the TEP’s analysis and believe that this measure meets the following measure removal criterion: Performance or improvement on a measure does not result in better patient outcomes. As a result, we believe the burden of continuing to include this chart-abstracted measure in the program outweighs the benefits; and thus, we proposed to remove OP-20: Door to Diagnostic Evaluation by a Qualified Medical Professional for the CY 2021 payment determination and subsequent years.

We invited public comment on our proposal to remove OP-20: Door to Diagnostic Evaluation by a Qualified Medical Professional for the CY 2021 payment determination and subsequent years as discussed above.

Comment: Several commenters supported the proposal to remove OP-20: Door to Diagnostic Evaluation by a Qualified Medical Professional for the CY 2021 payment determination. Some commenters supported the proposal to remove the measure, but recommended that it be removed as soon as possible.

Many commenters supported the proposal to remove the measure, but recommended that it be removed beginning with the CY 2020 payment determination, one year earlier than proposed.

Response: We thank the commenters for their support. While planning for the proposed rule, we did not believe we had the logistical capacity to support successful removal of all six measures at once from our systems. Upon further consideration, we have determined it is, in fact, operationally feasible to remove OP–20 beginning with the CY 2020 payment determination rather than the CY 2021 payment determination as proposed. We believe that removing this measure one year earlier than proposed will reduce hourly and financial burden on hospitals. Therefore, we agree that we should remove the measure as soon as possible.

Comment: A few commenters expressed concern that there are socioeconomic pressures that can vary by community that cause variation in performance on this measure. However, these commenters also noted the value of the measure and recommended that CMS consider a refined version of OP–20 that stratifies by hospital size and other factors related to measure performance.

Response: We acknowledge the suggestion that OP–20 be refined to account for community factors that influence performance. While the TEP

found a potential for skewed measure performance due to disease severity and institution-specific confounders, we do not believe modifying the measure to account for social risk factors will address our primary concern that the measure is not adequately tied to better patient outcomes. We thank the commenters for their recommendation, however; we will take these comments into consideration as we continue to review and refine the Hospital OQR Program measure set. In addition, we acknowledge the suggestion that OP–20 be refined to account for community factors that influence performance and note that the TEP found a potential for skewed measure performance due to disease severity and institution-specific confounders. However, modifying the measure to account for social risk factors in this or future rulemaking will not address our primary concern that the measure is not adequately tied to patient outcomes.

After consideration of the public comments we received, we are finalizing our proposal to remove OP–20: Door to Diagnostic Evaluation by a Qualified Medical Professional with modification. Instead of beginning with the CY 2021 payment determination as proposed, we are finalizing the removal of this measure for the CY 2020 payment determination and subsequent years, one year earlier than proposed.

(6) Removal of OP–25: Safe Surgery Checklist Use Beginning With the CY 2020 Payment Determination

We refer readers to the CY 2012 OPPS/ASC final rule with comment period (76 FR 74464 through 74466), where we adopted OP–25: Safe Surgery Checklist Use beginning with the CY 2014 payment determination. This structural measure of hospital process assesses whether a hospital employed a safe surgery checklist that covered each of the three critical perioperative periods (prior to administering anesthesia, prior to skin incision, and prior to patient leaving the operating room) for the entire data collection period. Based on our review of reported data under the measure, this measure meets our first criterion for measure removal that measure performance is so high and unvarying that meaningful distinctions and improvements in performance can no longer be made.

The Hospital OQR Program previously finalized two criteria for determining when a measure is “topped out”: (1) When there is statistically indistinguishable performance at the 75th and 90th percentiles of national facility performance; and (2) when the measure’s truncated coefficient of variation is less than or equal to 0.10 (79 FR 66942). Our estimations indicate that performance on this measure is trending towards topped out status. This analysis is captured in the table below.

OP–25—SAFE SURGERY CHECKLIST USE PERFORMANCE ANALYSIS

Encounters	Number of hospitals	Rate	75th percentile	90th percentile	Truncated COV
CY 2012	3,227	0.910	100.000	100.000	0.314
CY 2013	3,184	0.949	100.000	100.000	0.232
CY 2014	3,177	0.963	100.000	100.000	0.196
CY 2015	3,166	0.970	100.000	100.000	0.176

Based on the analysis above, the national rate of “Yes” response for the OP–25 measure is nearly 1.0, or 100 percent, nationwide, and has remained at this level for the last two years. In addition, the truncated coefficient of variation has decreased such that it is trending towards 0.10 and there is no distinguishable difference in hospital performance between the 75th and 90th percentiles. We have previously stated the benefits of removing a measure from the Hospital OQR Program will be assessed on a case-by-case basis (79 FR 66941 through 66942). We believe that removal of this measure from the Hospital OQR Program measure set is appropriate, as there is little room for improvement. We believe that safe

surgical checklist is widely used and that hospitals will continue its use. In addition, removal of this measure would alleviate the administrative burden to hospitals associated with reporting on this measure. As such, we believe the reporting burden of this measure outweigh the benefits of keeping the measure in the Hospital OQR Program.

Therefore, we proposed to remove OP–25: Safe Surgery Checklist Use for the CY 2021 payment determination and subsequent years. We refer readers to section XIV.B.3.b.(2) of this final rule with comment period, where the ASCQR Program is finalizing a proposal to remove a similar measure.

We invited public comment on our proposal to remove the OP–25: Safe

Surgery Checklist Use measure for the CY 2021 payment determination and subsequent years as discussed above.

Comment: Several commenters supported the proposal to remove OP–25 for the CY 2021 payment determination. Some commenters supported the proposal to remove the measure, but recommended removal as soon as possible. Many commenters supported the proposal to remove the measure, but recommended that it be removed beginning with the CY 2020 payment determination, one year earlier than proposed.

Response: We thank the commenters for their support. While planning for the proposed rule, we did not believe we had the logistical capacity to support

successful removal of all six measures at once from our systems. Upon further consideration, we have determined it is, in fact, operationally feasible to remove OP–25 beginning with the CY 2020 payment determination rather than the CY 2021 payment determination as proposed. We believe that removing this measure one year earlier than proposed will reduce hourly and financial burden on hospitals. Therefore, we agree that we should remove the measure as soon as possible.

Comment: A few commenters opposed the proposal to remove OP–25: Safe Surgery Checklist Use, noting that the measure adds value. One commenter recommended that CMS retain the measure until there is further evidence that the use of a safe surgery checklist is supporting effective perioperative communication.

Response: As stated in our proposal, we believe that there is little room for improvement as shown by the data in our table above. In addition, removal of this measure would alleviate the maintenance costs and administrative burden to hospitals of data collection and reporting. While retaining the measure may add some nominal value, we believe that the burdens outweigh the benefits. In addition, in response to the suggestion that we retain the measure until there is further evidence that the use of a safe surgery checklist is supporting effective perioperative communication, we would like to make clear that high performance on OP–25: Safe Surgery Checklist Use is not intended to indicate whether perioperative communication among team members is effective; this measure is not specified to assess the effectiveness of a team’s communication, only whether a safe surgery checklist is used. Therefore, we do not believe continuing to collect—or, conversely, ceasing to collect—data under this measure will assess or affect the effectiveness of perioperative communication within Hospital Outpatient Departments.

After consideration of the public comments we received, we are finalizing our proposal to remove OP–25: Safe Surgery Checklist Use with modification. Instead of beginning with the CY 2021 payment determination as proposed, we are finalizing the removal of this measure for the CY 2020 payment determination and subsequent years, one year earlier than proposed.

5. Delay of OP–37a–e: Outpatient and Ambulatory Surgery Consumer Assessment of Healthcare Providers and Systems (OAS CAHPS) Survey-Based Measures Beginning With the CY 2020 Payment Determination

We refer readers to the CY 2017 OPSS/ASC final rule with comment period where we adopted OP–37a–e (81 FR 79771 through 79784), and finalized data collection and data submission timelines (81 FR 79792 through 79794). These measures assess patients’ experience with care following a procedure or surgery in a hospital outpatient department by rating patient experience as a means for empowering patients and improving the quality of their care.

In CY 2018 OPSS/ASC proposed rule (82 FR 33675), we proposed to delay implementation of the Outpatient and Ambulatory Surgery Consumer Assessment of Healthcare Providers and Systems (OAS CAHPS) Survey-Based Measures OP–37a–e beginning with the CY 2020 payment determination (2018 data collection) and subsequent years. Since our adoption of these measures, we have come to believe that we need to collect more operational and implementation data. Specifically, we want to ensure that the survey measures appropriately account for patient response rates, both aggregate and by survey administration method; reaffirm the reliability of national implementation of OAS CAHPS Survey data; and appropriately account for the burden associated with administering the survey in the outpatient setting of care. We note that commenters expressed concern over the burden associated with the survey in the CY 2017 OPSS/ASC final rule with comment period (81 FR 79777). We believe that the voluntary national implementation of the survey, which began in January 2016, would provide valuable information moving forward.⁴⁶ We plan to conduct analyses of the national implementation data to undertake any necessary modifications to the survey tool and/or CMS systems. We believe it is important to allow time for any modifications before requiring the survey under the Hospital OQR Program. However, we continue to believe that these measures address an area of care that is not adequately addressed in our current measure set and will be useful to assess aspects of care where the patient is the best or only source of information. Further, we continue to believe these measures will

enable objective and meaningful comparisons between hospital outpatient departments. Therefore, we proposed to delay implementation of OP–37a–e beginning with the CY 2020 payment determination (2018 data collection) until further action in future rulemaking. We also refer readers to section XIV.B.4. of this final rule with comment period where we are finalizing a similar proposal in the ASCQR Program.

We invited public comment on our proposal to delay the OAS CAHPS Survey measures beginning with the CY 2020 payment determination (2018 data collection) as discussed above.

Comment: Many commenters supported the proposal to delay implementation of the OAS CAHPS Survey, noting agreement that an analysis of the national implementation will provide valuable information. One commenter noted that the high volume of facilities and hospitals participating in the voluntary national implementation indicates that the data collection burden of the survey is low.

Response: We thank the commenters for their support, and note our belief that an analysis of the national implementation of OAS CAHPS Survey will provide valuable information.

Comment: Citing the importance of patient experience data, a few commenters recommended that CMS move toward mandatory data collection in the future as some hospitals have already invested resources to begin data collection. One commenter recommended a dry run for the first quarter of mandatory implementation. A few commenters recommended that the survey be voluntary for all future years of the program. Another commenter recommended that the survey be introduced with advance notice so hospitals can prepare.

Response: We thank the commenters for their recommendations, and will take these comments under consideration as we craft future policy for the OAS CAHPS Survey. First, we acknowledge the work completed thus far by hospitals beginning to prepare for OAS CAHPS Survey data collection and thank them for their commitment to improving patient experience. We note that changes to this measure would be made in notice and comment rulemaking so that stakeholders can prepare. Finally, while we do not anticipate conducting a dry run for this survey at this time, we refer readers to the voluntary national implementation of the OAS CAHPS Survey.⁴⁷

⁴⁶ About the National Implementation and Public Reporting. Available at: <https://oascahps.org/General-Information/National-Implementation>.

⁴⁷ Ibid.

Comment: Several commenters noted specific concerns about the OAS CAHPS Survey, including that the survey is unnecessarily long, that not all of the questions are relevant, and that requiring a standardized survey prevents hospitals from targeting specific areas for improvement. Some commenters noted that the use of a third-party vendor is too costly. Several commenters recommended that vendors should provide electronic or email options for conducting the OAS CAHPS Survey in order to increase response rates. Others recommended that CMS administer the survey on its Web site. One commenter noted concern that timely results are not provided. A few commenters expressed concern about the use of CPT codes to determine eligibility for the survey and one noted that the CPT codes include procedures that a patient may not perceive as a surgery.

Response: While web-based surveys are not available survey modes at present, we are actively investigating these modes as possible options for the future. We are exploring whether hospitals and ASCs receive reliable email addresses from patients and whether there is adequate access to the internet across all types of patients. Ultimately, the purpose of the investigation is to ensure that any future survey administration method does not introduce bias in the survey process and reduces length and burden if at all possible. Although we are investigating other modes of survey administration, we do not expect that CMS will directly administer the survey; the survey would still be administered through vendors. Finally, we acknowledge the concern about the use of CPT codes, including those for procedures that patients may not perceive as surgery, and note that we will consider this issue. We note that many CPT codes have been excluded from inclusion in the OAS CAHPS

Survey, including services like application of a cast or splint, in order to ensure that only patients receiving applicable procedures are surveyed.⁴⁸ We thank the commenters and will take all comments under consideration as we craft future policy for the OAS CAHPS Survey.

Comment: Several commenters recommended that the survey be NQF-endorsed prior to implementation and that the survey should be refined with input from stakeholders.

Response: Section 1833(t)(17)(C)(i) of the Act does not require that each measure we adopt for the Hospital OQR Program be endorsed by a national consensus building entity, or the NQF specifically. While we strive to adopt NQF-endorsed measures when feasible and practicable, we believe the requirement that measures reflect consensus among affected parties can be achieved in other ways, including through the measure development process, stakeholder input via a Technical Expert Panel (TEP), review by the MAP, broad acceptance and use of the measure, and public comments. As stated in the CY 2017 OPPS/ASC final rule with comment period (81 FR 79772), the OAS CAHPS Survey measures were included on the CY 2014 MUC list,⁴⁹ and reviewed by the MAP.⁵⁰ The MAP encouraged continued development of these survey-based measures; however, we note that these measures had not been fully specified by the time of submission to the MUC List.⁵¹ The MAP stated that these are high impact measures that will improve both quality and efficiency of care and be meaningful to consumers.⁵² Further, the MAP stated that given that these measures are also under consideration for the ASCQR Program, they help to promote alignment across care settings.⁵³ It also stated that these measures would begin to fill a gap MAP has previously identified for this

program including patient reported outcomes and patient and family engagement.⁵⁴ Several MAP workgroup members noted that CMS should consider how these measures are related to other existing ambulatory surveys to ensure that patients and facilities are not overburdened. In addition, we refer readers to the CY 2017 OPPS/ASC final rule with comment period (81 FR 79775), where we received public comments on this measure during development.

Comment: One commenter requested that survey development and testing data be made public.

Response: We refer commenters to the voluntary national implementation of the OAS CAHPS Survey for more information on results to date (<https://oascahps.org/General-Information/National-Implementation>).

After consideration of the public comments we received, we are finalizing the proposal to delay implementation of the Outpatient and Ambulatory Surgery Consumer Assessment of Healthcare Providers and Systems (OAS CAHPS) Survey-based Measures (OP-37a-e) beginning with the CY 2020 payment determination (CY 2018 data collection) until further action in future rulemaking, as proposed. We refer readers to section XIV.B.4. of this final rule with comment where we are also finalizing delay of the OAS CAHPS Survey-based measures in the ASCQR Program.

6. Previously Adopted Hospital OQR Program Measure Set for the CY 2020 Payment Determination and Subsequent Years

We refer readers to the CY 2017 OPPS/ASC final rule with comment period (81 FR 79784) for the previously finalized measure set for the Hospital OQR Program CY 2020 payment determination and subsequent years. These measures also are listed below.

PREVIOUSLY FINALIZED HOSPITAL OQR PROGRAM MEASURE SET FOR THE CY 2020 PAYMENT DETERMINATION AND SUBSEQUENT YEARS

NQF No.	Measure name
0287	OP-1: Median Time to Fibrinolysis.†
0288	OP-2: Fibrinolytic Therapy Received Within 30 Minutes of ED Arrival.
0290	OP-3: Median Time to Transfer to Another Facility for Acute Coronary Intervention.
0286	OP-4: Aspirin at Arrival.†
0289	OP-5: Median Time to ECG.†

⁴⁸ OASCAHPS.org. Additional Procedural Codes for Exclusion from the OAS CAHPS Survey. Available at: <https://oascahps.org/General-Information/Announcements/EntryId/80/Additional-Procedural-Codes-for-Exclusion-from-the-OAS-CAHPS-Survey>.

⁴⁹ National Quality Forum. List of Measures under Consideration for December 1, 2014. National

Quality Forum, Dec. 2014. Available at: https://www.qualityforum.org/Setting_Priorities/Partnership/Measures_Under_Consideration_List_2014.aspx.

⁵⁰ National Quality Forum. MAP 2015 Final Recommendations to HHS and CMS. Rep. National Quality Forum, Jan. 2015. Available at: <http://www.qualityforum.org/WorkArea/linkit.aspx?LinkIdIdentifier=id&ItemID=78711>.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Ibid.

PREVIOUSLY FINALIZED HOSPITAL OQR PROGRAM MEASURE SET FOR THE CY 2020 PAYMENT DETERMINATION AND SUBSEQUENT YEARS—Continued

NQF No.	Measure name
0514	OP-8: MRI Lumbar Spine for Low Back Pain.
None	OP-9: Mammography Follow-up Rates.
None	OP-10: Abdomen CT—Use of Contrast Material.
0513	OP-11: Thorax CT—Use of Contrast Material.
None	OP-12: The Ability for Providers with HIT to Receive Laboratory Data Electronically Directly into their ONC-Certified EHR System as Discrete Searchable Data.
0669	OP-13: Cardiac Imaging for Preoperative Risk Assessment for Non-Cardiac, Low-Risk Surgery.
None	OP-14: Simultaneous Use of Brain Computed Tomography (CT) and Sinus Computed Tomography (CT).
0491	OP-17: Tracking Clinical Results between Visits.†
0496	OP-18: Median Time from ED Arrival to ED Departure for Discharged ED Patients.
None	OP-20: Door to Diagnostic Evaluation by a Qualified Medical Professional.
0662	OP-21: Median Time to Pain Management for Long Bone Fracture.
0499	OP-22: Left Without Being Seen.†
0661	OP-23: Head CT or MRI Scan Results for Acute Ischemic Stroke or Hemorrhagic Stroke who Received Head CT or MRI Scan Interpretation Within 45 minutes of ED Arrival.
None	OP-25: Safe Surgery Checklist Use.
None	OP-26: Hospital Outpatient Volume on Selected Outpatient Surgical Procedures. *
0431	OP-27: Influenza Vaccination Coverage among Healthcare Personnel.
0658	OP-29: Appropriate Follow-Up Interval for Normal Colonoscopy in Average Risk Patients.**
0659	OP-30: Colonoscopy Interval for Patients with a History of Adenomatous Polyps—Avoidance of Inappropriate Use.**
1536	OP-31: Cataracts: Improvement in Patient's Visual Function within 90 Days Following Cataract Surgery.***
2539	OP-32: Facility 7-Day Risk-Standardized Hospital Visit Rate after Outpatient Colonoscopy.
1822	OP-33: External Beam Radiotherapy for Bone Metastases.
None	OP-35: Admissions and Emergency Department (ED) Visits for Patients Receiving Outpatient Chemotherapy.
2687	OP-36: Hospital Visits after Hospital Outpatient Surgery.
None	OP-37a: OAS CAHPS—About Facilities and Staff.****
None	OP-37b: OAS CAHPS—Communication About Procedure.****
None	OP-37c: OAS CAHPS—Preparation for Discharge and Recovery.****
None	OP-37d: OAS CAHPS—Overall Rating of Facility.****
None	OP-37e: OAS CAHPS—Recommendation of Facility.****

† We note that NQF endorsement for this measure was removed.

* OP-26: Procedure categories and corresponding HCPCS codes are located at: <https://www.qualitynet.org/dcs/ContentServer?c=Page&pagename=QnetPublic%2FPages%2FQnetTier3&cid=1196289981244>.

** We note that measure name was revised to reflect NQF title.

*** Measure voluntarily collected as set forth in section XIII.D.3.b. of the CY 2015 OPPTS/ASC final rule with comment period (79 FR 66946 through 66947).

**** Measure reporting delayed beginning with CY 2018 reporting and for subsequent years as discussed in section XIII.B.5. of this final rule with comment period.

7. Newly Finalized Hospital OQR Program Measure Set for the CY 2020 Payment Determination and Subsequent Years

In the CY 2018 OPPTS/ASC proposed rule (82 FR 33676), we did not propose any new measures for the Hospital OQR

Program. However, beginning with the CY 2020 payment determination, in section XIII.B.4.c. of this final rule with comment period, we are finalizing proposals to remove six measures, and in section XIII.B.5. of this final rule with comment period, we are finalizing a proposal to delay OP-37a-e beginning

with the CY 2020 payment determination (2018 data collection). The table below outlines the Hospital OQR Program measure set we are finalizing in this final rule with comment period for the CY 2020 payment determination and subsequent years.

NEWLY FINALIZED HOSPITAL OQR PROGRAM MEASURE SET FOR THE CY 2020 PAYMENT DETERMINATION AND SUBSEQUENT YEARS

NQF No.	Measure name
0288	OP-2: Fibrinolytic Therapy Received Within 30 Minutes of ED Arrival.
0290	OP-3: Median Time to Transfer to Another Facility for Acute Coronary Intervention.
0289	OP-5: Median Time to ECG.†
0514	OP-8: MRI Lumbar Spine for Low Back Pain.
None	OP-9: Mammography Follow-up Rates.
None	OP-10: Abdomen CT—Use of Contrast Material.
0513	OP-11: Thorax CT—Use of Contrast Material.
None	OP-12: The Ability for Providers with HIT to Receive Laboratory Data Electronically Directly into their ONC-Certified EHR System as Discrete Searchable Data.
0669	OP-13: Cardiac Imaging for Preoperative Risk Assessment for Non-Cardiac, Low-Risk Surgery.
None	OP-14: Simultaneous Use of Brain Computed Tomography (CT) and Sinus Computed Tomography (CT).
0491	OP-17: Tracking Clinical Results between Visits.†
0496	OP-18: Median Time from ED Arrival to ED Departure for Discharged ED Patients.
0499	OP-22: Left Without Being Seen.†

NEWLY FINALIZED HOSPITAL OQR PROGRAM MEASURE SET FOR THE CY 2020 PAYMENT DETERMINATION AND SUBSEQUENT YEARS—Continued

NQF No.	Measure name
0661	OP-23: Head CT or MRI Scan Results for Acute Ischemic Stroke or Hemorrhagic Stroke who Received Head CT or MRI Scan Interpretation Within 45 minutes of ED Arrival.
0431	OP-27: Influenza Vaccination Coverage among Healthcare Personnel.
0658	OP-29: Appropriate Follow-Up Interval for Normal Colonoscopy in Average Risk Patients.*
0659	OP-30: Colonoscopy Interval for Patients with a History of Adenomatous Polyps—Avoidance of Inappropriate Use.*
1536	OP-31: Cataracts: Improvement in Patient's Visual Function within 90 Days Following Cataract Surgery.**
2539	OP-32: Facility 7-Day Risk-Standardized Hospital Visit Rate after Outpatient Colonoscopy.
1822	OP-33: External Beam Radiotherapy for Bone Metastases.
None	OP-35: Admissions and Emergency Department (ED) Visits for Patients Receiving Outpatient Chemotherapy.
2687	OP-36: Hospital Visits after Hospital Outpatient Surgery.
None	OP-37a: OAS CAHPS—About Facilities and Staff.***
None	OP-37b: OAS CAHPS—Communication About Procedure.***
None	OP-37c: OAS CAHPS—Preparation for Discharge and Recovery.***
None	OP-37d: OAS CAHPS—Overall Rating of Facility.***
None	OP-37e: OAS CAHPS—Recommendation of Facility.***

† We note that NQF endorsement for this measure was removed.

○ OP-26: Procedure categories and corresponding HCPCS codes are located at: <https://www.qualitynet.org/dcs/ContentServer?c=Page&pagename=QnetPublic%2FPage%2FQnetTier3&cid=1196289981244>.

* We note that measure name was revised to reflect NQF title.

** Measure voluntarily collected as set forth in section XIII.D.3.b. of the CY 2015 OPPTS/ASC final rule with comment period (79 FR 66946 through 66947).

*** Measure reporting delayed beginning with CY 2018 reporting and for subsequent years as discussed in section XIII.B.5. of this final rule with comment period.

8. Hospital OQR Program Measures and Topics for Future Consideration

In the CY 2018 OPPTS/ASC proposed rule (82 FR 33678), we requested public comment on: (1) Future measure topics; and (2) future development of OP-2: Fibrinolytic Therapy Received Within 30 Minutes of ED Arrival as an electronic clinical quality measure (eCQM). These are discussed in detail below.

a. Future Measure Topics

We seek to develop a comprehensive set of quality measures to be available for widespread use for informed decision-making and quality improvement in the hospital outpatient setting. The current measure set for the Hospital OQR Program includes measures that assess process of care, imaging efficiency patterns, care transitions, ED throughput efficiency, Health Information Technology (health IT) use, care coordination, and patient safety. Measures are of various types, including those of process, structure, outcome, and efficiency. Through future rulemaking, we intend to propose new measures that help us further our goal of achieving better health care and improved health for Medicare beneficiaries who receive health care in hospital outpatient settings, while aligning quality measures across the Medicare program.

We are moving towards the use of outcome measures and away from the use of clinical process measures across our Medicare quality reporting and value-based purchasing programs. We

invited public comments on possible measure topics for future consideration in the Hospital OQR Program. We specifically requested comment on any outcome measures that would be useful to add to the Hospital OQR Program as well as any clinical process measures that should be eliminated from the Hospital OQR Program.

Comment: A few commenters recommended that we adopt the eCQM version of OP-18: Median Time from ED Arrival to ED Departure for Discharged ED Patients.

Response: We thank the commenters for their feedback. We will consider these suggestions as we consider including and developing eCQMs for future rulemaking.

Comment: Several commenters suggested measure topics for future consideration, including measures that address Total Knee Arthroplasty (TKA) and Total Hip Arthroplasty (THA) procedures and measures that address recommended vaccines for adults, including pneumococcal immunization measures. A few commenters noted support for outcome measures, and recommended that CMS engage with stakeholders in identifying priority measurement areas. One commenter specifically recommended patient reported outcomes and patient reported experience measures. A commenter recommended the inclusion of pain experience and management measures. One commenter recommended the following topic areas for quality measures: Patient safety outcomes, readmission rates, risk-adjusted

mortality, effective patient transitions, diabetes, obesity, guidelines for overused procedures, end of life care according to preferences, cost per episode, behavioral health and patient experience.

Response: We thank the commenters for their recommendations and suggestions and agree that there are additional high priority topic measurement areas that may be appropriate for the Hospital OQR Program. We will consider the suggested topic areas for future rulemaking and intend to work with stakeholders as we continue to develop the Hospital OQR Program measure set.

b. Possible Future Adoption of the Electronic Version of OP-2: Fibrinolytic Therapy Received Within 30 Minutes of Emergency Department Arrival

We have previously stated that automated electronic extraction and reporting of clinical quality data, including measure results calculated automatically by appropriately certified health IT, could significantly reduce the administrative burden on hospitals under the Hospital OQR Program (81 FR 79785). In the CY 2017 OPPTS/ASC final rule with comment period (81 FR 79786), some commenters supported CMS' goal to incorporate electronic clinical quality measures (eCQMs) in the Hospital OQR Program.

OP-2: Fibrinolytic Therapy Received Within 30 Minutes of Emergency Department Arrival was finalized in the CY 2008 OPPTS/ASC final rule with comment period (72 FR 66865), where

it was designated as ED-AMI-3. In the CY 2009 OPPS/ASC final rule with comment period (73 FR 68761), the measure was re-labeled as OP-2 for the CY 2010 payment determination and subsequent years. OP-2 measures the number of AMI patients receiving fibrinolytic therapy during the ED visit with a time from hospital arrival to fibrinolysis of 30 minutes or less.

We are considering developing OP-2: Fibrinolytic Therapy Received Within 30 Minutes of Emergency Department Arrival⁵⁵ as an eCQM and proposing the eCQM in future rulemaking. We note that since OP-2 is not yet developed as an eCQM; electronic measure specifications are not available at this time. We are considering OP-2: Fibrinolytic Therapy Received Within 30 Minutes of Emergency Department Arrival in particular because we believe this measure is the most feasible out of all the existing Hospital OQR Program measures for development as an eCQM.

We invited public comment on the possible future development and future adoption of an eCQM version of OP-2: Fibrinolytic Therapy Received Within 30 Minutes of Emergency Department Arrival.

Comment: A few commenters supported the adoption of an eCQM version of OP-2: Fibrinolytic Therapy Received Within 30 Minutes of Emergency Department Arrival. Several commenters noted their support for the adoption of eCQMs, but expressed concern about the future adoption of an eCQM version OP-2: Fibrinolytic Therapy Received Within 30 Minutes of Emergency Department Arrival in the Hospital OQR Program noting that other measures, such as OP-18, are already specified as an eCQM and that other measures may be more relevant to the Hospital OQR Program since fibrinolytic therapy is not always appropriate with the increasing availability of cardiac catheterization labs.

Response: We will consider OP-18 for future rulemaking. In addition, while we acknowledge that OP-2 may not be relevant to all hospitals due to the increased availability of cardiac catheterization labs, we believe this measure would be important for smaller hospitals that continue to rely on fibrinolytic therapy. We thank the commenters for their feedback and will consider these concerns and suggestions before we decide whether to develop an eCQM version of OP-2: Fibrinolytic Therapy Received Within 30 Minutes of

Emergency Department Arrival or propose the eCQM in future rulemaking.

Comment: Other commenters opposed the adoption of eCQMs in the Hospital OQR Program and expressed concern that eCQMs add, rather than reduce, administrative burden. Some commenters recommended that CMS delay implementation of eCQMs in the Hospital OQR Program until the vendor and CMS systems issues noted in Hospital IQR Program rulemaking are addressed and until the Hospital IQR Program demonstrates accurate and feasible submission of electronic data.

Response: In the FY 2018 IPPS/LTCH PPS final rule (82 FR 38355), commenters raised concerns about EHR system upgrades, the difficulty of transitioning to a new EHR vendor, and updating to new editions of certified health IT. We appreciate commenters sharing their concerns about the challenges associated with eCQM reporting, including the significant expenditure of resources required to make necessary changes to health IT systems, documentation or utilization of EHRs, and workflow process changes and acknowledge commenters' feedback that many hospitals may not be ready to report eCQMs. We will take lessons learned from eCQM submission in the Hospital IQR Program into consideration as we develop policy for the Hospital OQR Program. As we stated in the FY 2017 IPPS/LTCH PPS final rule (81 FR 57177) regarding the Hospital IQR Program, however, we acknowledge that there are initial costs, but believe that long-term benefits associated with electronic data capture outweigh those costs. In addition, as we stated in the FY 2016 IPPS/LTCH PPS final rule (80 FR 49696) regarding the Hospital IQR Program, we believe that it is appropriate to consider reporting of eCQMs given that measures available now and those being developed for the future are increasingly based on electronic standards. We thank the commenters for their feedback and acknowledge the concerns raised. We will consider these concerns and suggestions as we further consider developing OP-2: Fibrinolytic Therapy Received Within 30 Minutes of Emergency Department Arrival as an eCQM or proposing the eCQM in future rulemaking.

9. Maintenance of Technical Specifications for Quality Measures

CMS maintains technical specifications for previously adopted Hospital OQR Program measures. These specifications are updated as we modify the Hospital OQR Program measure set. The manuals that contain specifications

for the previously adopted measures can be found on the QualityNet Web site at: <https://www.qualitynet.org/dcs/ContentServer?c=Page&pagename=QnetPublic%2FPPage%2FQnetTier2&cid=1196289981244>.

For a history of our policies regarding maintenance of technical specifications for quality measures, we refer readers to the CY 2010 OPPS/ASC final rule with comment period (74 FR 60631), the CY 2011 OPPS/ASC final rule with comment period (75 FR 72069), and the CY 2013 OPPS/ASC final rule with comment period (77 FR 68469 through 68470). We did not propose any changes to our technical specifications policies.

10. Public Display of Quality Measures

a. Background

We refer readers to the CY 2014 and CY 2017 OPPS/ASC final rules with comment period (78 FR 75092 and 81 FR 79791, respectively) for our previously finalized policies regarding public display of quality measures.

In the CY 2018 OPPS/ASC proposed rule (82 FR 33679), we proposed to update public reporting for the OP-18: Median Time from ED Arrival to ED Departure for Discharged ED Patients measure.

b. Public Reporting of OP-18c: Median Time From Emergency Department Arrival to Emergency Department Departure for Discharged Emergency Department Patients—Psychiatric/ Mental Health Patients

OP-18 Median Time from ED Arrival to ED Departure for Discharged ED Patients was finalized for reporting for the CY 2013 payment determination and subsequent years in the CY 2011 OPPS/ASC final rule with comment period (75 FR 72086). This measure addresses ED efficiency in the form of the median time from ED arrival to time of departure from the ED for patients discharged from the ED (also known as ED throughput). Reducing the time patients spend in the ED can improve the quality of care. As discussed in the measure specifications and Measure Information Form (MIF),^{56 57} OP-18 measure data is stratified into four separate calculations: (1) OP-18a is defined as the overall rate; (2) OP-18b is defined as the reporting measure; (3) OP-18c is defined as assessing

⁵⁶ A Measure Information Form provides detail on the rationale for a measure as well as the relevant numerator statements, denominator statements and measure calculations.

⁵⁷ Hospital OQR Program ED Throughput Measures Information Form. Available at: <http://www.qualitynet.org/dcs/ContentServer?c=Page&pagename=QnetPublic%2FPPage%2FSpecsManualTemplate&cid=1228775748170>.

⁵⁵ eCQI Resource Center: <https://ecqi.healthit.gov/eh/ecqms-2016-reporting-period/fibrinolytic-therapy-received-within-30-minutes-hospital-arrival>.

Psychiatric/Mental Health Patients; and (4) OP–18d is defined as assessing Transfer Patients.

Section 1833(t)(17)(E) of the Act, requires that the Secretary establish procedures to make data collected under the Hospital OQR Program available to the public and that such procedures must ensure that a hospital has the opportunity to review the data that are to be made public, with respect to the hospital prior to such data being made public. Currently, and as detailed in the OP–18 MIF, the OP–18 measure publicly reports data only for the calculations designated as OP–18b: Median Time from Emergency Department Arrival to Emergency Department Departure for Discharged Emergency Department Patients—Reporting Measure, which excludes psychiatric/mental health patients and transfer patients.⁵⁸

The ICD–10 diagnostic codes for OP–18c include numerous substance abuse codes for inclusion in this subset, along with numerous nonsubstance abuse codes. We believe it is important to publicly report data for OP–18c (Median Time from Emergency Department Arrival to Emergency Department Departure for Discharged Emergency Department Patients—Psychiatric/Mental Health Patients) to address a behavioral health gap in the publicly reported Hospital OQR Program measure set. Therefore, in the CY 2018 OPPS/ASC proposed rule (82 FR 33679), we proposed to also publicly report OP–18c and begin public reporting as early as July of 2018 using data from patient encounters during the third quarter of 2017. In addition, we would make corresponding updates to our MIF to reflect these proposals,⁵⁹ such as: (1) Renaming OP–18b from “Median Time from Emergency Department Arrival to Emergency Department Departure for Discharged Emergency Department Patients—Reporting Measure” to “OP–18b: Median Time from Emergency Department Arrival to Emergency Department Departure for Discharged Emergency Department Patients—Excluding Psychiatric/Mental Health Patients and Transfer Patients;” and (2) modifying the form to reflect that OP–18c would also be publicly reported. Administrative changes made to the MIF would not affect hospital reporting requirements or burden. The data required for public reporting are already collected and submitted by participating outpatient hospital departments and our proposal to publicly report OP–18c does not create additional burden. We note

that hospitals would be able to preview these data in accordance with our previously established 30-day preview period procedures (81 FR 79791).

In developing this proposal, we also considered proposing to publicly report around July 2019 (not 2018 as proposed) using data from patient encounters occurring during the first quarter of 2018. However, we decided against this timeline, because under this reporting option, we would not be able to publicly report behavioral health data until as early as July of 2019, creating a delay in our efforts to address the behavioral health data gap in the publicly reported measure set.

We invited public comment on our proposal to publicly report OP–18c: Median Time from Emergency Department Arrival to Emergency Department Departure for Discharged Emergency Department Patients—Psychiatric/Mental Health Patients beginning with third quarter 2017 data as discussed above.

Comment: Some commenters supported the proposal to publicly display OP–18c Median Time from ED Arrival to ED Departure for Discharged ED Patients—Psychiatric/Mental Health Patient, noting that the data can be valuable to improving patient care.

Response: We thank the commenters for their support; we agree that these data can be useful toward improving patient care for these patients.

Comment: Several commenters opposed the proposal to publicly report OP–18c: Median Time from ED Arrival to ED Departure for Discharged ED Patients—Psychiatric/Mental Health Patients. These commenters expressed concern that publicly reporting the measure will not address the behavioral health gap in the Hospital OQR Program. Several commenters expressed concern that data on time to departure may not help patients make care decisions. One commenter expressed concern that the measure sample size is small, leading to large variation in month-to-month performance. Another commenter recommended that data for substance abuse and non-substance abuse patients be separated in publicly reported OP–18c data, citing a concern that substance abuse patients may spend more time in the ED.

A few commenters cited concerns that delays in discharging psychiatric patients are caused by a lack of community resources rather than poor quality of care. One commenter recommended that publicly displayed data for OP–18c also include data on mental health resources in the community to provide context for the data. Other commenters expressed

concern that the data could incentivize limiting the care provided to these patients in the ED in order to discharge them quickly.

Response: We disagree that OP–18c does not address the Hospital OQR Program’s gap in measuring behavioral health or that it would not provide useful information. We believe this helps to address a gap in measuring behavioral health by attempting to address the increased wait times experienced by mental health patients in EDs. Research has indicated that mental health patients experience a prolonged ED length of stay as compared to other patients, and that these longer wait times can lead to medication errors and adverse outcomes.⁶⁰ Another study demonstrated that patients presenting to the ED with acute myocardial infarction who have a history of depression are given lower priority care.⁶¹ In addition, we believe data from OP–18c will be useful to researchers and hospital staff as they attempt to address these disparities, as well as to patients choosing a care location. We further disagree that measure sample size will lead to inconsistent measure results. This measure has undergone the NQF endorsement process and, as such, has been tested and determined to be reliable.⁶² Although, we acknowledge commenters concerns that substance abuse patients may spend more time in the ED, we believe it is important to not separate substance abuse patients in the measure, as research shows that illicit drug use is particularly high among adults with serious mental illnesses and that these co-occurring disorders tend to go undetected and untreated, especially among the elderly population.^{63 64} Given this, we believe it is important to include substance abuse populations for quality improvement.

However, the comments received have shed some light on aspects of this particular subset of data that may need additional consideration prior to posting on the consumer-facing *Hospital*

⁶⁰ Pearlmutter, Mark D. et al. Analysis of Emergency Department Length of Stay for Mental Health Patients at Ten Massachusetts Emergency Departments. *Annals of Emergency Medicine*, Volume 70, Issue 2, 193–202.e16.

⁶¹ Atzema CL, Schull MJ, Tu JV. The effect of a charted history of depression on emergency department triage and outcomes in patients with acute myocardial infarction. *CMAJ* 2011;183:663–9.

⁶² NQF: Median Time from ED Arrival to ED Departure for Discharged ED Patients. Available at: <https://qualityforum.org/qps/0496>.

⁶³ SAMHSA. Results from the 2014 National Survey on Drug Use and Health: Mental Health Findings.

⁶⁴ Robert Drake. “Dual Diagnosis and Integrated Treatment of Mental Illness and Substance Abuse Disorder.”

⁵⁸ Ibid.

⁵⁹ Ibid.

Compare Web site. We acknowledge commenters' concerns regarding unintended consequences, including that the time to discharge for mental health patients may be influenced, in part, by the availability of community resources and that the measure could be perceived as creating pressure on providers to inappropriately limit care in order to quickly discharge mental health patients. Literature has shown that the number of inpatient psychiatric beds as decreased from 400,000 in 1970 to 50,000 in 2006.⁶⁵

Therefore, after considering the public comments we received, including these additional factors, we would like to err on the side of caution and take additional time for further consideration prior to posting this particular subset of data on *Hospital Compare*, a consumer-facing Web site. As background, we typically allow 30 days for hospitals to preview their data two months prior to public reporting, after which we deliver final public reporting files for the *Hospital Compare* Web site (77 FR 68483). Simultaneously, in addition to posting on *Hospital Compare*, Hospital OQR Program quality measure data are also typically published on data.medicare.gov in downloadable data files.^{66 67 68} While we will not publicly report OP-18c on *Hospital Compare*, we will instead publish it on data.medicare.gov. Affected parties will be notified via CMS listservs, CMS email blasts, national provider calls, and QualityNet announcements regarding the release of preview reports followed by the posting of data on a Web site other than *Hospital Compare* (76 FR 74453).

Based on the public comments we received, we intend to make measure data available in a downloadable data file rather than on *Hospital Compare* so that we may continue to evaluate the concerns raised by commenters regarding unintended consequences. We believe this modified approach to our original proposal is more appropriate than publishing on *Hospital Compare*, which is more public facing, because we want to avoid any potential circumstance in which the publication

of these data exacerbate the concerns raised by commenters. We continue to believe the measure provides value to hospital quality improvement efforts and to patients. However, out of an abundance of caution, we intend to make data available on data.medicare.gov instead of *Hospital Compare* until we have been able to evaluate the concerns raised by commenters.

To be clear, data for what is referred to as OP-18b Median Time from Emergency Department Arrival to Emergency Department Departure for Discharged Emergency Department Patients—Reporting Measure will still continue to be made available on *Hospital Compare* as it has in the past. In addition, in accordance with our decision to not publish OP-18c data on *Hospital Compare*, we are also not finalizing the proposed measure subset name changes or MIF form changes described in our proposal. We will continue to work toward finding the best means to make this subset of information more easily understandable to the public and consider other measures to help fill the behavioral health gap in the future.

After consideration of the public comments we received, we are finalizing the proposal, with modification, as discussed in our response above, such that we will make OP-18c rates available to the public on <https://data.medicare.gov> in downloadable files. We will take additional time to further assess how best to make this subset of data available on the *Hospital Compare* Web site for consumers. In addition, we are not finalizing our proposals to: (1) Rename OP-18b from “Median Time from Emergency Department Arrival to Emergency Department Departure for Discharged Emergency Department Patients—Reporting Measure” to “OP 18b: Median Time from Emergency Department Arrival to Emergency Department Departure for Discharged Emergency Department Patients—Excluding Psychiatric/Mental Health Patients and Transfer Patients;” and (2) modify the MIF to reflect that OP-18c would also be publicly reported on *Hospital Compare*.

C. Administrative Requirements

1. QualityNet Account and Security Administrator

The previously finalized QualityNet security administrator requirements, including setting up a QualityNet account and the associated timelines, are described in the CY 2014 OPPS/ASC final rule with comment period (78 FR

75108 through 75109). In that final rule with comment period, we codified these procedural requirements at 42 CFR 419.46(a).

2. Requirements Regarding Participation Status

a. Background

We refer readers to the CY 2014 OPPS/ASC final rule with comment period (78 FR 75108 through 75109) and the CY 2016 OPPS/ASC final rule with comment period (80 FR 70519) for requirements for participation and withdrawal from the Hospital OQR Program. We also codified these procedural requirements at 42 CFR 419.46(a) and 42 CFR 419.46(b). In the CY 2018 OPPS/ASC proposed rule (82 FR 33679), we proposed changes to the NOP submission deadline, as described below.

b. Proposed Changes to the NOP Submission Deadline

We finalized in the CY 2014 OPPS/ASC final rule with comment period (78 FR 75108 through 75109) that participation in the Hospital OQR Program requires that hospitals must: (1) Register on the QualityNet Web site before beginning to report data; (2) identify and register a QualityNet security administrator; and (3) complete and submit an online participation form available at the QualityNet.org Web site if this form has not been previously completed, if a hospital has previously withdrawn, or if the hospital acquires a new CMS Certification Number (CCN). In addition, in the CY 2014 OPPS/ASC final rule with comment period (78 FR 75108 through 75109) we finalized the requirement that hospitals must submit the NOP according to the following deadlines:

- If a hospital has a Medicare acceptance date before January 1 of the year prior to the affected annual payment update, the hospital must complete and submit to CMS a completed Hospital OQR Program Notice of Participation Form by July 31 of the calendar year prior to the affected annual payment update.
- If a hospital has a Medicare acceptance date on or after January 1 of the year prior to the affected annual payment update, the hospital must submit a completed participation form no later than 180 days from the date identified as its Medicare acceptance date.

These requirements are also codified at 42 CFR 419.46(a).

In the CY 2018 OPPS/ASC proposed rule (82 FR 33680), beginning with the CY 2020 payment determination, we

⁶⁵ Tuttle GA. Report of the Council on Medical Service, American Medical Association: Access to psychiatric beds and impact on emergency medicine [Internet]. Chicago (IL): AMA; 2008.

⁶⁶ [Data.medicare.gov](https://data.medicare.gov) OP Imaging Measures: <https://data.medicare.gov/Hospital-Compare/Outpatient-Imaging-Efficiency-Hospital/wkfw-kthe>.

⁶⁷ [Data.medicare.gov](https://data.medicare.gov) OP Procedure Volume: <https://data.medicare.gov/Hospital-Compare/Outpatient-Procedures-Volume/xbz4-gvaz>.

⁶⁸ [Data.medicare.gov](https://data.medicare.gov) Timely and Effective Care Measures: <https://data.medicare.gov/Hospital-Compare/Timely-and-Effective-Care-Hospital/yv7e-xc69>.

proposed to: (1) Revise the NOP submission deadline described above, and (2) make corresponding revisions at 42 CFR 419.46(a). Specifically, we proposed to change the NOP submission deadlines such that hospitals are required to submit the NOP any time prior to registering on the QualityNet Web site, rather than by the deadlines specified above. For example, under this proposal, and in accordance with the data submission deadlines described in section XIII.D.1. of this final rule with comment period, below and finalized in the CY 2016 OPPS/ASC final rule with comment period (80 FR 70519 through 70520), a hospital submitting data for Q1 2019 encounters would be required to submit the NOP only prior to registering on the QualityNet Web site, which must be done prior to the data submission deadline of August 1, 2019 (80 FR 70519 through 70520).

We believe this proposed timeline is appropriate, because registration with the QualityNet Web site is necessary to submit data. We believe that extending the NOP submission deadline will better enable hospitals to meet the Hospital OQR Program participation requirements.

As discussed above, we also proposed to make conforming revisions at 42 CFR 419.46(a).

We invited public comment on our proposals as discussed above.

We did not receive any public comment on our proposal to require submission of the NOP any time prior to registering on the QualityNet Web site. However, due to logistical and operational constraints, participants in the Hospital OQR Program must still first login to QualityNet in order to access the NOP form; therefore, we are unable to implement this proposal. As a result, we are not finalizing our proposals to extend the NOP submission deadline and to make conforming revisions at 42 CFR 419.46(a). We intend to revisit this issue in future rulemaking, because we believe that extending the NOP submission deadline will better enable hospitals to meet the Hospital OQR Program participation requirements.

D. Form, Manner, and Timing of Data Submitted for the Hospital OQR Program

1. Hospital OQR Program Annual Payment Determinations

In the CY 2014 OPPS/ASC final rule with comment period (78 FR 75110 through 75111) and the CY 2016 OPPS/ASC final rule with comment period (80 FR 70519 through 70520), we specified our data submission deadlines. We also

codified our submission requirements at 42 CFR 419.46(c).

We refer readers to the CY 2016 OPPS/ASC final rule with comment period (80 FR 70519 through 70520), where we finalized our proposal to shift the quarters upon which the Hospital OQR Program payment determinations are based, beginning with the CY 2018 payment determination. The finalized deadlines for the CY 2020 payment determination and subsequent years are illustrated in the tables below.

CY 2020 PAYMENT DETERMINATION AND SUBSEQUENT YEARS

Patient encounter quarter	Clinical data submission deadline
Q2 2018 (April 1–June 30)	11/1/2018
Q3 2018 (July 1–September 30)	2/1/2019
Q4 2018 (October 1–December 31)	5/1/2019
Q1 2019 (January 1–March 31)	8/1/2019

For the CY 2020 payment determination and subsequent years, we proposed to revise the data submission requirements for hospitals that did not participate in the previous year’s Hospital OQR Program. Specifically, we proposed to revise the first quarter for which newly participating hospitals are required to submit data (see details below). We did not propose any changes to the previously finalized data submission deadlines for each quarter.

In the CY 2013 OPPS/ASC final rule with comment period (77 FR 68482), we finalized the following data submission requirements for hospitals that did not participate in the previous year’s Hospital OQR Program:

- If a hospital has a Medicare acceptance date before January 1 of the year prior to the affected annual payment update, the hospital must submit data beginning with encounters occurring during the first calendar quarter of the year prior to the affected annual payment update;
- If a hospital has a Medicare acceptance date on or after January 1 of the year prior to the affected annual payment update, the hospital must submit data for encounters beginning with the first full quarter following submission of the completed Hospital OQR Program Notice of Participation Form; and
- Hospitals with a Medicare acceptance date before or after January 1 of the year prior to an affected annual payment update must follow data submission deadlines as posted on the QualityNet Web site.

These policies are also codified at 42 CFR 419.46(c)(3). In the CY 2018 OPPS/ASC proposed rule (82 FR 33680), we proposed to: (1) Align the timeline specifying the initial quarter for which hospitals must submit data for all hospitals that did not participate in the previous year’s Hospital OQR Program, rather than specifying different timelines for hospitals with Medicare acceptance dates before versus after January 1 of the year prior to an affected annual payment update; and (2) make conforming revisions at 42 CFR 419.46(c)(3). Specifically, we proposed that any hospital that did not participate in the previous year’s Hospital OQR Program must submit data beginning with encounters occurring during the first calendar quarter of the year prior to the affected annual payment update. We note that hospitals must still follow data submission deadlines corresponding to the quarter for which they are reporting data as posted on the QualityNet Web site.

We invited public comment on our proposals to align the initial data submission timeline for all hospitals that did not participate in the previous year’s Hospital OQR Program and to make conforming revisions at 42 CFR 419.46(c)(3).

We did not receive any public comment on our proposals. Therefore, we are finalizing our proposals to align the initial data submission timeline for all hospitals that did not participate in the previous year’s Hospital OQR Program and to make conforming revisions at 42 CFR 419.46(c)(3), as proposed.

2. Requirements for Chart-Abstracted Measures Where Patient-Level Data Are Submitted Directly to CMS for the CY 2020 Payment Determination and Subsequent Years

We refer readers to the CY 2013 OPPS/ASC final rule with comment period (77 FR 68481 through 68484) for a discussion of the form, manner, and timing for data submission requirements of chart-abstracted measures for the CY 2014 payment determination and subsequent years.

We did not propose any changes to our policies regarding the submission of chart abstracted measure data where patient-level data are submitted directly to CMS.

We note that, in section XIII.B.4.c. of this final rule with comment period, we are finalizing the removal of OP–21: Median Time to Pain Management for Long Bone Fracture, OP–1: Median Time to Fibrinolysis, OP–4: Aspirin at Arrival, and OP–20: Door to Diagnostic Evaluation by a Qualified Medical

Professional for the CY 2020 payment determination and subsequent years. Therefore, the following previously finalized Hospital OQR Program chart-abstracted measures will require patient-level data to be submitted for the CY 2020 payment determination and subsequent years:

- OP–2: Fibrinolytic Therapy Received Within 30 Minutes of ED Arrival (NQF #0288);
- OP–3: Median Time to Transfer to Another Facility for Acute Coronary Intervention (NQF #0290);
- OP–5: Median Time to ECG (NQF #0289);
- OP–18: Median Time from ED Arrival to ED Departure for Discharged ED Patients (NQF #0496);
- OP–23: Head CT Scan Results for Acute Ischemic Stroke or Hemorrhagic Stroke Patients who Received Head CT Scan Interpretation Within 45 Minutes of ED Arrival (NQF #0661).

3. Claims-Based Measure Data Requirements for the CY 2020 Payment Determination and Subsequent Years

We refer readers to the CY 2014 OP/ASC final rule with comment period (78 FR 75111 through 75112) for a discussion of the general claims-based measure data submission requirements for the CY 2015 payment determination and subsequent years. We did not propose any changes to our claims-based measures submission policies for the CY 2020 payment determination and subsequent years.

There are a total of nine claims-based measures for the CY 2020 payment determination and subsequent years:

- OP–8: MRI Lumbar Spine for Low Back Pain (NQF #0514);
- OP–9: Mammography Follow-Up Rates;
- OP–10: Abdomen CT—Use of Contrast Material;
- OP–11: Thorax CT—Use of Contrast Material (NQF #0513);
- OP–13: Cardiac Imaging for Preoperative Risk Assessment for Non-Cardiac, Low Risk Surgery (NQF #0669);
- OP–14: Simultaneous Use of Brain Computed Tomography (CT) and Sinus Computed Tomography (CT);
- OP–32: Facility 7-Day Risk-Standardized Hospital Visit Rate after Outpatient Colonoscopy (NQF #2539);
- OP–35: Admissions and Emergency Department Visits for Patients Receiving Outpatient Chemotherapy; and
- OP–36: Hospital Visits after Hospital Outpatient Surgery (NQF #2687).

4. Data Submission Requirements for the OP–37a–e: Outpatient and Ambulatory Surgery Consumer Assessment of Healthcare Providers and Systems (OAS CAHPS) Survey-Based Measures for the CY 2020 Payment Determination and Subsequent Years

We refer readers to the CY 2017 OP/ASC final rule with comment period (81 FR 79792 through 79794) for a discussion of the previously finalized requirements related to survey administration and vendors for the OAS CAHPS Survey-based measures. However, we refer readers to section XIII.B.5. of this final rule with comment period, where we are finalizing our proposal to delay implementation of the OP–37a–e OAS CAHPS Survey-based measures beginning with the CY 2020 payment determination (2018 data collection) until further action in future rulemaking.

As noted in the CY 2017 OP/ASC final rule with comment period (81 FR 79815), some commenters suggested shortening sections of the survey, such as the “About You” section. We continue to evaluate the utility of individual questions as we collect new data from the survey’s voluntary national implementation, and will consider different options for shortening the OAS CAHPS Survey without the loss of important data in the future. Specifically, we continue to consider the removal of two demographic questions—the “gender” and “age” questions—from the OAS CAHPS Survey in a future update.

Comment: Some commenters supported removal of the gender and age questions from the survey.

Response: We thank the commenters for their support. We will take these comments under consideration as we craft future policies for the OAS CAHPS Survey.

5. Data Submission Requirements for Previously Finalized Measures for Data Submitted via a Web-Based Tool for the CY 2020 Payment Determination and Subsequent Years

We refer readers to the CY 2014 OP/ASC final rule with comment period (78 FR 75112 through 75115) and the CY 2016 OP/ASC final rule with comment period (80 FR 70521) and the CMS QualityNet Web site (<https://www.qualitynet.org/dcs/ContentServer?c=Page&pagename=QnetPublic%2FPage%2FQnetTier2&cid=1205442125082>) for a discussion of the requirements for measure data submitted via the CMS QualityNet Web site for the CY 2017 payment determination and subsequent years. In addition, we refer readers to

the CY 2014 OP/ASC final rule with comment period (78 FR 75097 through 75100) for a discussion of the requirements for measure data (specifically, the Influenza Vaccination Coverage Among Healthcare Personnel measure (NQF #0431)) submitted via the Centers for Disease Control and Prevention (CDC) NHSN Web site. We did not propose any changes to our policies regarding the submission of measure data submitted via a web-based tool.

We note that, in section XIII.B.4.c. of this final rule with comment period, we are finalizing the removal of OP–25: Safe Surgery Checklist Use and OP–26: Hospital Outpatient Volume on Selected Outpatient Surgical Procedures beginning with the CY 2020 payment determination and for subsequent years. Therefore, the following web-based quality measures previously finalized and retained in the Hospital OQR Program will require data to be submitted via a web-based tool (CMS’ QualityNet Web site or CDC’s NHSN Web site) for the CY 2020 payment determination and subsequent years:

- OP–12: The Ability for Providers with HIT to Receive Laboratory Data Electronically Directly into their ONC-Certified EHR System as Discrete Searchable Data (via CMS’ QualityNet Web site);
- OP–17: Tracking Clinical Results between Visits (NQF #0491) (via CMS’ QualityNet Web site);
- OP–22: Left Without Being Seen (NQF #0499) (via CMS’ QualityNet Web site);
- OP–27: Influenza Vaccination Coverage among Healthcare Personnel (via the CDC NHSN Web site) (NQF #0431);
- OP–29: Appropriate Follow-up Interval for Normal Colonoscopy in Average Risk Patients (NQF #0658) (via CMS’ QualityNet Web site);
- OP–30: Colonoscopy Interval for Patients with a History of Adenomatous Polyps—Avoidance of Inappropriate Use (NQF #0659) (via CMS’ QualityNet Web site);
- OP–31: Cataracts: Improvement in Patient’s Visual Function within 90 Days Following Cataract Surgery (NQF #1536) (via CMS’ QualityNet Web site); and
- OP–33: External Beam Radiotherapy (EBRT) for Bone Metastases (NQF #1822) (via CMS’ QualityNet Web site).

6. Population and Sampling Data Requirements for the CY 2020 Payment Determination and Subsequent Years

We refer readers to the CY 2011 OP/ASC final rule with comment

period (75 FR 72100 through 72103) and the CY 2012 OPPTS/ASC final rule with comment period (76 FR 74482 through 74483) for discussions of our population and sampling requirements.

We did not propose any changes to our population and sampling requirements.

7. Hospital OQR Program Validation Requirements for Chart-Abstracted Measure Data Submitted Directly to CMS for the CY 2020 Payment Determination and Subsequent Years

We refer readers to the CY 2013 OPPTS/ASC final rule with comment period (77 FR 68484 through 68487) and the CY 2015 OPPTS/ASC final rule with comment period (79 FR 66964 through 66965) for a discussion of finalized policies regarding our validation requirements. We also refer readers to the CY 2013 OPPTS/ASC final rule with comment period (77 FR 68486 through 68487) for a discussion of finalized policies regarding our medical record validation procedure requirements. We codified these policies at 42 CFR 419.46(e). For the CY 2018 payment determination and subsequent years, validation is based on four quarters of data (validation quarter 1 (January 1–March 31), validation quarter 2 (April 1–June 30), validation quarter 3 (July 1–September 30), and validation quarter 4 (October 1–December 31)) (80 FR 70524).

In the CY 2018 OPPTS/ASC proposed rule (82 FR 33682), we: (1) Clarified the hospital selection process previously finalized for validation; (2) proposed to codify the procedures for targeting hospitals at 42 CFR 419.46(e); and (3) proposed to formalize and update our educational review process. These are discussed in more detail below.

a. Clarification

In the CY 2012 OPPTS/ASC final rule with comment period (76 FR 74485), we finalized a validation selection process in which we select a random sample of 450 hospitals for validation purposes, and select an additional 50 hospitals based on the following specific criteria:

- Hospital fails the validation requirement that applies to the previous year's payment determination; or
- Hospital has an outlier value for a measure based on the data it submits. We defined an "outlier value" for purposes of this targeting as a measure value that appears to deviate markedly from the measure values for other hospitals. Specifically, we would select hospitals for validation if their measure value for a measure is greater than 5 standard deviations from the mean, placing the expected occurrence of such

a value outside of this range at 1 in 1,744,278.

We note that the criteria for targeting 50 outlier hospitals, described above, does not specify whether high or low performing hospitals will be targeted. Therefore, we clarified that hospitals with outlier values indicating specifically poor scores on a measure (for example, a long median time to fibrinolysis) will be targeted for validation. In other words, an "outlier value" is a measure value that is greater than 5 standard deviations from the mean of the measure values for other hospitals, and indicates a poor score.

Comment: One commenter recommended that CMS target hospitals for validation whether their score is greater than five standard deviations above or below the mean, noting that very good scores may especially indicate a need for validation.

Response: The intent of this policy is to target and prevent extreme negative values rather than to identify high performance. This is also evidenced in the first of our two criteria for targeting hospitals for validation—to target hospitals that fail the validation requirement that applies to the previous year's payment determination. We believe it is appropriate to specifically target hospitals with poor performance, rather than those performing well to encourage improved performance among low performing hospitals. We note that only 50 hospitals will be selected for validation through these targeting criteria and in order to address the issue of very low performance, we believe it is appropriate to use these targeting criteria to identify extreme negative measure values. An additional 450 hospitals will be selected at random, and will include both low and high performing hospitals. However, we thank the commenter for their feedback that extremely high performance could indicate a need for validation, and will take this into consideration as we craft future policies.

b. Codification

We note that the previously finalized procedures for targeting hospitals for validation, described in section XIII.D.7.a. of this final rule with comment period, and finalized in the CY 2012 OPPTS/ASC final rule with comment period (76 FR 74485), are not yet codified at 42 CFR 419.46. We proposed to codify the previously finalized procedures for targeting hospitals and well as the procedures regarding outlier hospitals as discussed and clarified above at 42 CFR 419.46(e)(3).

We invited public comment on our proposal to codify our validation targeting criteria as discussed above.

We did not receive any public comments on this proposal. Therefore, we are finalizing our proposal to codify the previously finalized procedures for targeting hospitals and well as the procedures regarding outlier hospitals as discussed and clarified above at 42 CFR 419.46(e)(3), as proposed.

c. Formalization and Modifications to the Educational Review Process for Chart-Abstracted Measures Validation (1) Background

We have described our processes for educational review on the QualityNet Web site.⁶⁹ We note that historically this process functioned as an outreach and education opportunity we provided to hospitals, but based on our experience, stakeholder feedback, and more robust validation requirements, we believed that it would be beneficial to hospitals to propose formalizing and updating this process.

Under the current informal process, if results of an educational review indicate that CDAC or CMS has incorrectly scored a hospital after validation, those results are not changed, but are taken into consideration if the hospital submits a reconsideration request. Stakeholder feedback, provided via email, has indicated that while the educational review process is helpful to participating hospitals, it is limited in its impact, given that a hospital's validation result is not corrected even after an educational review determines that CMS reached an incorrect conclusion regarding a hospital's validation score for a given quarter. Based on this feedback, we proposed to formalize and update the Hospital OQR Program's chart-abstracted measure validation educational review process. Our goal is to reduce the number of reconsideration requests by identifying and correcting errors before the final yearly validation score is derived. By identifying and correcting any mistakes early on, this process could help decrease the burden during the annual reconsideration process, both for hospitals and CMS.

Therefore, in an effort to streamline this process, we proposed to: (1) Formalize this process; and (2) specify that if the results of an educational review indicate that we incorrectly scored a hospital's medical records

⁶⁹ Data Validation—Educational Reviews: Hospitals-Outpatient. Available at: <http://www.qualitynet.org/dcs/ContentServer?c=Page&pagename=QnetPublic/Page/QnetTier3&cid=1228764927987>.

selected for validation, the corrected quarterly validation score would be used to compute the hospital's final validation score at the end of the calendar year. These proposals are discussed in more detail below.

(2) Educational Review Process for the CY 2020 Payment Determination and Subsequent Years

(a) Formalizing the Educational Review Process

As stated above, our informal processes for educational review have been described on the QualityNet Web site.⁷⁰ Under the informal process, hospitals that were selected and received a score for validation may request an educational review in order to better understand the results. Many times, hospitals request an educational review to examine any data element discrepancies, if they believe the score is incorrect, or when they have general questions about their score. Currently, hospitals receive validation results on a quarterly basis⁷¹ and can request informal educational reviews for each quarter. Under this informal process, a hospital has 30 calendar days from the date the validation results are posted on the QualityNet Secure Portal Web site to contact the CMS designated contractor, currently known as the Validation Support Contractor (VSC), to request an educational review.⁷² In response to a request, the VSC obtains and reviews medical records directly from the Clinical Data Abstraction Center (CDAC) and provides feedback. CMS, or its contractor, generally provides educational review results and responses via a secure file transfer to the hospital.⁷³

We proposed to formalize this educational review process, as described above, for the CY 2020 payment determination and subsequent years—in other words, starting for validations of CY 2018 data affecting the CY 2020 payment determination and subsequent years.

We invited public comment on our proposal to formalize the chart-abstracted measures validation educational review process for the CY

2020 payment determination and subsequent years as described above.

We did not receive any public comments on our proposal. Therefore, we are finalizing the proposal to formalize the chart-abstracted measures validation educational review process for the CY 2020 payment determination and subsequent years, as proposed.

(b) Validation Score Review and Correction

We previously finalized, in the CY 2011 OPPTS/ASC final rule with comment period (75 FR 72105 to 72106), that we calculate validation scores under the Hospital OQR Program using the upper bound of a one-tailed confidence interval (CI) with a 75 percent threshold level with a binomial approach. Using that approach, at the end of each calendar year, CMS computes a CI using the results of all four quarters to determine the final validation score.⁷⁴ If the upper bound of this confidence interval is 75 percent or higher, the hospital will pass the Hospital OQR Program validation requirement.⁷⁵ We proposed that if the results of a validation educational review determine that the original quarterly validation score was incorrect, the corrected score would be used to compute the final validation score and CI at the end of each calendar year.

To determine whether a quarterly validation score was correct, in the CY 2018 OPPTS/ASC proposed rule (82 FR 33683), we proposed to use a similar process as one previously finalized for reconsideration requests. Specifically, we proposed that during an educational review request, evaluating a validation score would consist of and be limited to reviewing data elements that were labeled as mismatched (between the originally calculated measure score and the measure score calculated in validation) in the original validation results. We would also take into consideration written justifications provided by hospitals in the Educational Review request. For more information about the previously finalized reconsideration request procedures, we refer readers to the CY 2013 OPPTS/ASC final rule with comment period (77 FR 68487 through 68489), the CY 2014 OPPTS/ASC final rule with comment period (78 FR 75118 through 75119), the CY 2016 OPPTS/ASC final rule with comment period (80 FR 70524), and the CY 2017 OPPTS/ASC

final rule with comment period (81 FR 79795).

For the CY 2020 payment determination and subsequent years, we further proposed that if an educational review requested for any of the first 3 quarters of validation yields incorrect CMS validation results for chart-abstracted measures, according to the review process described above, we would use the corrected quarterly score, as recalculated during the educational review process, to compute the final CI at the end of the calendar year.⁷⁶ We note that for the last quarter of validation, because of the need to calculate the confidence interval in a timely manner and the insufficient time available to conduct educational reviews prior to the annual payment update, the validation score review and correction would not be available. Instead, the existing reconsideration process would be used to dispute any unsatisfactory validation result. We refer readers to section XIII.D.9. of this final rule with comment period for a discussion about our reconsideration and appeals process.

The corrected scores would be applicable to the corresponding quarter, for the first 3 quarters of validation, for which a request was submitted. Under this proposal, after evaluating the validation score during the educational review process, if results show that there was indeed an error in the originally calculated score, we would take steps to correct it. However, so as not to dissuade participation in the educational review process, corrected scores identified through the educational review would only be used to recalculate the CI if they indicate that the hospital performed more favorably than previously determined. If the hospital performed less favorably, their score would not be updated to reflect the less favorable score.

We note that under this proposal, the quarterly validation reports issued to hospitals would not be updated to reflect the corrected score due to the burden associated with reissuing corrected reports. However, the corrected score would be communicated to the hospital via secure file format as discussed above.

We invited public comment on our proposal, as discussed above for the CY 2020 payment determination and subsequent years, to use corrected quarterly scores, as recalculated during the educational review process

⁷⁰ Ibid.

⁷¹ QualityNet: Data Validation—Overview. Available at: <https://www.qualitynet.org/dcs/ContentServer?c=Page&pagename=QnetPublic%2FPage%2FQnetTier2&cid=1228758729356>.

⁷² The educational review request form can be found at: <https://www.qualitynet.org/dcs/ContentServer?c=Page&pagename=QnetPublic%2FPage%2FQnetTier3&cid=1228764927987>.

⁷³ Hospital OQR Validation Educational Review Process: Available at: <https://www.qualitynet.org/dcs/ContentServer?c=Page&pagename=QnetPublic%2FPage%2FQnetTier3&cid=1228764927987>.

⁷⁴ QualityNet Data Validation Overview.

Available at: <https://www.qualitynet.org/dcs/ContentServer?c=Page&pagename=QnetPublic%2FPage%2FQnetTier2&cid=1228758729356>.

⁷⁵ Ibid.

⁷⁶ Validation pass-fail status is determined by the confidence interval report. Detail at: <http://www.qualityreportingcenter.com/wp-content/uploads/2017/01/OQR-CY18-Validation-Webinar.508.2.pdf>.

described and finalized in section XIII.D.7.c.(2)(a) of this final rule with comment period above, to compute the final confidence interval for the first 3 quarters of validation.

Comment: Several commenters supported the proposed changes to use the educational review process to correct validation scores, noting that the policy will increase efficiency and help hospitals understand their annual validation score. One commenter recommended that CMS accept educational review requests from facilities that have a passing validation score, given that there could be errors that result in a mistakenly low, though still passing, score.

Response: We thank the commenters for their support and note that under the formalized process we are finalizing, hospitals may request an educational review to examine any data element discrepancies, if they believe the score is incorrect, or when they have general questions about their score (82 FR 33682). Under this process, hospitals receive validation results on a quarterly basis and can request informal educational reviews for each quarter. A hospital has 30 calendar days from the date the validation results are posted on the QualityNet Secure Portal Web site to contact the CMS designated contractor, currently known as the Validation Support Contractor (VSC), to request an educational review. To be clear, educational review requests are not limited to hospitals that fail validation; any hospital that receives validation results (pass or fail) may request a validation educational review.

After consideration of the public comments received, we are finalizing our proposal to use corrected quarterly scores, as recalculated during the educational review process described in section XIII.D.7.c.(2)(a) of this final rule with comment period above, to compute the final confidence interval for the first 3 quarters of validation for the CY 2020 payment determination and subsequent years, as proposed.

8. Extraordinary Circumstances Exception Process for the CY 2020 Payment Determination and Subsequent Years

We refer readers to the CY 2013 OPPS/ASC final rule with comment period (77 FR 68489), the CY 2014 OPPS/ASC final rule with comment period (78 FR 75119 through 75120), the CY 2015 OPPS/ASC final rule with comment period (79 FR 66966), the CY 2016 OPPS/ASC final rule with comment period (80 FR 70524), and 42 CFR 419.46(d) for a complete discussion of our extraordinary circumstances

extension or exception process under the Hospital OQR Program.

In the CY 2017 OPPS/ASC final rule with comment period (81 FR 79795), we finalized an update to our extraordinary circumstances exemption (ECE) policy to extend the ECE request deadline for both chart-abstracted and web-based measures from 45 days following an event causing hardship to 90 days following an event causing hardship, effective with ECEs requested on or after January 1, 2017.

We note that many of our quality reporting and value-based purchasing programs share a common process for requesting an exception from program reporting due to an extraordinary circumstance not within a provider's control. The Hospital IQR, Hospital OQR, IPFQR, ASCQR, and PCHQR Programs, as well as the Hospital Acquired Condition Reduction Program and the Hospital Readmissions Reduction Program, share similar processes for ECE requests. We refer readers to policies for the Hospital IQR Program (76 FR 51651 through 51652, 78 FR 50836 through 50837, 79 FR 50277, 81 FR 57181 through 57182, and 42 CFR 412.140(c)(2)), the IPFQR Program (77 FR 53659 through 53660 and 79 FR 45978), the ASCQR Program (77 FR 53642 through 53643 and 78 FR 75140 through 75141), the PCHQR Program (78 FR 50848), the HAC Reduction Program (80 FR 49579 through 49581), and the Hospital Readmissions Reduction Program (80 FR 49542 through 49543) for program specific information about extraordinary circumstances exceptions requests. As noted below, some of these policies were updated in the FY 2018 IPPS/LTCH PPS final rule.

In reviewing the policies for these programs, we recognized that there are five areas in which these programs have variances regarding ECE requests. These are: (1) Allowing the facilities or hospitals to submit a form signed by the facility's or hospital's CEO versus CEO or designated personnel; (2) requiring the form be submitted within 30 days following the date that the extraordinary circumstance occurred versus within 90 days following the date the extraordinary circumstance occurred; (3) inconsistency regarding specification of a timeline for us to provide our formal response notifying the facility or hospital of our decision; (4) inconsistency regarding specification of our authority to grant ECEs due to CMS data system issues; and (5) referring to the program as "extraordinary extensions/exemptions" versus as "extraordinary circumstances exceptions." We believe addressing

these five areas, as appropriate, can improve administrative efficiencies for affected facilities or hospitals.

We note that, in the FY 2018 IPPS/LTCH PPS final rule, we examined our policies in these areas for the Hospital Readmissions Reduction Program, the HAC Reduction Program, the Hospital IQR Program, the PCHQR Program and the IPFQR Program (82 FR 38240, 38277, 38410, 38425 and 38473 through 38474, respectively) and finalized proposals to address differences in these areas for those programs. In section XIV.D.6. of this final rule with comment period, we are also finalizing revisions to our ECE policies for the ASCQR Program.

With the exception of the specification of a timeline for us to provide our formal response and the terminology used to describe these processes (items 3 and 5 above), the Hospital OQR Program is aligned with the existing and proposed policies for the other quality reporting programs discussed above. As a result, we proposed to rename the process as the extraordinary circumstances exceptions (ECE) policy and make conforming changes to 42 CFR 419.46(d).

a. ECE Policy Nomenclature

We have observed that while all quality programs listed above have developed similar policies to provide exceptions from program requirements to facilities that have experienced extraordinary circumstances, such as natural disasters, these programs refer to these policies using inconsistent terminology. Some programs refer to these policies as "extraordinary circumstances extensions/exemptions" while others refer to the set of policies as "extraordinary circumstances exceptions." Several programs (specifically, the Hospital VBP Program, HAC Reduction Program, and the Hospital Readmissions Reduction Program) are not able to grant extensions to required data reporting timelines due to their reliance on data external to their program and, thus, the term, "extraordinary circumstances extensions/exemptions" is not applicable to all programs. However, all of the described programs are able to offer exceptions from their reporting requirements.

As stated above, in order to align this policy across CMS quality programs, we proposed to: (1) Change the name of this policy from "extraordinary circumstances extensions or exemptions" to "extraordinary circumstances exceptions" for the Hospital OQR Program, beginning January 1, 2018; and (2) revise 42 CFR

419.46(d) of our regulations to reflect this change. We note that changing the terminology for this policy does not change the availability for a hospital to request an extension under the Hospital OQR Program.

We invited public comment on these proposals as discussed above.

Comment: One commenter supported the proposed alignment of the ECE process across quality reporting programs.

Response: We appreciate the commenter's support.

After consideration of the public comment we received, we are finalizing the proposal to rename the process as the extraordinary circumstances exceptions (ECE) policy and make conforming changes to 42 CFR 419.46(d), as proposed.

b. Timeline for CMS Response to ECE Requests

We also note that we believe it is important for facilities to receive timely feedback regarding the status of ECE requests. We strive to complete our review of each ECE request as quickly as possible. However, we recognize that the number of requests we receive, and the complexity of the information provided impacts the actual timeframe to make ECE determinations. To improve transparency of our process, we believe it is appropriate to specify that we will strive to complete our review of each request within 90 days of receipt.

9. Hospital OQR Program Reconsideration and Appeals Procedures for the CY 2020 Payment Determination and Subsequent Years

We refer readers to the CY 2013 OPPS/ASC final rule with comment period (77 FR 68487 through 68489), the CY 2014 OPPS/ASC final rule with comment period (78 FR 75118 through 75119), the CY 2016 OPPS/ASC final rule with comment period (80 FR 70524), and the CY 2017 OPPS/ASC final rule with comment period (81 FR 79795) for a discussion of our reconsideration and appeals procedures. We codified the process by which participating hospitals may submit requests for reconsideration at 42 CFR 419.46(f). We also codified language at § 419.46(f)(3) regarding appeals with the Provider Reimbursement Review Board.

We did not propose any changes to our reconsideration and appeals procedure.

E. Payment Reduction for Hospitals That Fail To Meet the Hospital OQR Program Requirements for the CY 2018 Payment Determination

1. Background

Section 1833(t)(17) of the Act, which applies to subsection (d) hospitals (as defined under section 1886(d)(1)(B) of the Act), states that hospitals that fail to report data required to be submitted on measures selected by the Secretary, in the form and manner, and at a time, specified by the Secretary will incur a 2.0 percentage point reduction to their Outpatient Department (OPD) fee schedule increase factor; that is, the annual payment update factor. Section 1833(t)(17)(A)(ii) of the Act specifies that any reduction applies only to the payment year involved and will not be taken into account in computing the applicable OPD fee schedule increase factor for a subsequent year.

The application of a reduced OPD fee schedule increase factor results in reduced national unadjusted payment rates that apply to certain outpatient items and services provided by hospitals that are required to report outpatient quality data in order to receive the full payment update factor and that fail to meet the Hospital OQR Program requirements. Hospitals that meet the reporting requirements receive the full OPPS payment update without the reduction. For a more detailed discussion of how this payment reduction was initially implemented, we refer readers to the CY 2009 OPPS/ASC final rule with comment period (73 FR 68769 through 68772).

The national unadjusted payment rates for many services paid under the OPPS equal the product of the OPPS conversion factor and the scaled relative payment weight for the APC to which the service is assigned. The OPPS conversion factor, which is updated annually by the OPD fee schedule increase factor, is used to calculate the OPPS payment rate for services with the following status indicators (listed in Addendum B to the final rule, which is available via the Internet on the CMS Web site): “J1”, “J2”, “P”, “Q1”, “Q2”, “Q3”, “R”, “S”, “T”, “V”, or “U”. In the CY 2017 OPPS/ASC final rule with comment period (81 FR 79796), we clarified that the reporting ratio does not apply to codes with status indicator “Q4” because services and procedures coded with status indicator “Q4” are either packaged or paid through the Clinical Laboratory Fee Schedule and are never paid separately through the OPPS. Payment for all services assigned to these status indicators will be subject to the reduction of the national

unadjusted payment rates for hospitals that fail to meet Hospital OQR Program requirements, with the exception of services assigned to New Technology APCs with assigned status indicator “S” or “T”. We refer readers to the CY 2009 OPPS/ASC final rule with comment period (73 FR 68770 through 68771) for a discussion of this policy.

The OPD fee schedule increase factor is an input into the OPPS conversion factor, which is used to calculate OPPS payment rates. To reduce the OPD fee schedule increase factor for hospitals that fail to meet reporting requirements, we calculate two conversion factors—a full market basket conversion factor (that is, the full conversion factor), and a reduced market basket conversion factor (that is, the reduced conversion factor). We then calculate a reduction ratio by dividing the reduced conversion factor by the full conversion factor. We refer to this reduction ratio as the “reporting ratio” to indicate that it applies to payment for hospitals that fail to meet their reporting requirements. Applying this reporting ratio to the OPPS payment amounts results in reduced national unadjusted payment rates that are mathematically equivalent to the reduced national unadjusted payment rates that would result if we multiplied the scaled OPPS relative payment weights by the reduced conversion factor. For example, to determine the reduced national unadjusted payment rates that applied to hospitals that failed to meet their quality reporting requirements for the CY 2010 OPPS, we multiplied the final full national unadjusted payment rate found in Addendum B of the CY 2010 OPPS/ASC final rule with comment period by the CY 2010 OPPS final reporting ratio of 0.980 (74 FR 60642).

In the CY 2009 OPPS/ASC final rule with comment period (73 FR 68771 through 68772), we established a policy that the Medicare beneficiary's minimum unadjusted copayment and national unadjusted copayment for a service to which a reduced national unadjusted payment rate applies would each equal the product of the reporting ratio and the national unadjusted copayment or the minimum unadjusted copayment, as applicable, for the service. Under this policy, we apply the reporting ratio to both the minimum unadjusted copayment and national unadjusted copayment for services provided by hospitals that receive the payment reduction for failure to meet the Hospital OQR Program reporting requirements. This application of the reporting ratio to the national unadjusted and minimum unadjusted copayments is calculated according to

§ 419.41 of our regulations, prior to any adjustment for a hospital's failure to meet the quality reporting standards according to § 419.43(h). Beneficiaries and secondary payers thereby share in the reduction of payments to these hospitals.

In the CY 2009 OPPS/ASC final rule with comment period (73 FR 68772), we established the policy that all other applicable adjustments to the OPPS national unadjusted payment rates apply when the OPD fee schedule increase factor is reduced for hospitals that fail to meet the requirements of the Hospital OQR Program. For example, the following standard adjustments apply to the reduced national unadjusted payment rates: the wage index adjustment; the multiple procedure adjustment; the interrupted procedure adjustment; the rural sole community hospital adjustment; and the adjustment for devices furnished with full or partial credit or without cost. Similarly, OPSS outlier payments made for high cost and complex procedures will continue to be made when outlier criteria are met. For hospitals that fail to meet the quality data reporting requirements, the hospitals' costs are compared to the reduced payments for purposes of outlier eligibility and payment calculation. We established this policy in the OPSS beginning in the CY 2010 OPSS/ASC final rule with comment period (74 FR 60642). For a complete discussion of the OPSS outlier calculation and eligibility criteria, we refer readers to section II.G. of this final rule with comment period.

2. Reporting Ratio Application and Associated Adjustment Policy for CY 2018

In the CY 2018 OPSS/ASC proposed rule (82 FR 33684 through 33685), we proposed to continue our established policy of applying the reduction of the OPD fee schedule increase factor through the use of a reporting ratio for those hospitals that fail to meet the Hospital OQR Program requirements for the full CY 2018 annual payment update factor. For the CY 2018 OPSS, the proposed reporting ratio was 0.980, calculated by dividing the proposed reduced conversion factor of 74.953 by the proposed full conversion factor of 76.483. We proposed to continue to apply the reporting ratio to all services calculated using the OPSS conversion factor. For the CY 2018 OPSS, we proposed to apply the reporting ratio, when applicable, to all HCPCS codes to which we have proposed status indicator assignments of "J1", "J2", "P", "Q1", "Q2", "Q3", "R", "S", "T", "V", and "U" (other than new technology

APCs to which we have proposed status indicator assignment of "S" and "T"). We proposed to continue to exclude services paid under New Technology APCs. We proposed to continue to apply the reporting ratio to the national unadjusted payment rates and the minimum unadjusted and national unadjusted copayment rates of all applicable services for those hospitals that fail to meet the Hospital OQR Program reporting requirements. We also proposed to continue to apply all other applicable standard adjustments to the OPSS national unadjusted payment rates for hospitals that fail to meet the requirements of the Hospital OQR Program. Similarly, we proposed to continue to calculate OPSS outlier eligibility and outlier payment based on the reduced payment rates for those hospitals that fail to meet the reporting requirements.

We invited public comments on these proposals but no comments were received. For the CY 2018 OPSS, the final reporting ratio is 0.980, calculated by dividing the final reduced conversion factor of 77.064 by the final full conversion factor of 78.636. We are finalizing the rest of our proposal without modification.

XIV. Requirements for the Ambulatory Surgical Center Quality Reporting (ASCQR) Program

A. Background

1. Overview

We refer readers to section XIII.A.1. of this final rule with comment period for a general overview of our quality reporting programs.

2. Statutory History of the ASCQR Program

We refer readers to section XIV.K.1. of the CY 2012 OPSS/ASC final rule with comment period (76 FR 74492 through 74494) for a detailed discussion of the statutory history of the ASCQR Program.

3. Regulatory History of the ASCQR Program

We seek to promote higher quality and more efficient health care for beneficiaries. This effort is supported by the adoption of widely-agreed-upon quality measures. We have worked with relevant stakeholders to define measures of quality in almost every healthcare setting and currently measure some aspect of care for almost all Medicare beneficiaries. These measures assess structural aspects of care, clinical processes, patient experiences with care, and outcomes. We have implemented quality measure reporting programs for multiple settings of care.

To measure the quality of ASC services, we implemented the ASCQR Program. We refer readers to section XV.A.3. of the CY 2014 OPSS/ASC final rule with comment period (78 FR 75122), section XIV. of the CY 2015 OPSS/ASC final rule with comment period (79 FR 66966 through 66987), section XIV. of the CY 2016 OPSS/ASC final rule with comment period (80 FR 70526 through 70538) and section XIV. of the CY 2017 OPSS/ASC final rule with comment period (81 FR 79797 through 79826) for an overview of the regulatory history of the ASCQR Program.

B. ASCQR Program Quality Measures

1. Considerations in the Selection of ASCQR Program Quality Measures

We refer readers to the CY 2013 OPSS/ASC final rule with comment period (77 FR 68493 through 68494) for a detailed discussion of the priorities we consider for ASCQR Program quality measure selection. We did not propose any changes to this policy.

2. Accounting for Social Risk Factors in the ASCQR Program

We understand that social risk factors such as income, education, race and ethnicity, employment, disability, community resources, and social support (certain factors of which are also sometimes referred to as socioeconomic status (SES) factors or socio-demographic status (SDS) factors) play a major role in health. One of our core objectives is to improve beneficiary outcomes including reducing health disparities, and we want to ensure that all beneficiaries, including those with social risk factors, receive high quality care. In addition, we seek to ensure that the quality of care furnished by providers and suppliers is assessed as fairly as possible under our programs while ensuring that beneficiaries have adequate access to excellent care.

We have been reviewing reports prepared by the Office of the Assistant Secretary for Planning and Evaluation (ASPE)⁷⁷ and the National Academies of Sciences, Engineering, and Medicine on the issue of measuring and accounting for social risk factors in CMS' value-based purchasing and quality reporting programs, and considering options on how to address the issue in these programs. On December 21, 2016, ASPE submitted a

⁷⁷ Office of the Assistant Secretary for Planning and Evaluation. 2016. Report to Congress: Social Risk Factors and Performance Under Medicare's Value-Based Purchasing Programs. 21 Dec. 2016. Available at: <https://aspe.hhs.gov/pdf-report/report-congress-social-risk-factors-and-performance-under-medicare-value-based-purchasing-programs>.

Report to Congress on a study it was required to conduct under section 2(d) of the Improving Medicare Post-Acute Care Transformation (IMPACT) Act of 2014. The study analyzed the effects of certain social risk factors of Medicare beneficiaries on quality measures and measures of resource use used in one or more of nine Medicare value-based purchasing programs.⁷⁸ The report also included considerations for strategies to account for social risk factors in these programs. In a January 10, 2017 report released by the National Academies of Sciences, Engineering, and Medicine, the body provided various potential methods for accounting for social risk factors, including stratified public reporting.⁷⁹

As noted in the FY 2017 IPPS/LTCH PPS final rule, the NQF has undertaken a 2-year trial period in which new measures, measures undergoing maintenance review, and measures endorsed with the condition that they enter the trial period can be assessed to determine whether risk adjustment for selected social risk factors is appropriate for these measures. This trial entailed temporarily allowing inclusion of social risk factors in the risk-adjustment approach for some performance measures. Since publication of the proposed rule, we have learned that the National Quality Forum (NQF) has concluded their initial trial on risk adjustment for quality measures.⁸⁰ Based on the findings from the initial trial, we have been informed that the NQF intends to continue its work to evaluate the impact of social risk factor adjustment on intermediate outcome and outcome measures for an additional three years. We understand that the extension of this work will allow NQF to determine further how to effectively account for social risk factors through risk adjustment and other strategies in quality measurement.

As we continue to consider the analyses and recommendations from these reports and the results of the NQF trial on risk adjustment for quality measures, we are continuing to work with stakeholders in this process. As we have previously communicated, we are

concerned about holding providers to different standards for the outcomes of their patients with social risk factors because we do not want to mask potential disparities or minimize incentives to improve the outcomes for disadvantaged populations. Keeping this concern in mind, in the proposed rule we sought public comment on whether we should account for social risk factors in the ASCQR Program, and if so, what method or combination of methods would be most appropriate for accounting for social risk factors. Examples of methods include: Confidential reporting to providers of measure rates stratified by social risk factors; public reporting of stratified measure rates; and potential risk adjustment of a particular measure as appropriate based on data and evidence.

In addition, we requested public comment on which social risk factors might be most appropriate for reporting stratified measure scores and/or potential risk adjustment of a particular measure. Examples of social risk factors include, but are not limited to, dual eligibility/low-income subsidy, race and ethnicity, and geographic area of residence. We sought comments on which of these factors, including current data sources where this information would be available, could be used alone or in combination, and whether other data should be collected to better capture the effects of social risk. We will take commenters' input into consideration as we continue to assess the appropriateness and feasibility of accounting for social risk factors in the ASCQR Program. We note that any such changes would be proposed through future notice and comment rulemaking.

We look forward to working with stakeholders as we consider the issue of accounting for social risk factors and reducing health disparities in CMS programs. Of note, implementing any of the above methods would be taken into consideration in the context of how this and other CMS programs operate (for example, data submission methods, availability of data, statistical considerations relating to reliability of data calculations, among others), so we also welcome comment on operational considerations. CMS is committed to ensuring that its beneficiaries have access to and receive excellent care, and that the quality of care furnished by providers and suppliers is assessed fairly in CMS programs.

We received extensive comments in response to our request for public comment on whether we should account for social risk factors in the ASCQR Program, and if so, what method or combination of methods

would be most appropriate for accounting for social risk factors.

Comment: Many commenters expressed support for CMS' effort to address social risk factors in the ASCQR Program, noting that social risk factors are powerful drivers of care provision and clinical outcomes.

One commenter recommended that CMS apply risk adjustment by stratifying providers into groups by proportion of at-risk patients, noting that this approach does not require measure-level research. Another commenter recommended that CMS determine whether or not social risk factor disparities exist in the ASC setting prior to committing to adjusting any measures for these factors, and that CMS rely on data elements existing in CMS databases. A few commenters recommended that CMS provide ASCs with both risk-adjusted and unadjusted data in order to allow for transparency.

One commenter noted that better data sources for socioeconomic status are needed, including patient-level and community-level data sources, and that measure-specific risk adjustment methodologies are appropriate. Finally, one commenter noted that risk adjustment should balance fair measurement with ensuring that disparities are not masked.

Response: We appreciate all the comments and interest in this topic. As we have previously stated regarding risk adjustment of publicly reported data for these factors, we are concerned about holding providers and suppliers to different standards for the outcomes of their patients with social risk factors, because we do not want to mask potential disparities or minimize incentives to improve outcomes for disadvantaged populations. With respect to public reporting, while we agree with commenters and believe it is important to avoid a scenario in which underlying disparities are masked rather than addressed, we also agree with commenters who support the public reporting of risk-adjusted data. We appreciate the need to balance risk adjustment as a strategy to account for social risk factors with the concern that risk adjustment could minimize incentives and reduce efforts to address disparities for patients with social risk factors. We believe that the path forward should incentivize improvements in health outcomes for disadvantaged populations while ensuring that beneficiaries have access to excellent care. We will consider all suggestions as we continue to assess the issue of accounting for social risk factors within individual measures and the program as a whole, and will actively perform

⁷⁸ Ibid.

⁷⁹ National Academies of Sciences, Engineering, and Medicine. 2017. Accounting for social risk factors in Medicare payment. Washington, DC: The National Academies Press.

⁸⁰ NQF. NQF Initiative to Determine the Impact of Adjusting Healthcare Performance Measures for Social Risk Factors Highlights Successes, Opportunities. Available at: https://www.qualityforum.org/News_And_Resources/Press_Releases/2017/NQF_Initiative_to_Determine_the_Impact_of_Adjusting_Healthcare_Performance_Measures_for_Social_Risk_Factors_Highlights_Successes,_Opportunities.aspx.

additional research and monitor for trends to prevent unintended consequences. We intend to conduct further analyses on the impact of different approaches to accounting for social risk factors in quality programs.

Comment: Many commenters recommended several social variables and comorbidities, including: Body mass index; race; smoking status; age; gender; back pain; pain in non-operative lower extremity joint; health risk status; mental health factors; chronic narcotic use; socioeconomic status; and pre-procedure ambulatory status.

Commenters also recommended that future risk variables could include literacy, marital status, live-in home support, family support structure, and home health resources. One commenter recommended that the following variables not be used: American Society of Anesthesiologists score; range of motion; and mode of patient-reported outcome measure collection. One commenter expressed concern with the use of dual eligible status as a factor, noting that it does not identify or address the specific factors that result in higher spending and/or poorer health outcomes.

Response: We appreciate commenters' recommendations regarding specific social risk factor variables and will consider them as we continue exploring options for accounting for social risk factors in the ASCQR Program.

Comment: Several commenters recommended that CMS consider potential administrative complexities as well as patient impact when implementing risk-adjustment methodologies.

Response: As we consider the feasibility of collecting patient-level data and the impact of strategies to account for social risk factors through further analysis, we will also continue to evaluate the reporting burden on patients and providers. We reiterate that we are committed to ensuring that CMS beneficiaries have access to and receive excellent care and that the quality of

care furnished by providers and suppliers is assessed fairly in CMS programs.

Comment: Some commenters recommended that CMS consider recommendations from NQF, ASPE, and the Agency for Healthcare Research and Quality (AHRQ).

Response: Any proposals would be made in future rulemaking after further research and continued stakeholder engagement including from NQF. In addition, we look forward to working with all stakeholders, including NQF, ASPE, the National Academy of Medicine, and AHRQ.

We thank all of the commenters for their input and will consider all suggestions as we continue to assess the issue of accounting for social risk factors within individual measures, the ASCQR Program as a whole, and across CMS quality programs.

3. Policies for Retention and Removal of Quality Measures From the ASCQR Program

a. Retention of Previously Adopted ASCQR Program Measures

We previously adopted a policy that quality measures adopted for an ASCQR Program measure set for a previous payment determination year be retained in the ASCQR Program for measure sets for subsequent payment determination years, except when they are removed, suspended, or replaced as indicated (76 FR 74494 and 74504; 77 FR 68494 through 68495; 78 FR 75122; and 79 FR 66967 through 66969). We did not propose any changes to this policy.

b. Measure Removal

We refer readers to the CY 2015 OPPS/ASC final rule with comment period (79 FR 66967 through 66969) and 42 CFR 416.320 for a detailed discussion of the process for removing adopted measures from the ASCQR Program. We did not propose any changes to this process.

In the CY 2018 OPPS/ASC proposed rule (82 FR 33687), we proposed to

remove a total of three measures for the CY 2019 payment determination and subsequent years: (1) ASC-5: Prophylactic Intravenous (IV) Antibiotic Timing; (2) ASC-6: Safe Surgery Checklist Use; and (3) ASC-7: ASC Facility Volume Data on Selected Procedures. These proposals are discussed in more detail below.

(1) Removal of ASC-5: Prophylactic Intravenous (IV) Antibiotic Timing Beginning With the CY 2019 Payment Determination

We refer readers to the CY 2012 OPPS/ASC final rule with comment period (76 FR 74499 through 74501) where we adopted ASC-5: Prophylactic Intravenous (IV) Antibiotic Timing measure (formerly NQF #0264) beginning with the CY 2014 payment determination and finalized the measure's data collection and data submission timelines (76 FR 74515 through 74516). This measure assesses whether intravenous antibiotics given for prevention of surgical site infection were administered on time per clinical guidelines.

Based on our analysis of ASCQR Program measure data for CY 2014 through 2016 encounters, ASC performance on this measure is so high and unvarying that meaningful distinctions in improvement cannot be made; as a result, we believe this measure meets removal criterion number one under the ASCQR Program's finalized measure removal criteria. The ASCQR Program previously finalized two criteria for determining when a measure is "topped out:" (1) When there is statistically indistinguishable performance at the 75th and 90th percentiles of national facility performance; and (2) when the measure's truncated coefficient of variation (COV) is less than or equal to 0.10 (79 FR 66968 through 66969). These analyses are captured in the table below.

ASC-5—PROPHYLACTIC INTRAVENOUS (IV) ANTIBIOTIC TIMING TOPPED OUT ANALYSIS

Encounters	Number of ASCs	75th percentile	90th percentile	Truncated COV
CY 2014	2,206	100.000	100.000	0.02633
CY 2015	2,196	100.000	100.000	0.03289
CY 2016	2,158	100.000	100.000	0.02619

As displayed in the table above, there is no distinguishable difference in ASC performance between the 75th and 90th percentiles under the ASC-5: Prophylactic Intravenous (IV) Antibiotic

Timing measure, and the truncated coefficient of variation has been below 0.10 since 2014. Therefore, the ASC-5: Prophylactic Intravenous (IV) Antibiotic Timing measure meets both "topped

out" measure criteria for the ASCQR Program.

Furthermore, we note that the NQF endorsement was removed on February 13, 2015; in its discussion of whether to

continue endorsement for the ASC-5: Prophylactic Intravenous (IV) Antibiotic Timing measure, the Surgery Standing Committee also noted that ASC performance on this measure was very high, with 99 percent of facilities meeting the timely antibiotic administration threshold in CY 2013.⁸¹ We believe that removal of this measure from the ASCQR Program measure set is appropriate, as there is little room for improvement and removal would alleviate maintenance costs and administrative burden to ASCs. As such, we believe the burdens outweigh the benefits of keeping the measure in the ASCQR Program. Therefore, in the CY 2018 OPPTS/ASC proposed rule (82 FR 33687), we proposed to remove the ASC-5: Prophylactic Intravenous (IV) Antibiotic Timing measure for the CY 2019 payment determination and subsequent years. Furthermore, we note that a similar measure was removed from the Hospital OQR Program in the CY 2015 OPPTS/ASC final rule with comment period (79 FR 66942 through 66944) due to topped-out status.

We invited public comment on our proposal to remove the ASC-5: Prophylactic Intravenous (IV) Antibiotic Timing measure for the CY 2019 payment determination and subsequent years as discussed above.

Comment: Many commenters supported the proposal to remove the ASC-5: Prophylactic Intravenous (IV) Antibiotic Timing measure, and agreed with CMS' rationale that the measure does not add value and that removal of

this measure reduces administrative burden.

Response: We thank the commenters for their support.

Comment: One commenter opposed the proposed removal of ASC-5: Prophylactic Intravenous (IV) Antibiotic Timing measure. The commenter noted that the measure provides value and recommended that the measure be retained in the ASCQR Program despite having "topped-out" status.

Response: We understand commenter's concern with removing the ASC-5: Prophylactic Intravenous (IV) Antibiotic Timing measure, and agree that the data captured under the ASC-5 measure could be useful in selecting an ASC at which to receive care. However, we believe that removal of this measure from the ASCQR Program measure set is appropriate as there is little room for improvement, as shown by our data in the table above, and removal would alleviate maintenance costs and administrative burden to ASCs. Overall, we believe the burdens outweigh the benefits of keeping the measure in the ASCQR Program, as stated in our proposal. In response to concerns that the measure adds value, we note that Prophylactic Intravenous (IV) Antibiotic Timing measure data are collected and publicly reported by the ASC Quality Collaboration.

After consideration of the public comments we received, we are finalizing the proposal to remove the ASC-5: Prophylactic Intravenous (IV) Antibiotic Timing measure for the CY

2019 payment determination and subsequent years, as proposed.

(2) Removal of ASC-6: Safe Surgery Checklist Use Beginning With the CY 2019 Payment Determination

We refer readers to the CY 2012 OPPTS/ASC final rule with comment period (76 FR 74505 through 74507 and 74509), where we adopted the ASC-6: Safe Surgery Checklist Use measure beginning with the CY 2015 payment determination. This structural measure of facility process assesses whether an ASC employed a safe surgery checklist that covered each of the three critical perioperative periods (prior to administering anesthesia, prior to skin incision, and prior to patient leaving the operating room) for the entire data collection period.

Based on our analysis of ASCQR Program measure data for CYs 2014 to 2016 encounters, the ASC-6: Safe Surgery Checklist Use measure meets our first criterion for measure removal that measure performance is so high and unvarying that meaningful distinctions and improvements in performance can no longer be made. The ASCQR Program previously finalized two criteria for determining when a measure is "topped out:" (1) When there is statistically indistinguishable performance at the 75th and 90th percentiles of national facility performance; and (2) when the measure's truncated coefficient of variation is less than or equal to 0.10 (79 FR 66968 through 66969). These analyses are captured in the table below.

ASC-6—SAFE SURGERY CHECKLIST USE PERFORMANCE ANALYSIS

Encounters	Number of ASCs	Rate	75th percentile	90th percentile	Truncated COV
CY 2012	4,356	0.989	100.000	100.000	0.106
CY 2013 ⁸²	(*)	(*)	(*)	(*)	(*)
CY 2014	4,328	0.997	100.000	100.000	0.050
CY 2015	4,305	0.998	100.000	100.000	0.043

Based on the analysis above the national rate of "Yes" response for the ASC-6: Safe Surgery Checklist Use measure is nearly 1.0, or 100 percent, nationwide, and has remained at this level for the last 2 years. In addition, there is no distinguishable difference in ASC performance between the 75th and 90th percentiles under measure, and the truncated coefficient of variation has been below 0.10 since 2014. We believe

that removal of this measure from the ASCQR Program measure set is appropriate, as there is little room for improvement. In addition, removal of this measure would alleviate the maintenance costs and administrative burden to ASCs associated with retaining the measure. As such, we believe the burdens of this measure outweigh the benefits of keeping the measure in the Program.

Therefore, in the CY 2018 OPPTS/ASC proposed rule (82 FR 33688), we proposed to remove ASC-6: Safe Surgery Checklist Use from the ASCQR Program measure set beginning with the CY 2019 payment determination. We also refer readers to section XIII.B.4.c.(6) of this final rule with comment period, where the Hospital OQR Program is removing a similar measure.

⁸¹ NQF. "NQF-Endorsed Measures for Surgical Procedures." Technical Report. Available at: http://www.qualityforum.org/Publications/2015/02/NQF-Endorsed_Measures_for_Surgical_Procedures.aspx.

⁸² We note that no performance data was collected for CY 2013 events for the web-based

measures; therefore, we lack performance data for the ASC-6 measure for this year of the ASCQR Program. Available at: <https://www.qualitynet.org/dcs/BlobServer?blobkey=id&blobnocache=true&blobwhere=1228890196351&blobheader=multipart%2Foctet-stream&blobheadername1=>

Content-Disposition&blobheadername1=attachment%3Bfilename%3DASC_wbnr_prsntn_121813_1ppg.pdf&blobcol=urldata&blobtable=MungoBlobs.

We invited public comment on our proposal to remove the ASC-6: Safe Surgery Checklist Use measure for the CY 2019 payment determination and subsequent years as discussed above.

Comment: Many commenters supported the proposal to remove the ASC-6: Safe Surgery Checklist Use measure, and agreed with our rationale that the measure does not add value and that removal would reduce administrative burden.

Response: We thank the commenters for their support.

Comment: A few commenters opposed the proposed removal of the ASC-6: Safe Surgery Checklist Use measure, noting that this measure provides value and recommending retention of this measure in the ASCQR Program. One commenter expressed concern that high performance on the measure does not indicate whether perioperative communication among team members is effective, and recommended that CMS retain the measure until there is further evidence of whether the use of a safe surgery checklist is supporting effective perioperative communication.

Response: While we agree the ASC-6: Safe Surgery Checklist Use measure captures data patients may find useful in comparing ASCs while selecting an ASC for their care, we believe that removal of this measure from the ASCQR Program measure set is appropriate as there is little room for improvement, as shown by our data in the table above. In addition, removal of this measure would alleviate the maintenance costs and administrative burden to ASCs. Therefore, overall, we believe the burden outweighs the benefits of keeping the measure in the ASCQR Program, as stated in our proposal. We also note that high performance on the ASC-6: Safe Surgery Checklist Use measure does not indicate whether perioperative communication among team members is effective; this measure is not specified to assess the effectiveness of a team's communication, only whether a safe surgery checklist is used at the ASC. Therefore, we do not believe continuing to collect—or, conversely, ceasing to collect—data under this measure will assess or affect the effectiveness of perioperative communication within ASCs.

After consideration of the public comments we received, we are finalizing the proposal to remove ASC-6: Safe Surgery Checklist Use from the ASCQR Program measure set beginning with the CY 2019 payment determination, as proposed. We also refer readers to section XIII.B.4.c.(6) of

this final rule where we are finalizing removal of a similar measure from the Hospital OQR Program.

(3) Removal of ASC-7: ASC Facility Volume Data on Selected Procedures Beginning With the CY 2019 Payment Determination

We refer readers to the CY 2012 OPPI/ASC final rule with comment period (76 FR 74507 through 74509), where we adopted the ASC-7: ASC Facility Volume Data on Selected Procedures measure beginning with the CY 2015 payment determination. This structural measure of facility capacity collects surgical procedure volume data on six categories of procedures frequently performed in the ASC setting (76 FR 74507).

We adopted the ASC-7: ASC Facility Volume Data on Selected Procedures measure based on evidence that volume of surgical procedures, particularly of high-risk surgical procedures, is related to better patient outcomes, including decreased medical errors and mortality (76 FR 74507). We further stated our belief that publicly reporting volume data would provide patients with beneficial performance information to use in selecting a care provider. However, over time, we have adopted, and intend to continue to adopt, more measures assessing ASCs' performance on specific procedure types, like ASC-14. As stated below, we believe measures on specific procedure types will provide patients with more valuable ASC performance data. These types of measures are also more strongly associated with desired patient outcomes for the particular topic. For example, in the CY 2017 OPPI/ASC final rule with comment period (81 FR 79801 through 79803), we adopted ASC-14: Unplanned Anterior Vitrectomy, a measure assessing patient outcomes following ophthalmologic procedures, and proposed to adopt a second ophthalmology-specific measure, ASC-16: Toxic Anterior Segment Syndrome, in the CY 2018 proposed rule (82 FR 33689 through 33691). We believe these procedure-type-specific measures provide patients with more valuable ASC performance data than the ASC-7: ASC Facility Volume Data on Selected Procedures measure in selecting an ASC for their care. For this reason, we believe the ASC-7: ASC Facility Volume Data on Selected Procedures measure meets our second criterion for removal from the program; specifically, that there are other measures available that are more strongly associated with desired patient outcomes for the particular topic. In addition, removal of this measure would

alleviate the maintenance costs and administrative burden to ASCs associated with retaining the measure. As such, we believe the burdens of this measure outweigh the benefits of keeping the measure in the ASCQR Program. Therefore, in the CY 2018 OPPI/ASC proposed rule (82 FR 33688), we proposed to remove ASC-7: ASC Facility Volume Data on Selected Procedures from the ASCQR Program beginning with the CY 2019 payment determination. We refer readers to section XIII.B.4.c.(2) of this final rule with comment period where we are removing a similar measure from the Hospital OQR Program.

We invited public comment on our proposal to remove the ASC-7: ASC Facility Volume Data on Selected Procedures measure for the CY 2019 payment determination and subsequent years as discussed above.

Comment: Many commenters supported the proposal to remove the ASC-7: ASC Facility Volume Data on Selected Procedures measure and agreed with CMS' rationale that the measure does not add value and that its removal reduces administrative burden.

Response: We thank the commenters for their support.

Comment: A few commenters opposed the proposal to remove the ASC-7: ASC Facility Volume Data on Selected Procedures measure. One commenter cited concern that removal of this measure will limit the availability of important data that informs comparative research, outcomes research, and that this measure provides immediate consumer value. Moreover, the commenter expressed concern that reducing the data available will interfere with the growing acceptance of ASC-based procedures. Another commenter noted that the measure is not overly burdensome and that it is helpful for strategic planning.

Response: While we believe that continuing to collect and publicly report facility volume data would provide patients with beneficial performance information to use in selecting a care provider, over time, we have adopted, and intend to continue to adopt, more measures assessing ASCs' performance on specific procedure types. In addition, removal of this measure would alleviate the maintenance costs and administrative burden to ASCs associated with retaining the measure. As such, although we recognize the value of the measure for research, strategic planning, and in demonstrating the value of ASC-based procedures, overall we believe the burden of this measure outweighs the benefits of

keeping the measure in the ASCQR Program as stated in our proposal.

After consideration of the public comments we received, we are finalizing our proposal to remove ASC-7: ASC Facility Volume Data on Selected Procedures from the ASCQR Program beginning with the CY 2019 payment determination, as proposed.

4. Delaying Implementation of ASC-15a-e: Outpatient and Ambulatory Surgery Consumer Assessment of Healthcare Providers and Systems (OAS CAHPS) Survey-Based Measures Beginning With the CY 2020 Payment Determination

We refer readers to the CY 2017 OPSS/ASC final rule with comment period where we adopted ASC-15a-e (81 FR 79803 through 79817), and finalized data collection and data submission timelines (81 FR 79822 through 79824). These measures assess patients' experience with care following a procedure or surgery in an ASC by rating patient experience as a means for empowering patients and improving the quality of their care.

In the CY 2018 OPSS/ASC proposed rule (82 FR 33688), we proposed to delay implementation of the Outpatient and Ambulatory Surgery Consumer Assessment of Healthcare Providers and Systems (OAS CAHPS) Survey-based Measures (ASC-15a-e) beginning with the CY 2020 payment determination (CY 2018 data collection) until further action in future rulemaking. Since our adoption of these measures, we have come to believe that we need to collect more operational and implementation data. Specifically, we want to ensure that the survey measures appropriately account for patient response rates, both aggregate and by survey administration method; reaffirm the reliability of national implementation of OAS CAHPS Survey data; and appropriately account for the burden associated with administering the survey in the outpatient setting of care. We note that commenters expressed concern over the burden associated with the survey in the CY 2017 OPSS/ASC final rule with comment period (81 FR 79810). We believe that the voluntary national implementation of the survey, which began in January 2016, would provide valuable information moving forward. We plan to conduct analyses of the national implementation data to undertake any necessary modifications to the survey tool and/or CMS systems. We believe it is important to allow time for any modifications before requiring the survey under the ASCQR Program. However, we continue to believe that these measures address an area of care

that is not adequately addressed in our current measure set and will be useful to assess aspects of care where the patient is the best or only source of information.

Further, we continue to believe these measures will enable objective and meaningful comparisons between ASCs. Therefore, we proposed to delay implementation of ASC-15a-e beginning with the CY 2020 payment determination (CY 2018 data collection) until further action in future rulemaking. We also refer readers to section XIII.B.5. of this final rule with comment period where we are finalizing a similar policy in the Hospital OQR Program.

We invited public comment on our proposal to delay the OAS CAHPS Survey-based measures beginning with the CY 2020 payment determination as discussed above.

Comment: Many commenters supported the proposal to delay implementation of the OAS CAHPS Survey and noted that if the survey could be improved, ASCs would benefit from having their scores available for comparison to hospital outpatient departments. One commenter agreed that an analysis of the national implementation will provide valuable information. Another commenter noted that the high volume of facilities and hospitals participating in the voluntary national implementation indicates that the data collection burden of the survey is low.

Response: We thank the commenters for their support, and agree that an analysis of the national implementation of OAS CAHPS Survey will provide valuable information as we continue to assess the survey. We also acknowledge that comparing scores between ASCs and hospital outpatient departments may be useful to ASCs and that some ASCs may find the survey to have only limited burden. However, as discussed below, in order to be responsive to concerns about vendor costs and to review the results of the national implementation, we are finalizing our proposal to delay implementation of the OAS CAHPS Survey.

Comment: A few commenters opposed the proposal to delay implementation of the OAS CAHPS Survey, noting the importance of patient experience data. One commenter noted that the survey assesses areas of care not yet adequately addressed and that patient experience of care is a priority area. Another commenter noted a belief that the use of surveys about patient experience in health care settings is the best way to examine whether high-

quality, patient-centered care actually takes place.

Response: We agree that patient experience of care data is valuable in assessing the quality of care provided at an ASC and assisting patients in selecting a provider or supplier for their care. However, we seek to ensure the value of this data is appropriately balanced against the implementation and operational burdens imposed to collect and submit these data. As we stated in the proposed rule, we believe delaying implementation of the OAS CAHPS Survey will provide additional time to assess these issues before moving forward.

Comment: A few commenters recommended that the survey be voluntary indefinitely or until implementation issues with the survey are addressed. One commenter recommended that CMS delay implementation of the OAS CAHPS indefinitely and instead increase the number of surveyors that inspect ASCs. Another commenter recommended that CMS adopt the CAHPS surgical care survey as a survey option.

Response: We thank the commenters for their recommendations, and we will take these comments under consideration as we craft future policy. We do not believe that inspectors replace a patient-experience-of-care survey, because inspections and surveys collect different information. Specifically, we believe that patient experience data is an important category of information to collect and would not be captured by surveyors. Further, we believe a patient experience of care survey will provide important information to not just providers, but also patients and the general public. Therefore, we will continue to work towards a successful implementation of a patient experience survey. In addition, we acknowledge the commenter's suggestion that we adopt the surgical CAHPS survey and we will consider this recommendation.

Comment: A few commenters expressed concern about the burden associated with collecting 300 surveys and requested that only 100 surveys be required. Other commenters noted that the survey is unnecessarily long, which could reduce response rates or skew results if only patients with negative feedback respond, and that not all of the questions are relevant. Some commenters noted that the use of a third-party vendor is too costly and could lead to more impersonal contacts with patients than if ASCs surveyed patients directly. Several commenters recommended that vendors should provide electronic or email options for

conducting the OAS CAHPS Survey in order to increase response rates. Other commenters recommended that CMS administer the survey on its Web site. One commenter noted concern that timely results are not provided. A few commenters expressed concern that the CPT codes included in the eligibility criteria for the survey are not always applicable.

Response: While web-based surveys are not available survey modes at present, we are actively investigating these modes as possible options for the future. We are exploring whether hospitals and ASCs receive reliable email addresses from patients and whether there is adequate access to the internet across all types of patients. Ultimately, the purpose of the investigation is to ensure that any future survey administration method does not introduce bias in the survey process and reduces length and burden if at all possible. Although we are investigating other modes of survey administration, we do not expect that CMS will directly

administer the survey; the survey would still be administered through vendors. In addition, we acknowledge commenters concerns that ASCs would not receive immediate feedback from patients that is obtained through the survey. Finally, we acknowledge the concern about the use of CPT codes, including those for procedures that patients may not perceive as surgery. We note that many CPT codes have been excluded from inclusion in the OAS CAHPS, including services like application of a cast or splint, in order to ensure that only patients receiving applicable procedures are surveyed.⁸³ We thank the commenters and will take all comments under consideration as we craft future policy for the OAS CAHPS Survey.

After consideration of the public comments we received, we are finalizing the proposal to delay implementation of the Outpatient and Ambulatory Surgery Consumer Assessment of Healthcare Providers and Systems (OAS CAHPS) Survey-based

Measures (ASC-15a-e) beginning with the CY 2020 payment determination (CY 2018 data collection) until further action in future rulemaking, as proposed. We refer readers to section XIII.B.5. of this final rule with comment where we are also finalizing delay of the OAS CAHPS Survey-based measures in the Hospital OQR Program.

5. ASCQR Program Quality Measures Adopted in Previous Rulemaking

For the CY 2020 payment determination and subsequent years, we have previously finalized the following measure set. We note that this chart still includes the ASC-5, ASC-6, and ASC-7 measures, which are being finalized for removal beginning with the CY 2019 payment determination as discussed above, as well as the ASC-15a-e measures, which are being finalized for delay beginning with the CY 2020 payment determination and until further action as discussed above:

ASCQR PROGRAM MEASURE SET PREVIOUSLY FINALIZED FOR THE CY 2020 PAYMENT DETERMINATION AND SUBSEQUENT YEARS

ASC No.	NQF No.	Measure name
ASC-1	0263	Patient Burn.
ASC-2	0266	Patient Fall.
ASC-3	0267	Wrong Site, Wrong Side, Wrong Patient, Wrong Procedure, Wrong Implant.
ASC-4	0265†	All-Cause Hospital Transfer/Admission.
ASC-5	0264†	Prophylactic Intravenous (IV) Antibiotic Timing.*
ASC-6	None	Safe Surgery Checklist Use.*
ASC-7	None	ASC Facility Volume Data on Selected Procedures.*
ASC-8	0431	Influenza Vaccination Coverage Among Healthcare Personnel.
ASC-9	0658	Endoscopy/Polyp Surveillance: Appropriate Follow-Up Interval for Normal Colonoscopy in Average Risk Patients.
ASC-10	0659	Endoscopy/Polyp Surveillance: Colonoscopy Interval for Patients with a History of Adenomatous Polyps-Avoidance of Inappropriate Use.
ASC-11	1536	Cataracts: Improvement in Patient's Visual Function within 90 Days Following Cataract Surgery.**
ASC-12	2539	Facility 7-Day Risk-Standardized Hospital Visit Rate after Outpatient Colonoscopy.
ASC-13	None	Normothermia Outcome.
ASC-14	None	Unplanned Anterior Vitrectomy.
ASC-15a	None	OAS CAHPS—About Facilities and Staff.***
ASC-15b	None	OAS CAHPS—Communication About Procedure.***
ASC-15c	None	OAS CAHPS—Preparation for Discharge and Recovery.***
ASC-15d	None	OAS CAHPS—Overall Rating of Facility.***
ASC-15e	None	OAS CAHPS—Recommendation of Facility.***

† We note that NQF endorsement for this measure was removed.

* Measure finalized for removal beginning with the CY 2019 payment determination, as discussed in section XIV.B.3.b. of this final rule with comment period.

** Measure voluntarily collected effective beginning with the CY 2017 payment determination as set forth in section XIV.E.3.c. of the CY 2015 OPPTS/ASC final rule with comment period (79 FR 66984 through 66985).

*** Measure finalized for delay in reporting beginning with the CY 2020 payment determination (CY 2018 data collection) until further action in future rulemaking as discussed in section XIV.B.4. of this final rule with comment period.

6. New ASCQR Program Quality Measures for the CY 2021 and CY 2022 Payment Determinations and Subsequent Years

We refer readers to the CY 2014 OPSS/ASC final rule with comment period (78 FR 75124) for a detailed discussion of our approach to measure selection for the ASCQR Program. In the CY 2018 OPSS/ASC proposed rule (82 FR 33689 through 33698), we proposed to adopt a total of three new measures for the ASCQR Program: one measure collected via a CMS web-based tool for the CY 2021 payment determination and subsequent years (ASC–16: Toxic Anterior Segment Syndrome), and two measures collected via claims for the CY 2022 payment determination and subsequent years (ASC–17: Hospital Visits after Orthopedic Ambulatory Surgical Center Procedures; and ASC–18: Hospital Visits after Urology Ambulatory Surgical Center Procedures). These measures are discussed in detail below.

a. Proposal To Adopt ASC–16: Toxic Anterior Segment Syndrome Beginning With the CY 2021 Payment Determination

(1) Background

Toxic Anterior Segment Syndrome (TASS), an acute, noninfectious inflammation of the anterior segment of the eye, is a complication of anterior segment eye surgery that typically develops within 24 hours after surgery.⁸⁴ The TASS measure assesses the number of ophthalmic anterior segment surgery patients diagnosed with TASS within two days of surgery. Although most cases of TASS can be treated, the inflammatory response associated with TASS can cause serious damage to intraocular tissues, resulting in vision loss.⁸⁵ Prevention requires careful attention to solutions, medications, and ophthalmic devices and to cleaning and sterilization of surgical equipment because of the numerous potential etiologies.⁸⁶ Despite a recent focus on prevention, cases of

TASS continue to occur, sometimes in clusters.⁸⁷ With millions of anterior segment surgeries being performed in the United States each year, measurement and public reporting have the potential to serve as an additional tool to drive further preventive efforts.

TASS is of interest to the ASCQR Program because cataract surgery is an anterior segment surgery commonly performed at ASCs. In addition, the TASS measure addresses the MAP-identified priority measure area of procedure complications for the ASCQR Program.⁸⁸

(2) Overview of Measure

We believe it is important to monitor the rate of TASS in the ASC setting because ophthalmologic procedures such as anterior segment surgery are commonly performed in this setting of care. Therefore, in the CY 2018 OPSS/ASC proposed rule (82 FR 33690), we proposed to adopt the ASC–16: Toxic Anterior Segment Syndrome measure, which is based on aggregate measure data collected by the ASC and submitted via a CMS online data submission tool (QualityNet), in the ASCQR Program for the CY 2021 payment determination and subsequent years. We expect the measure would promote improvement in patient care over time, because measurement coupled with transparency in publicly reporting of measure information would make patient outcomes following anterior segment procedures more visible to ASCs and patients and incentivize ASCs to incorporate quality improvement activities to reduce the incidence of TASS where necessary.

Section 1890A of the Act requires the Secretary to establish a prerulemaking process with respect to the selection of certain categories of quality and efficiency measures. Under section 1890A(a)(2) of the Act, the Secretary must make available to the public by December 1 of each year a list of quality and efficiency measures that the Secretary is considering for the Medicare program. The ASC–16 measure was included on the 2015 MUC list⁸⁹ and reviewed by the MAP. The

MAP reviewed the measure (MUC15–1047) and conditionally supported it for the ASCQR Program pending NQF review and endorsement.⁹⁰ The MAP noted the high value and urgency of this measure, given many new entrants to the ambulatory surgical center space, as well as the clustering outbreaks of TASS. The MAP also cautioned that the measure be reviewed and endorsed by NQF before adoption into the ASCQR Program, so that a specialized standing committee can evaluate the measure for scientific acceptability.⁹¹ A summary of the MAP recommendations can be found at: <https://www.qualityforum.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=81593>.

Sections 1833(i)(7)(B) and 1833(t)(17)(C)(i) of the Act, when read together, require the Secretary, except as the Secretary may otherwise provide, to develop measures appropriate for the measurement of the quality of care furnished by ASCs that reflect consensus among affected parties and, to the extent feasible and practicable, that include measures set forth by one or more national consensus building entities. However, we note that section 1833(i)(7)(B) of the Act does not require that each measure we adopt for the ASCQR Program be endorsed by a national consensus building entity, or by the NQF specifically. Further, under section 1833(i)(7)(B) of the Act, section 1833(t)(17)(C)(i) of the Act applies to the ASCQR Program, except as the Secretary may otherwise provide. Under this provision, the Secretary has further authority to adopt non-endorsed measures. As stated in the CY 2012 OPSS/ASC final rule with comment period (76 FR 74465 and 74505), we believe that consensus among affected parties can be reflected through means other than NQF endorsement, including consensus achieved during the measure development process, consensus shown through broad acceptance and use of measures, and consensus through public comment. We believe this measure meets these statutory requirements.

The proposed ASC–16: Toxic Anterior Segment Syndrome measure is not NQF-endorsed. However, this measure is maintained by the ASC Quality Collaboration,⁹² an entity recognized within the community as an expert in measure development for the ASC

⁸⁴ Centers for Disease Control and Prevention. Toxic Anterior Segment Syndrome after Cataract Surgery—Maine, 2006. *MMWR. Morbidity and Mortality Weekly Report*. 2007 Jun 29;56(25):629–630.

⁸⁵ Breebaart AC, Nuyts RM, Pels E, Edelhauser HF, Verbraak FD. Toxic Endothelial Cell Destruction of the Cornea after Routine Extracapsular Cataract Surgery. *Archives of Ophthalmology* 1990;108:1121–1125.

⁸⁶ Hellinger WC, Bacalis LP, Erdhauser HF, Mamalis N, Milstein B, Masket S. ASCRS Ad Hoc Task Force on Cleaning and Sterilization of Intraocular Instruments: Recommended Practices for Cleaning and Sterilizing Intraocular Surgical Instruments. *Journal of Cataract and Refractive Surgery*. 2007 Jun;33(6):1095–1100.

⁸⁷ Moyle W, Yee RD, Burns JK, Biggins T. Two Consecutive Clusters of Toxic Anterior Segment Syndrome. *Optometry and Vision Science*. 2013 Jan;90(1):e11–23.

⁸⁸ National Quality Forum. “MAP 2017 Considerations for Implementing Measures in Federal Programs: Hospitals.” Report. 2017. Available at: <http://www.qualityforum.org/map/under/Hospitals—Final Report>.

⁸⁹ National Quality Forum. *2015 Measures Under Consideration List*. National Quality Forum, Dec. 2016. Available at: http://www.qualityforum.org/2015_Measures_Under_Consideration.aspx, under “2015 Measures Under Consideration List (PDF).”

⁹⁰ National Quality Forum. *2016 Spreadsheet of Final Recommendations to HHS and CMS*. Available at: <https://www.qualityforum.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=81593>.

⁹¹ *Ibid*.

⁹² ASC Quality Collaboration. “ASC Quality Collaboration.” Available at: <http://www.ascquality.org/>.

setting. We believe that this measure is appropriate for the measurement of quality care furnished by ASCs because ophthalmologic procedures are commonly performed in ASCs and, as discussed above, the inflammatory response associated with TASS can cause serious damage to patients' vision, but TASS is also preventable through careful attention to solutions, medications, ophthalmic devices, and to cleaning and sterilization of surgical equipment. While the ASC-16: Toxic Anterior Segment Syndrome measure is not NQF-endorsed, we believe this measure reflects consensus among affected parties, because the MAP, which represents stakeholder groups, reviewed and conditionally supported the measure⁹³ for use in the ASCQR Program. The MAP agreed that this measure is high-value and urgent in the current healthcare marketplace and the number of new entrants to the surgical center place, as well as the clustering outbreaks of TASS.⁹⁴ Furthermore, we believe that this measure is scientifically acceptable, because the measure steward has completed reliability testing and validity assessment of the measure.⁹⁵ Specifically, an internal retrospective chart audit of the ASCs participating in measurement testing found no differences between the originally submitted and re-abstracted TASS rates, providing strong evidence the measure is reliable. The measure steward also conducted a formal consensus review to assess the measure's validity; the results of this assessment showed participants believe the measure appears to measure what it is intended to, and is defined in a way that will allow for consistent interpretation of the inclusion and exclusion criteria from ASC to ASC.

(3) Data Sources

This measure is based on aggregate measure data collected via chart-abstraction by the ASC and submitted via a CMS online data submission tool (that is, QualityNet).

We proposed that the data collection period for the proposed ASC-16 measure would be the calendar year two years prior to the applicable payment determination year. For example, for the

CY 2021 payment determination, the data collection period would be CY 2019. We also proposed that ASCs submit these data to CMS during the time period of January 1 to May 15 in the year prior to the affected payment determination year. For example, for the CY 2021 payment determination, the submission period would be January 1, 2020 to May 15, 2020. We refer readers to section XIV.D.3.b. of this final rule with comment period for a more detailed discussion of the requirements for data submitted via a CMS online data submission tool.

(4) Measure Calculation

The outcome measured in the proposed ASC-16: Toxic Anterior Segment Syndrome measure is the number of ophthalmic anterior segment surgery patients diagnosed with TASS within 2 days of surgery. The numerator for this measure is all anterior segment surgery patients diagnosed with TASS within 2 days of surgery. The denominator for this measure is all anterior segment surgery patients. The specifications for this measure for the ASC setting can be found at: <http://ascquality.org/documents/ASC%20QC%20Implementation%20Guide%203.2%20October%202015.pdf>.

(5) Cohort

The measure includes all patients, regardless of age, undergoing anterior segment surgery at an ASC. Additional methodology and measure development details are available at: <http://www.ascquality.org/qualitymeasures.cfm> under "ASC Quality Collaboration Measures Implementation Guide."

(6) Risk Adjustment

The proposed ASC-16: Toxic Anterior Segment Syndrome measure is not risk-adjusted; risk adjustment for patient characteristics is not appropriate for this measure.

We invited public comment on our proposal to adopt the ASC-16: Toxic Anterior Segment Syndrome measure for the CY 2021 payment determination and subsequent years as discussed above.

Comment: Some commenters supported CMS' proposal to adopt ASC-16: Toxic Anterior Segment Syndrome beginning with the CY 2021 payment determination, citing the measure's clinical significance and impact on patients. One commenter specifically noted the measure could improve patient care while adding little administrative burden. One commenter noted the measure's potential to

promote collaboration between surgeons and facilities and ensure that prevention guidelines are appropriately followed. Another commenter noted this measure is currently in use as part of the ASC Quality Collaboration's public report of ASC quality data, and expressed particular support for submission of aggregated measure data for the proposed ASC-16: Toxic Anterior Segment Syndrome measure via QualityNet.

Response: We thank the commenters for their support.

Comment: Another commenter specifically noted the measure could improve patient care while adding little administrative burden, but also expressed concern about an ASC's ability to collect measure data if patients do not present back to the ASC where their procedure was performed.

Response: We thank the commenter for their feedback and acknowledge that it may be difficult to collect data based on where patients present.

Comment: One commenter expressed conditional support for the proposed ASC-16: Toxic Anterior Segment Syndrome measure pending NQF endorsement prior to adoption. Other commenters expressed concern that the measure is not NQF-endorsed and recommended CMS secure NQF endorsement for the measure prior to adopting it for use in the ASCQR Program.

Response: Sections 1833(i)(7)(B) and 1833(t)(17)(C)(i) of the Act, when read together, require the Secretary, except as the Secretary may otherwise provide, to develop measures appropriate for the measurement of the quality of care furnished by ASCs that reflect consensus among affected parties and, to the extent feasible and practicable, that include measures set forth by one or more national consensus building entities. However, we note that section 1833(i)(7)(B) of the Act does not require that each measure we adopt for the ASCQR Program be endorsed by a national consensus building entity, or by the NQF specifically. Further, under section 1833(i)(7)(B) of the Act, section 1833(t)(17)(C)(i) of the Act applies to the ASCQR Program, except as the Secretary may otherwise provide. Under this provision, the Secretary has further authority to adopt non NQF-endorsed measures. As stated in the CY 2012 OPPI/ASC final rule with comment period (76 FR 74465 and 74505), we believe that consensus among affected parties can be reflected through means other than NQF endorsement, including consensus achieved during the measure development process, consensus shown through broad acceptance and use of

⁹³ National Quality Forum. 2016 Spreadsheet of Final Recommendations to HHS and CMS. Available at: <https://www.qualityforum.org/WorkArea/linkit.aspx?LinkIdIdentifier=id&ItemID=81593>.

⁹⁴ Ibid.

⁹⁵ AHRQ Measure Summary. Available at: <https://www.qualitymeasures.ahrq.gov/summaries/summary/49582/ambulatory-surgery-percentage-of-ophthalmic-anterior-segment-surgery-patients-diagnosed-with-toxic-anterior-segment-syndrome-tass-within-2-days-of-surgery>.

measures, and consensus through public comment. This measure is maintained by the ASC Quality Collaboration,⁹⁶ an entity recognized within the community as an expert in measure development for the ASC setting. Furthermore, the ASC-16 measure was included on the 2015 MUC list⁹⁷ and reviewed by the MAP. While the ASC-16: Toxic Anterior Segment Syndrome measure is not NQF-endorsed, we believe this measure reflects consensus among affected parties, because the MAP, which represents stakeholder groups, reviewed and conditionally supported the measure⁹⁸ for use in the ASCQR Program. The MAP agreed that this measure is high-value and urgent in the current healthcare marketplace and the number of new entrants to the surgical center place, as well as the clustering outbreaks of TASS.⁹⁹

Comment: Several commenters did not support adoption of the proposed ASC-16: Toxic Anterior Segment Syndrome measure. Two commenters noted it may not be feasible for ASCs to implement the measure due to the small number of patients experiencing TASS. Other commenters similarly asserted ASCs will encounter operational difficulties incorporating the measure into their clinical workflow, because the measure requires information sharing across clinicians in order to collect accurate data, making accurate data collection both expensive and labor-intensive. A commenter also expressed concern that patients may not understand the difference between TASS and infection, leading to inaccurate data being present in charts. Another commenter expressed concern that the measure's reliance on self-reported data may lead to subjective results or manipulation, and that the measure is limited to a segment of the larger ASC industry, as only very few ASCs will have patients presenting with

TASS. One commenter expressed concern that the proposed ASC-16: Toxic Anterior Segment Syndrome measure will not improve healthcare quality because the measure provides data that is retrospective in nature and the commenter believes the measure will not assist ASCs in implementing improvement activities.

Response: We thank the commenters for their suggestions and note the concerns about the proposal to adopt ASC-16: Toxic Anterior Segment Syndrome beginning with the CY 2021 payment determination. While we believe the measure is reliable, we recognize that there are concerns over the feasibility of implementing the TASS measure. Some commenters expressed concern that ASCs will have difficulty reporting the measure if patients present to another facility with TASS within 2 days of a procedure and we acknowledge that some cases could be missing from inclusion in the measure especially given the very low incidence of TASS. In response to concerns that ASCs will receive retrospective data on the measure, rather than during the time that a patient is experiencing TASS, we note our belief that tracking TASS for the purpose of the measure reporting would increase facility awareness of potential outbreaks. In addition, we disagree with commenters that the measure relies on subjective or self-reported data, as data sources for this measure include physician diagnosis and report, clinical administrative data, paper medical records, or incident/occurrence reports.¹⁰⁰

Regarding concerns about the low volume of procedures, although data show that TASS occurs in clusters, these clusters do indeed include low numbers, ranging from just a few cases to up to 20 cases during a year's time.¹⁰¹ As a result of this low volume, we agree

that this measure may not be appropriate for national implementation in the ASCQR Program. Upon further consideration of the difficulty of implementing the measure, the likelihood of applicability to only very specific ASC facilities where TASS occurs, and from incoming comments, we believe that the burden of the measure would outweigh the benefits and no longer believe that the measure is appropriate for the ASCQR Program at this time. Therefore, we are not finalizing this measure. However, we refer readers to the ASC Quality Collaboration, the measure steward, which is independently collecting and publicly reporting this TASS measure: <http://ascquality.org/documents/ASC-QC-Implementation-Guide-4.0-September-2016.pdf>.

Comment: One commenter recommended CMS instead enable ASCs to learn best practices and techniques from other facilities by facilitating data-sharing among facilities.

Response: We agree that data-sharing among facilities could inform quality improvement activities. We will consider opportunities to further promote the sharing of best practices across ASCs.

After consideration of the public comments we received, we are not finalizing the proposal to adopt the ASC-16: Toxic Anterior Segment Syndrome measure for the CY 2021 payment determination and subsequent years for reasons discussed in our responses above.

The measure set for the ASCQR Program CY 2021 payment determination and subsequent years is as listed below. We note that the measures we are finalizing for removal in this final rule with comment period are not included in this chart.

ASCQR PROGRAM MEASURE SET FINALIZED FOR THE CY 2021 PAYMENT DETERMINATION AND SUBSEQUENT YEARS ***

ASC No.	NQF No.	Measure name
ASC-1	0263	Patient Burn.
ASC-2	0266	Patient Fall.
ASC-3	0267	Wrong Site, Wrong Side, Wrong Patient, Wrong Procedure, Wrong Implant.
ASC-4	0265 †	All-Cause Hospital Transfer/Admission.
ASC-8	0431	Influenza Vaccination Coverage among Healthcare Personnel.
ASC-9	0658	Endoscopy/Polyp Surveillance: Appropriate Follow-Up Interval for Normal Colonoscopy in Average Risk Patients.

⁹⁶ ASC Quality Collaboration. "ASC Quality Collaboration." Available at: <http://www.ascquality.org/>.

⁹⁷ National Quality Forum. *2015 Measures Under Consideration List*. National Quality Forum, Dec. 2016. Available at: http://www.qualityforum.org/2015_Measures_Under_Consideration.aspx, under "2015 Measures Under Consideration List (PDF)."

⁹⁸ National Quality Forum. *2016 Spreadsheet of Final Recommendations to HHS and CMS*. Available at: <https://www.qualityforum.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=81593>.

⁹⁹ *Ibid.*

¹⁰⁰ ASC Quality Measures Implementation Guide. Available at: <http://ascquality.org/documents/ASC-QC-Implementation-Guide-4.0-September-2016.pdf>.

¹⁰¹ Moyle W, Yee RD, Burns JK, Biggins T. Two Consecutive Clusters of Toxic Anterior Segment Syndrome. *Optometry and Vision Science*. 2013 Jan;90(1):e11-23.

ASCQR PROGRAM MEASURE SET FINALIZED FOR THE CY 2021 PAYMENT DETERMINATION AND SUBSEQUENT YEARS ***—Continued

ASC No.	NQF No.	Measure name
ASC-10	0659	Endoscopy/Polyp Surveillance: Colonoscopy Interval for Patients with a History of Adenomatous Polyps—Avoidance of Inappropriate Use.
ASC-11	1536	Cataracts: Improvement in Patient’s Visual Function within 90 Days Following Cataract Surgery.*
ASC-12	2539	Facility 7-Day Risk-Standardized Hospital Visit Rate after Outpatient Colonoscopy.
ASC-13	None	Normothermia Outcome.
ASC-14	None	Unplanned Anterior Vitrectomy.
ASC-15a	None	OAS CAHPS—About Facilities and Staff.**
ASC-15b	None	OAS CAHPS—Communication About Procedure.**
ASC-15c	None	OAS CAHPS—Preparation for Discharge and Recovery.**
ASC-15d	None	OAS CAHPS—Overall Rating of Facility.**
ASC-15e	None	OAS CAHPS—Recommendation of Facility.**

† We note that NQF endorsement for this measure was removed.

* Measure voluntarily collected effective beginning with the CY 2017 payment determination as set forth in section XIV.E.3.c. of the CY 2015 OPPS/ASC final rule with comment period (79 FR 66984 through 66985).

** Measure reporting delayed beginning with the CY 2020 payment determination (CY 2018 data collection) and until further action in future rulemaking, as discussed in section XIV.B.4. of this final rule with comment period.

*** The ASC-5, ASC-6 and ASC-7 measures are finalized for removal beginning with the CY 2019 payment determination, as discussed in section XIV.B.3.b. of this final rule with comment period.

b. Adoption of ASC-17: Hospital Visits After Orthopedic Ambulatory Surgical Center Procedures Beginning With the CY 2022 Payment Determination

(1) Background

Reporting the quality of care provided at ASCs is a key priority in the context of growth in the number of ASCs and the number of procedures performed in this setting. More than 60 percent of all medical or surgical procedures performed in 2006 were performed at ASCs; this represents a three-fold increase from the late 1990s.¹⁰² In 2015, more than 3.4 million fee-for-service Medicare beneficiaries were treated at 5,475 Medicare-certified ASCs, and spending on ASC services by Medicare and its beneficiaries amounted to 4.1 billion dollars.¹⁰³ The patient population served at ASCs has increased not only in volume, but also in age and complexity, which can be partially attributed to improvements in anesthetic care and innovations in minimally invasive surgical techniques.¹⁰⁴ ¹⁰⁵ As such, ASCs have become the preferred setting for the provision of low-risk surgical and medical procedures in the United States, as many patients experience shorter wait times, prefer to avoid

hospitalization, and are able to return to work more quickly.¹⁰⁶ As the number of orthopedic procedures performed in ASCs increases, it is increasingly important to report the quality of care for patients undergoing these procedures. According to Medicare claims data, approximately seven percent of surgeries performed in ASCs in 2007 were orthopedic in nature, which reflects a 77-percent increase in orthopedic procedures performed at ASCs from 2000 to 2007.¹⁰⁷

We believe measuring and reporting seven-day unplanned hospital visits following orthopedic ASC procedures will incentivize ASCs to improve care and care transitions. Patients that have hospital visits that occur at or after discharge from the ASC and may not be readily visible to clinicians because such patients often present to alternative facilities, such as emergency departments where patient information is not linked back to the ASC. Furthermore, many of the reasons for hospital visits following surgery at an ASC are preventable; patients often present to the hospital for complications of medical care, including infection, post-operative bleeding, urinary retention, nausea and vomiting, and pain. One study found that of 10,032 patients who underwent orthopedic surgery in an ASC between 1993 and 2012, 121 (1.2 percent) needed attention in the emergency department in the first 24 hours after discharge due to pain or

bleeding, while others were admitted later for issues related to pain and swelling.¹⁰⁸ Therefore, we believe tracking and reporting these events would facilitate efforts to lower the rate of preventable adverse events and to improve the quality of care following orthopedic surgeries performed at an ASC.

(2) Overview of Measure

Based on the increasing prevalence of orthopedic surgery in the ASC setting, we believe it is important to minimize adverse patient outcomes associated with these orthopedic ASC surgeries. Therefore, in the CY 2018 OPPS/ASC proposed rule (82 FR 33692), we proposed to adopt the ASC-17: Hospital Visits after Orthopedic Ambulatory Surgical Center Procedures measure into the ASCQR Program for the CY 2022 payment determination and subsequent years. We expect the measure would promote improvement in patient care over time, because measurement coupled with transparency in publicly reporting measure information would make the rate of unplanned hospital visits (emergency department visits, observation stays, and unplanned inpatient admissions) following orthopedic surgery at ASCs more visible to both ASCs and patients and would incentivize ASCs to incorporate quality improvement activities to reduce these unplanned hospital visits. The measure also addresses the CMS National Quality Strategy domains of making care safer by reducing harm caused in the delivery of care and promoting effective

¹⁰² Cullen KA, Hall MJ, Golosinskiy A, Statistics NfCh. Ambulatory Surgery in the United States, 2006. National Health Statistics Report; 2009.

¹⁰³ Medicare Payment Advisory Commission (MedPAC). Report to Congress: Medicare Payment Policy. March 2017; Available at: http://www.medpac.gov/docs/default-source/reports/mar17_entirereport.pdf?sfvrsn=0.

¹⁰⁴ Bettelli G. High Risk Patients in Day Surgery. *Minerva Anestesiologica*. 2009;75(5):259–268. See also Fuchs K. Minimally Invasive Surgery. *Endoscopy*. 2002;34(2):154–159.

¹⁰⁵ Fuchs K. Minimally invasive surgery. *Endoscopy*. 200234(2):154159.

¹⁰⁶ Cullen KA, Hall MJ, Golosinskiy A, Statistics NfCh. Ambulatory Surgery in the United States, 2006. National Health Statistics Report; 2009.

¹⁰⁷ Goyal KS, Jain S, Buterbaugh GA, et al. The Safety of Hang and Upper-Extremity Surgical Procedures at a Freestanding Ambulatory Surgical Center. *The Journal of Bone and Joint Surgery*. 2016;90:600–604.

¹⁰⁸ Martín-Ferrero MA, Faour-Martín O. Ambulatory surgery in orthopedics: experience of over 10,000 patients. *Journal of Orthopaedic Surgery*. 2014;19:332–338.

communication and coordination of care.

Section 1890A of the Act requires the Secretary to establish a prerulemaking process with respect to the selection of certain categories of quality and efficiency measures. Under section 1890A(a)(2) of the Act, the Secretary must make available to the public by December 1 of each year a list of quality and efficiency measures that the Secretary is considering for the Medicare program. The ASC-17: Hospital Visits after Orthopedic Ambulatory Surgical Center Procedures measure was included on a publicly available document entitled “List of Measures under Consideration for December 1, 2016.”¹⁰⁹ The MAP reviewed this measure (MUC16-152) and recommended this measure be refined and resubmitted prior to adoption, stating that testing results should demonstrate reliability and validity at the facility level in the ambulatory surgical setting.¹¹⁰ MAP also recommended that this measure be submitted to NQF for review and endorsement.¹¹¹ At the time of the MAP’s review, this measure was still undergoing field testing.

Since the MAP’s review and recommendation of ‘Refine and Resubmit’ in 2016, we have completed testing for this measure and continued to refine this proposed measure in response to the MAP’s recommendations. Results of continued development activities, including stakeholder feedback from the public comment period and pilot test findings will be presented to the MAP during the MAP feedback loop meeting in fall 2017. The proposed measure is consistent with the information submitted to the MAP, and the original MAP submission and our continued refinements support its scientific acceptability for use in quality reporting programs. Facility-level testing showed variation in unplanned hospital visits among ASCs after adjusting for case-mix differences, which suggests variation in quality of care and opportunities for quality improvement; and reliability testing showed fair measure score reliability.¹¹² As expected, the

reliability increased for ASCs with more patients; ASCs with at least 250 cases showed moderate reliability, consistent with other publicly reported Medicare claims-based, risk-adjusted outcome measures.¹¹³ The validity testing results demonstrated that the measure scores are valid and useful measures of ASC orthopedic surgical quality of care and will provide ASCs with information that can be used to improve their quality of care. Detailed testing results are available in the technical report for this measure, located at: <https://www.cms.gov/medicare/Quality-Initiatives-Patient-Assessment-Instruments/HospitalQualityInits/Measure-Methodology.html>.

Sections 1833(i)(7)(B) and 1833(t)(17)(C)(i) of the Act, when read together, require the Secretary, except as the Secretary may otherwise provide, to develop measures appropriate for the measurement of the quality of care furnished by ASCs that reflect consensus among affected parties and, to the extent feasible and practicable, that include measures set forth by one or more national consensus building entities. However, we note that section 1833(i)(7)(B) of the Act does not require that each measure we adopt for the ASCQR Program be endorsed by a national consensus building entity, or by the NQF specifically. Further, under section 1833(i)(7)(B) of the Act, section 1833(t)(17)(C)(i) of the Act applies to the ASCQR Program, except as the Secretary may otherwise provide. Under this provision, the Secretary has further authority to adopt non-NQF-endorsed measures. As stated in the CY 2012 OPPS/ASC final rule with comment period (76 FR 74465 and 74505), we believe that consensus among affected parties can be reflected through means other than NQF endorsement, including consensus achieved during the measure development process, consensus shown through broad acceptance and use of measures, and consensus through public comment. We believe this proposed measure meets these statutory requirements.

The proposed ASC-17: Hospital Visits after Orthopedic Ambulatory Surgical Center Procedures measure is not currently NQF-endorsed. However, we intend to submit this measure for review and endorsement by NQF once an

appropriate NQF project has a call for measures. We believe that this measure is appropriate for the measurement of quality care furnished by ASCs, because surgeries are becoming increasingly common in ASCs and, as discussed above, can signify unanticipated admissions after care provided in ASCs. Such visits are an unexpected and potentially preventable outcome for patients with a low anticipated perioperative risk. We also believe this proposed measure reflects consensus among affected parties, because it was developed with stakeholder input from a Technical Expert Panel convened by a CMS contractor as well as from the measure development public comment period.¹¹⁴ During the MAP and measure development processes, public commenters supported the measure’s focus on assessing patient outcomes after orthopedic surgery performed in ASC setting of care, and agreed that the measure would be meaningful and improve quality of care. In addition, the ASC-17: Hospital Visits after Orthopedic Ambulatory Surgical Center Procedures measure addresses the MAP-identified priority measure area of surgical complications for the ASCQR Program.¹¹⁵ Therefore, we believe it is appropriate to incorporate this measure into the ASCQR Program measure set because collecting and publicly reporting these data will improve transparency, inform patients and providers, and foster quality improvement efforts.

(3) Data Sources

This measure is claims-based and uses Part A and Part B Medicare administrative claims and Medicare enrollment data to calculate the measure.

We proposed that the data collection period for the proposed ASC-17: Hospital Visits after Orthopedic Ambulatory Surgical Center Procedures measure would be the two calendar years ending two years prior to the applicable payment determination year. For example, for the CY 2022 payment determination, the data collection period would be CY 2019 to 2020. Because the measure data are collected via claims, ASCs will not need to submit any additional data directly to CMS. We refer readers to section XIV.D.4. of this final rule with comment period for a more detailed discussion of

¹⁰⁹ National Quality Forum. *List of Measures under Consideration for December 1, 2016*. National Quality Forum, Dec. 2016. Available at: <http://www.qualityforum.org/map/>.

¹¹⁰ National Quality Forum. *2016-2017 Spreadsheet of Final Recommendations to HHS and CMS*. Available at: <https://www.qualityforum.org/WorkArea/linkit.aspx?LinkIdIdentifier=id&ItemID=81593>.

¹¹¹ *Ibid.*

¹¹² Landis JR, Koch GG. The Measurement of Observer Agreement for Categorical Data. *Biometrics*. 1977;33(1):159-174.

¹¹³ Yale New Haven Health Services Corporation—Center for Outcomes Research and Evaluation (CORE). Measure Technical Report: Hospital Visits after Orthopedic Ambulatory Surgical Center Procedures (Version 1.0). May 2017. Available at: https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/HospitalQualityInits/Downloads/Version-10-Hospital-Visits_Orthopedic-ASC-Procedures_Measure-Technical-Report_052017.pdf.

¹¹⁴ National Quality Forum. “MAP 2017 Considerations for Implementing Measures in Federal Programs: Hospitals.” Report. 2017. Available at: <http://www.qualityforum.org/map/under/Hospitals—Final-Report.”>

¹¹⁵ *Ibid.*

the requirements for data submitted via claims.

(4) Measure Calculation

The measure outcome is all-cause, unplanned hospital visits within seven days of an orthopedic procedure performed at an ASC. For the purposes of this measure, “hospital visits” include emergency department visits, observation stays, and unplanned inpatient admissions. When there are two or more qualifying surgical procedures within a 7-day period, the measure considers all procedures as index procedures; however, the timeframe for outcome assessment is defined as the interval between procedures (including the day of the next procedure) and then 7 days after the last procedure.

The facility-level score is a risk-standardized hospital visit rate, calculated by multiplying the ratio of the predicted to the expected number of post-surgical hospital visits among the given ASC’s patients by the national observed hospital visit rate for all ASCs. For each ASC, the numerator of the ratio is the number of hospital visits predicted for the ASC’s patients accounting for its observed rate, the number of the orthopedic surgeries performed at the ASC, the case-mix, and the surgical complexity mix. The denominator of the ratio is the expected number of hospital visits given the ASC’s case-mix and surgical complexity mix. A ratio of less than one indicates the ASC facility’s patients were estimated as having fewer post-surgical visits than expected compared to ASCs with similar surgical complexity and patients; and a ratio of greater than one indicates the ASC facility’s patients were estimated as having more visits than expected. The national observed hospital visit rate is the national unadjusted proportion of patients who had a hospital visit following an orthopedic ASC surgery. For more information on measure calculations, we refer readers to: <https://www.cms.gov/medicare/Quality-Initiatives-Patient-Assessment-Instruments/HospitalQualityInits/Measure-Methodology.html>.

(5) Cohort

The patient cohort for the proposed ASC–17 measure includes all Medicare beneficiaries ages 65 and older undergoing outpatient orthopedic surgery at an ASC who have 12 prior months of Medicare fee-for-service Parts A and B enrollment. The target group of procedures includes those that: (1) Are routinely performed at ASCs; (2) involve some increased risk of post-surgery

hospital visits; and (3) are routinely performed by orthopedists.

Procedures included in the measure cohort are on Medicare’s list of covered ambulatory surgical center (ASC) procedures.¹¹⁶ Medicare developed this list to identify surgeries that have a low to moderate risk profile. Surgeries on the ASC list of covered procedures do not involve or require major or prolonged invasion of body cavities, extensive blood loss, major blood vessels, or care that is either emergent or life threatening. Medicare annually reviews and updates this list, and includes a transparent public comment submission and review process for addition and/or removal of procedure codes.¹¹⁷ The current list is accessible in the Downloads section at: https://www.cms.gov/medicare/medicare-fee-for-service-payment/ascpayment/11_addenda_updates.html.

In addition, to focus the measure only on the subset of surgeries on Medicare’s list of covered ASC procedures that impose a meaningful risk of post-orthopedic ASC surgery hospital visits, the measure includes only “major” and “minor” procedures, as indicated by the Medicare Physician Fee Schedule global surgery indicator (GSI) values of 090 and 010, respectively. This list of GSI values is publicly available at: <https://www.cms.gov/Medicare/Medicare-fee-for-service-payment/physicianfeesched/pfs-federal-regulation-notices-items/cms-1590-fc.html> (download Addendum B). Moreover, to identify the subset of ASC procedures typically performed by orthopedists, we used the Clinical Classifications Software (CCS) developed by the Agency for Healthcare Research and Quality (AHRQ) and include in this measure procedures from AHRQ’s “operations on the musculoskeletal system” group of procedures.¹¹⁸ For more cohort details, we refer readers to the measure technical report located at: <https://www.cms.gov/medicare/Quality-Initiatives-Patient-Assessment-Instruments/HospitalQualityInits/Measure-Methodology.html>.

The measure excludes patients who survived at least 7 days following orthopedic surgery at an ASC, but were not continuously enrolled in Medicare fee-for-service Parts A and B in the 7

¹¹⁶ Centers for Medicare and Medicaid Services. “Ambulatory Surgical Center (ASC) Payment: Addenda Updates.” Available at: https://www.cms.gov/medicare/medicare-fee-for-service-payment/ascpayment/11_addenda_updates.html.

¹¹⁷ Ibid.

¹¹⁸ Healthcare Cost and Utilization Project. *Clinical Classifications Software for Services and Procedures*. Available at: https://www.hcup-us.ahrq.gov/toolsoftware/ccs_svcspoc/ccsvproc.jsp.

days after surgery. These patients are excluded to ensure all patients captured under this measure have full data available for outcome assessment. There are no additional inclusion or exclusion criteria for the proposed ASC–17 measure. Additional methodology and measure development details are available at: <https://www.cms.gov/medicare/Quality-Initiatives-Patient-Assessment-Instruments/HospitalQualityInits/Measure-Methodology.html>.

(6) Risk Adjustment

The statistical risk-adjustment model includes 29 clinically relevant risk-adjustment variables that are strongly associated with risk of hospital visits within seven days following ASC orthopedic surgery. The measure risk adjusts for age, 27 comorbidities, and a variable for work Relative Value Units (RVUs) to adjust for surgical complexity.¹¹⁹ Additional risk adjustment details are available in the technical report at: <https://www.cms.gov/medicare/Quality-Initiatives-Patient-Assessment-Instruments/HospitalQualityInits/Measure-Methodology.html>.

(7) Public Reporting

As stated above, facility-level testing showed variation in unplanned hospital visits among ASCs after adjusting for case-mix differences, which suggests variation in quality of care and opportunities for quality improvement.¹²⁰ Reliability testing showed fair measure score reliability.¹²¹ As expected, the reliability increased for ASCs with more patients; ASCs with at least 250 cases showed moderate reliability, consistent with other publicly reported Medicare claims-based, risk-adjusted outcome measures. We proposed that if this measure were adopted, we would publicly report results only for facilities with sufficient case numbers to meet moderate reliability standards.¹²² CMS will determine the case size cutoff for meeting moderate reliability standards using the intraclass correlation (ICC)

¹¹⁹ S. Coberly. *The Basics; Relative Value Units (RVUs)*. National Health Policy Forum. January 12, 2015. Available at: http://www.nhpf.org/library/the-basics/Basics_RVUs_01-12-15.pdf.

¹²⁰ Yale New Haven Health Services Corporation. *Hospital Visits after Orthopedic Ambulatory Surgical Center Procedures (Version 1.0)*. May 2017. Available at: https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/HospitalQualityInits/Downloads/Version-10_Hospital-Visits_Orthopedic-ASC-Procedures_Measure-Technical-Report_052017.pdf.

¹²¹ Landis JR, Koch GG. The Measurement of Observer Agreement for Categorical Data. *Biometrics*. 1977;33(1):159–174.

¹²² Ibid.

during the measure dry run (discussed below) by testing the reliability of the scores at different case sizes in the dry run data. However, we would also provide confidential performance data directly to smaller facilities, which do not meet the criteria for sufficient case numbers for reliability considerations that would benefit from seeing their measure results and individual patient-level outcomes. These data are currently largely unknown to ASCs and providers. The validity testing results demonstrated that the measure scores are valid and useful measures of ASC orthopedic surgical quality of care and will provide ASCs with information that can be used to improve their quality of care. Detailed testing results are available in the technical report for this measure, located at: <https://www.cms.gov/medicare/Quality-Initiatives-Patient-Assessment-Instruments/HospitalQualityInits/Measure-Methodology.html>.

(8) Provision of Facility-Specific Information Prior to Public Reporting

In the CY 2018 OPPS/ASC proposed rule (82 FR 33694), we stated that if this proposed measure is finalized as proposed, we intend to conduct a dry run before the official data collection period or any public reporting. A dry run is a period of confidential reporting and feedback during which ASCs may review their dry-run measure results, and in addition, further familiarize themselves with the measure methodology and ask questions. For the dry-run, we intend to use the most current 2-year set of complete claims (usually 12 months prior to the start date) available at the time of dry run. For example, if the dry run began in June 2018, the most current 2-year set of data available would likely be July 2015 to June 2017. Because we use paid, final action Medicare claims, ASCs would not need to submit any additional data for the dry run. The dry run would generate confidential feedback reports for ASCs, including patient-level data indicating whether the patient had a hospital visit and, if so, the type of visit (emergency department visit, observation stay, or unplanned inpatient admission), the admitting facility, and the principal discharge diagnosis. Further, the dry run would enable ASCs to see their risk-standardized hospital visit rate prior to the measure being implemented. General information about the dry run as well as confidential facility-specific reports would be made available for ASCs to review on their accounts at: <http://www.qualitynet.org>. We plan to continue to generate these reports for ASCs after we implement the

measure so ASCs can use the information to identify performance gaps and develop quality improvement strategies.

These confidential dry run results are not publicly reported and do not affect payment. We expect the dry run to take approximately one month to conduct, during which facilities would be provided the confidential report and the opportunity to review their performance and provide feedback to us. However, after the dry run, measure results would have a payment impact and be publicly reported beginning with the CY 2022 payment determination and for subsequent years as proposed. Although not previously stated in the CY 2018 OPPS/ASC proposed rule (82 FR 33694), we note that the primary purpose of the records maintained in the National Claims History system of records (SOR) is for evaluating and studying the operation and effectiveness of the Medicare program, which aligns with the purposes of the ASCQR Program and a permissible use of beneficiary information. In addition, under 45 CFR 164.506(c)(4) of the HIPAA Privacy Rule, we may disclose protected health information to another covered entity, such as the ASCs, provided that both the ASC and CMS have or had a relationship with each individual who is the subject of the PHI being requested, the PHI pertains to such relationship, and the disclosure is for the purposes of conducting quality assessment and improvement activities listed in paragraph (1) or (2) of the definition of "health care operations" at 45 CFR 164.501. We believe that this provision is extensive enough to cover the uses that we would expect an ASC to make of the PHI.

We invited public comment on our proposal to adopt the ASC-17: Hospital Visits after Orthopedic Ambulatory Surgical Center Procedures measure beginning with the CY 2022 payment determination as discussed above.

Comment: A few commenters supported the proposed adoption of the ASC-17: Hospital Visits after Orthopedic Ambulatory Surgical Center Procedures in the ASCQR Program. One of the commenters noted that these measures will provide patients with valuable data and address clinical areas critical to providers.

Response: We thank the commenters for their support. We agree that measuring quality of care associated with orthopedic procedures performed at ASCs is patient-centered and is an important clinical care area to evaluate.

Comment: Two commenters believed that the measure should be refined and resubmitted prior to rulemaking, as

suggested by the MAP. Several commenters noted or were concerned that the measure lacks NQF endorsement. A few commenters also suggested that CMS seek input from the MAP on the finalized measure prior to including the measure in the program.

Response: Section 1833(h)(7)(B) of the Act does not require that each measure we adopt for the ASCQR Program be endorsed by a national consensus building entity, or the NQF specifically. Under this provision, the Secretary has further authority to adopt non-endorsed measures. As stated in the CY 2012 OPPS/ASC final rule with comment period (76 FR 74465 and 74505), we believe the requirement that measures reflect consensus among affected parties can be achieved in other ways, including through the measure development process, broad acceptance and use of the measure, and public comments. As part of the measure development process, a national Technical Expert Panel (TEP), clinical experts, and stakeholders provided input at multiple points during development. We believe the ASC-17 measure meets these statutory requirements.

We strive to adopt NQF-endorsed measures when possible. Although ASC-17 is not currently NQF-endorsed, our research and analysis conducted during development demonstrate that the measure is accurate, valid, and actionable. We refer readers to the technical report for more information about the measure and testing results: https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/HospitalQualityInits/Downloads/Version-10_Hospital-Visits_Orthopedic-ASC-Procedures_Measure-Technical-Report_052017.pdf. We will submit this measure, with complete evidence, specifications, and testing results, to NQF for endorsement when an appropriate NQF project has a call for the measure.

In addition, in December 2016, the MAP Hospital Workgroup reviewed and classified the measure as "Refine and Resubmit Prior to Rulemaking."¹²³ We understand that the measure received this classification because: (1) The measure was still undergoing field testing at the time, and (2) the MAP also recommended that the measure be submitted to the NQF for review and endorsement. Between that initial MAP review in December 2016 and the CY 2018 OPPS/ASC proposed rule, we

¹²³ Spreadsheet of MAP 2017 Final Recommendations, February 1, 2017. Available at: <http://www.qualityforum.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=84452>.

completed field testing and refined the measure.¹²⁴ The final methodology report, which was presented in the proposed rule, included the final results of measure testing and completed measure specifications that occurred between the MAP's review in December 2016 and CMS' proposal to adopt the measure in the ASCQR Program.¹²⁵ We also intend to update the MAP at the next appropriate opportunity. As stated above, we also intend to submit the measure to the NQF for endorsement during the next appropriate call for measures.

Comment: A few commenters expressed concerns over the measure outcome. One commenter stated that it is not well proven that a hospital visit within 7 days of ASC procedure is a sign of poor quality. Similarly, one commenter suggested that CMS should adopt a measure that captures hospital visits directly tied to complications arising from orthopedic procedures performed in an ASC, and another commenter suggested that CMS exclude unrelated hospital visits. A commenter suggested that CMS remove ED visits and observation stays from the measure outcome because the ED is seen not as a healthcare resource to be avoided, but a key stabilization and decision point for patient disposition. Another commenter expressed concern about the attribution of outcomes. Specifically, the commenter flagged four of the top reasons for hospital visits within 7 days of orthopedic procedures that likely reflect routine follow-up rather than quality of care as intended by the measure.

Response: We have designed the measure to capture all unplanned hospital visits that may be a signal of poor quality of care and encourage ASCs to minimize the risk of follow-up hospital visits. The outcome captures the full range of adverse events related to undergoing orthopedic ASC surgery. We believe that the measure, as specified, has the potential to illuminate differences in quality, inform patient choice, drive quality improvement, enhance care coordination, and

ultimately to minimize acute complications and reduce unplanned hospital visits following orthopedic procedures performed at ASCs.

The measure was purposely designed to evaluate all-cause hospital visits to broadly capture serious adverse events experienced by patients after undergoing orthopedic ASC procedures, rather than a narrow set of identifiable complications, for many reasons. The outcome of all-cause hospital visits is consistent with a patient-centric view of care that is designed to prompt ASC providers to minimize the risk and reduce the need for a broad range of outcomes after undergoing orthopedic ASC procedures, including the risk of dehydration, nausea and vomiting, dizziness, and urinary retention. Measuring only hospital visits that are overtly related to a procedure, such as visits for pain and bleeding, would limit the measure's intended broad impact on quality improvement efforts.

Furthermore, the rate of hospital visits is not expected to be zero, since some patients will have visits for reasons unrelated to the procedure. In designing the measure, we narrowed the measure to include surgical procedure that: (1) Are routinely performed at ASCs; (2) involve increased risk of post-surgery hospital visits; and (3) are routinely performed by orthopedists. In addition, the measure is risk adjusted for patient demographics, clinical characteristics, and surgical procedural complexity, so that facilities that experience more unrelated visits due to a generally higher-risk patient mix will not be disadvantaged. We refer readers to the methods section in the measure specifications for more information about the risk-adjustment methodology.

In addition, we only measure the rate of *unplanned* hospital admissions; ED visits and observation stays are never considered planned.^{126 127} This approach removes from the outcome admissions that are not a signal of quality of care, because they represent: (1) A condition or diagnosis that is considered to be always planned (such as transplants or maintenance chemotherapy); or (2) that are considered potentially planned (such as cardiovascular procedures) and are not accompanied by an acute diagnosis. The planned admission algorithm is based

on CMS' widely-used Planned Readmission Algorithm v4.0.¹²⁸ We refer readers to the measure methodology report at: <https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/HospitalQualityInits/Measure-Methodology.html> for more details.

Furthermore, we disagree with the commenter's suggestion that we remove ED visits and observation stays from the measure outcome, because these are unplanned visits for patients undergoing low- to moderate-risk outpatient procedures. From a patient perspective, we believe that ED visits and observation stays are an undesirable outcome. We believe a quality measure assessing hospital visits following ASC surgery will serve to improve transparency, inform patients and providers, and foster quality improvement, because providers at ASCs are often unaware of patients' subsequent acute care visits given that patients tend to present to the emergency department or to hospitals unaffiliated with the ASC. Moreover, the measure outcome of hospital visits within 7 days after a procedure aligns with the NQF-endorsed measure Facility 7-Day Risk-Standardized Hospital Visit Rate after Outpatient Colonoscopy Measure (NQF #2539).

Regarding the commenter's concerns about the attribution of outcomes and whether hospital visits within 7 days of ASC procedure is a sign of poor quality, we believe that the measure captures the full range of potentially serious adverse events related to orthopedic procedures performed as ASCs. We limited the outcome timeframe for hospital visits (ED visits, observation stays, and unplanned admissions) to 7 days because existing literature suggests that the vast majority of adverse events after an orthopedic procedure occur within the first 7 days following the procedure and because the highest rates of hospital visits were observed in claims data within 7 days following the procedure.^{129 130} A 7-day timeframe helps to ensure that the measure will capture adverse events following the procedure, but will not capture events impacted by factors unrelated to the

¹²⁸ Ibid.

¹²⁹ Mattila K, Toivonen J, Janhunen L, Rosenberg PH, Hynynen M. Postdischarge symptoms after ambulatory surgery: First-week incidence, intensity, and risk factors. *Anesthesia and Analgesia*. 2005;101(6):1643–1650.

¹³⁰ Fleisher LA, Pasternak LR, Herbert R, Anderson GF. Inpatient hospital admission and death after outpatient surgery in elderly patients: Importance of patient and system characteristics and location of care. *Archives of Surgery*. 2004;139(1):67–72.

¹²⁴ MAP 2017 Considerations for Implementing Measures in Federal Programs: Hospitals. Final Report. February 15, 2017. Available at: http://www.qualityforum.org/Publications/2017/02/2017_Considerations_for_Implementing_Measures_Final_Report_-_Hospitals.aspx.

¹²⁵ Yale New Haven Health Services Corporation—Center for Outcomes Research and Evaluation (CORE). Measure Technical Report: Hospital Visits after Orthopedic Ambulatory Surgical Center Procedures (Version 1.0). May 2017. Available at: https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/HospitalQualityInits/Downloads/Version-1_0_Hospital-Visits_Orthopedic-ASC-Procedures_Measure-Technical-Report_052017.pdf.

¹²⁶ Horwitz, Leora I., et al. "Development and validation of an algorithm to identify planned readmissions from claims data." *Journal of hospital medicine* 10.10 (2015): 670–677.

¹²⁷ Ranasinghe, Isuru, et al. "Differences in colonoscopy quality among facilities: development of a post-colonoscopy risk-standardized rate of unplanned hospital visits." *Gastroenterology* 150.1 (2016): 103–113.

care patients received.¹³¹ We appreciate the commenter's careful review of the top hospital visit diagnoses within seven days of orthopedic procedures. We welcome specific examples of potentially planned admissions following outpatient orthopedic procedures.

Comment: One commenter suggested that CMS provide a detailed clinical review of all the measure results by several seasoned orthopedic surgeons to ensure the measure algorithm is appropriate.

Response: In developing the measure, we incorporated significant input from various experts and stakeholders. In addition to the MUC and MAP processes described above, a multidisciplinary team of clinicians, health services researchers, and statisticians were informed, in part, by a national TEP consisting of patients, methodologists, researchers, and providers, including orthopedists who conducted a detailed clinical review of all the measure results to ensure the measure algorithm is appropriate. We also held a public comment period soliciting stakeholder input on the measure methodology, including the planned admission algorithm. However, we will continue to evaluate the measure as our goal is to ensure that the measure accurately reflects the quality of care provided in ASCs.

We appreciate the commenter's careful review of the top hospital visit diagnoses within seven days of orthopedic procedures. We welcome specific examples of potentially planned admissions following outpatient orthopedic procedures.

Comment: Some commenters were concerned that ASCs may not have actionable information generated from ASC-17. Specifically, some commenters did not support adoption of the measure, because measure score calculation relies on retrospective claims data. The commenters expressed concerns that the delay in providing data to facilities would provide limited usefulness for quality improvement or for consumers in choosing an ASC facility. Regarding a similar measure, ASC-12 Facility Risk-Standardized Visit Rate after Outpatient Colonoscopy, one commenter noted that in their members' experience with the confidential feedback reports, facilities were already aware of most of the visits in the claims detail report and did not review the reports unless the facilities were categorized as underperforming. The commenter also questioned the

usefulness of the measure to make distinction among facilities and to consumers, because the performance for the overwhelming majority of the facilities would be no different than expected.

Response: We acknowledge the commenters' concerns regarding the use of claims data for the ASC-17 measure; however, the measure would provide facilities with the most recently available, patient-level data to help guide quality improvement efforts that would also be low burden.

Further, we believe that measures of hospital events following specific types of surgical procedures fully based on Medicare FFS claims recently adopted (for example, ASC-12: Facility 7-Day Risk Standardized Hospital Visit Rate after Outpatient Colonoscopy Measure) and including those newly finalized in this final rule with comment period (that is, ASC-17: Hospital Visits after Orthopedic Ambulatory Surgical Center Procedures and ASC-18: Hospital Visits after Urology Ambulatory Surgical Center Procedures) will better inform Medicare beneficiaries and other consumers about post-procedure complication rates. Existing ASC quality measures tend to focus on very rare, patient safety-related events. For example, ASC-3 counts cases in which a wrong site, wrong side, wrong patient, wrong procedure, or wrong implant event occurred (76 FR 74499).¹³² Measures designed to capture more common adverse outcomes that patients experience, such as pain, bleeding, urinary retention, and other complications, prompting acute care hospital visits or admissions are lacking at this time, and this is what this measure is intended to accomplish.

While we appreciate the commenter's feedback that some ASCs were already aware of most of the visits in the claims detail report and did not review the reports unless the facilities were categorized as underperforming, that is not always the case. Providers at ASCs are often unaware of patients' subsequent acute care visits given that separate providers (for example, emergency department physicians) tend to provide post-surgical care when it is required.¹³³ This measure is intended to bring greater awareness to a larger

number of ASCs and patients, in addition to actionable information to lower the rate of preventable adverse events and to improve the quality of care following procedures performed at an ASC.

Although the majority of ASCs would be expected to have risk-standardized rates that would be classified as "no different than the national rate" on *Hospital Compare*, we believe that the measure will be able to make distinction among facilities and to consumers because the variation in risk-standardized hospital visit rates across ASCs nationally suggests that there is still room for quality improvement. *Hospital Compare* will also report facilities' risk-standardized rates, and facilities will receive confidential feedback reports to support quality improvement efforts. Furthermore, feedback from national TEP members showed that the ASC-17 measure, as specified, can be used to distinguish between better and worse quality facilities.¹³⁴ This shows TEP agreement with the overall face validity of the measure.

Comment: A few commenters expressed concerns about risk adjustment. A commenter noted that the measure is not risk adjusted to account for socioeconomic status and other factors beyond an ASC's control. Another commenter noted that successful application of risk stratification methods must be accomplished before using claims data, especially with the move from traditionally inpatient procedures to the outpatient and ambulatory settings. A third commenter expressed a concern about including condition category (CC 82), Respirator dependence/tracheostomy status, on the list of condition categories that are not risk-adjusted if the condition occurs only at the time of the procedure. The commenter noted that this type of condition is not something that develops acutely within the timeframe of an ASC procedure, but rather is reflective of a more chronic patient condition.

Response: We understand the important role that factors outside of an ASC's control, for example, socioeconomic and sociodemographic status, play in the care of patients.

¹³² Centers for Medicare & Medicaid Services. Ambulatory Surgical Center Quality Reporting Specifications Manual Release Notes Version: 6.0. 2016; <http://qualitynet.org/dcs/ContentServer?c=Page&pagename=QnetPublic%2FPage%2FQnetTier2&cid=1228772475754>. Accessed July 13, 2016.

¹³³ Mezei G, Chung F. Return hospital visits and hospital readmissions after ambulatory surgery. *Annals of Surgery*. 1999;230(5):721-727.

¹³⁴ Yale New Haven Health Services Corporation—Center for Outcomes Research and Evaluation (CORE). Measure Technical Report: Hospital Visits after Orthopedic Ambulatory Surgical Center Procedures (Version 1.0). May 2017. Available at: https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/HospitalQualityInits/Downloads/Version-10-Hospital-Visits_Orthopedic-ASC-Procedures_Measure-Technical-Report_052017.pdf.

¹³¹ Parry, Nicola. "7-Day Readmissions: Better Indicators of Patient Care." *Medscape*, 2016.

Although the risk-adjustment methodology does not stratify by social risk factors, it does account for risk by adjusting for risk factors associated with increased risk for hospital visits after surgery. In developing this measure, we evaluated the potential effects of risk adjusting for three socioeconomic status (SES) factors that are available in CMS claims (Medicaid dual-eligibility status, African-American race, and the AHRQ SES index). Our results show that adjusting for these three factors at the patient level do not change the measure scores. We assessed the relationship of SES to hospital visits at the patient and facility levels. Unadjusted and adjusted ASC-level risk-standardized hospital visit rates were highly correlated (Spearman correlation coefficients of nearly 1.0) when calculated with and without the addition of the three SES variables (Medicaid dual-eligibility status, African-American race, and the AHRQ SES index). This indicates that including SES variables in the ASC-level risk-adjusted measure score will result in limited differences in measure results after accounting for other risk factors, such as age and comorbidities. We refer readers to the methodology in the measure specifications for more information about SES testing for this measure at: <https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/HospitalQualityInits/Measure-Methodology.html>. We also refer readers to section XIV.B.2. of this final rule with comment period where we discuss social risk factors in the ASCQR Program in more detail.

In addition, analyses of ASCs categorized into quartiles based on proportions of Medicaid dual-eligible patients, of African-American patients, and of low-SES patients (as identified by the AHRQ SES index),¹³⁵ showed largely overlapping distributions (with similar median values) of the risk-standardized hospital visit rates (RSHVRs) by quartile. This means that facilities serving larger proportions of low-SES patients perform similarly to facilities serving lower proportions of low-SES patients.

Furthermore, we appreciate the commenter's concern about including condition category (CC) 82 on the list of condition categories that are not risk-adjusted for if they occur only at the time of the procedure.¹³⁶ Condition

categories are used to classify diagnoses into clinically coherent groups.¹³⁷ We consolidated like risk factors into candidate variables, which were the variables that we considered for the risk-adjustment model. We agree with the commenter for noting that CC 82 is unlikely to develop acutely during the timeframe of a procedure; we will review this group of codes and will consider revising the list of CCs that are not risk-adjusted for if the condition occurs at the time of the procedure. As explained above, this measure was reviewed using a consensus-driven approach, with input from a national TEP and surgeons, including orthopedists, providing care in the ASC setting. Potential candidate risk factors and condition categories were identified from related quality measures and the literature;¹³⁸ a preliminary list of risk factors was developed and then revised based on national TEP and clinical expert review that included several orthopedists. These risk variables were further released and reviewed during the measure development public comment period prior to the selection of the final model.¹⁴⁰ This consensus-based approach was used to achieve clinical face validity prior to the model selection.

Comment: One commenter suggested that the ASC-17 should not be tied to payment or measure procedures until after the first year of provision in the ASC setting and noted concern that doing so at the outset would not accurately reflect quality and risks

Evaluation (CORE). Measure Technical Report: Hospital Visits after Orthopedic Ambulatory Surgical Center Procedures (Version 1.0). May 2017. Available at: https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/HospitalQualityInits/Downloads/Version-10-Hospital-Visits_Orthopedic-ASC-Procedures_Measure-Technical-Report_052017.pdf.

¹³⁷ HCUP CCS Fact Sheet. Healthcare Cost and Utilization Project (HCUP). January 2012. Agency for Healthcare Research and Quality, Rockville, MD. <https://www.hcup-us.ahrq.gov/toolssoftware/ccs/ccsfactsheet.jsp>.

¹³⁸ Sherman SL, Lyman S, Koulouvaris P, Willis A, Marx RG. Risk factors for readmission and revision surgery following rotator cuff repair. *Clinical Orthopaedics and Related Research*. 2008;466(3):608–613.

¹³⁹ Fleisher LA, Pasternak LR, Herbert R, Anderson GF. Inpatient hospital admission and death after outpatient surgery in elderly patients: Importance of patient and system characteristics and location of care. *Archives of Surgery*. 2004;139(1):67–72.

¹⁴⁰ Yale New Haven Health Services Corporation—Center for Outcomes Research and Evaluation (CORE). Measure Technical Report: Hospital Visits after Orthopedic Ambulatory Surgical Center Procedures (Version 1.0). May 2017. Available at: https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/HospitalQualityInits/Downloads/Version-10-Hospital-Visits_Orthopedic-ASC-Procedures_Measure-Technical-Report_052017.pdf.

incentivizing hospital services over ASCs. Another commenter noted that ASCs still receive a full payment update even if the ASCs are not involved in the measure.

Response: We thank the commenters for their suggestions regarding the link of the ASC-17 measure to payment. We do not believe that the measure risks incentivizing hospital services over ASCs. The ASCQR Program is a pay-for-reporting quality data program. This means that payments under our pay-for-reporting quality data program are tied to reporting of the measures in the form and manner specified, not to specific performance on the measures, like for pay-for-performance programs (for example, the Hospital VBP Program (82 FR 38240)). In addition, we believe that the measure does indeed reflect quality. Feedback from national TEP members showed that the ASC-17 measure, as specified, can be used to distinguish between better and worse quality facilities.¹⁴¹ This shows TEP agreement with the overall face validity of the measure.

We note that while ASCs will not be required to submit additional data for measure calculation, because this is a claims-based measure, we strongly encourage ASCs to review measure scores to improve quality of care and patient outcomes. The detailed feedback reports, which provide information on every procedure performed during the performance period and the details of the hospital visits within seven days of the orthopedic procedure, will enable ASCs to understand the post-surgical hospital visit patterns. We believe this will help to facilitate ASCs to tailor clinical and educational interventions with the goal of reducing or eliminating the risk of hospital visits for complication of an orthopedic surgery. We also believe that the measure will facilitate improvements via public reporting by informing the general public and ASCs even if particular ASCs are not active in the measure.

Comment: A few commenters expressed concerns about the reliability of the measure. One commenter noted that low-volume situations tend to produce measure scores that lack reliability. The commenter noted that the measure is only “fairly” reliable and suggested the reliability for a measure intended for public reporting should be substantially reliable, or have an ICC of 0.61 to 0.80. Furthermore, the commenter noted that the measure also suffers from limited discriminatory power because the number of underperforming facilities is very small.

¹⁴¹ Ibid.

¹³⁵ Bonito A, Bann C, Eicheldinger C, Carpenter L. Creation of new race-ethnicity codes and socioeconomic status (SES) indicators for Medicare beneficiaries. RTI International, *Agency for Healthcare Research and Quality*. 2008.

¹³⁶ Yale New Haven Health Services Corporation—Center for Outcomes Research and

The commenter urged CMS to ensure that the publicly reported scores are reliable. A few commenters expressed concern about the reliability of the measure for public reporting.

Response: We thank the commenters for their feedback about the measure reliability. We disagree with the commenters and believe that ASC-17 is sufficiently reliable to be included in the ASCQR Program. Our calculated intraclass correlation coefficient (ICC),¹⁴² a measure of reliability or the degree to which the measure can produce accurate and consistent results across multiple measurements of the same entities in a time period, for this measure was 0.226.¹⁴³ The NQF considers ICC values ranging from 0.01–0.20 as “slight” reliability, 0.21–0.40 as “fair” reliability, 0.41 to 0.60 as “moderate” reliability, and 0.61 to 0.80 as “strong” reliability.¹⁴⁴ Although this value indicates fair measure score reliability,¹⁴⁵ we recognize that it is lower than for other claims-based outcomes measures developed by CMS.¹⁴⁶ However, as we would expect, the ICC increases for ASCs with more patients.¹⁴⁷ We disagree that the measure reliability should be “substantially” reliable, or have an ICC of 0.61 to 0.80, and believe the publicly reported scores will be sufficiently reliable based on results showing

increased reliability with increased case numbers.¹⁴⁸ Specifically, for ASCs with at least 250 cases in each of the two samples, the ICC was 0.359, which reflects better reliability that is more consistent with previously developed measures.¹⁴⁹ During the measure dry run, we intend to determine the case size cutoff for meeting moderate reliability standards using the ICC by testing the reliability of the scores at different case sizes in the dry run data. In the 4-year data set, of the 3,075 ASCs, 467 (15.2 percent) had 250 or more procedures, accounting for 57.3 percent of all procedures in the measure cohort.¹⁵⁰

Regarding the comment about lack of discriminatory power, we agree that the many small-volume ASCs will limit the ability to make distinctions in performance between facilities. ASCs with few cases in a given year limit our ability to capture variation in ASC-level measure scores because our modeling methodology is conservative and will estimate measure scores toward the national mean for facilities with small volumes. Specifically, ASCs with relatively few cases in the performance period may have a true rate that is worse/better than the national average. However, the model estimates their rate as close to the mean because their low volume does not provide enough information to accurately estimate a value near their true rate. As a result, the model may capture less variation than truly exists due to low case sizes. To improve the measure’s ability to detect quality differences, we crafted our proposal to use 2 years of data for public reporting to expand the number of cases available for estimating rates across all facilities and to increase both the reliability of the measure score and the ability to discriminate performance across facilities. Furthermore, ASC facilities that have too few cases to reliably estimate a measure score (moderate reliability as discussed in the prior paragraph) would be treated in the same way as other facilities with too few cases and would not have their scores posted on *Hospital Compare*; their data would be replaced with a footnote. We discuss our *Hospital Compare* footnotes at: <https://www.medicare.gov/hospital-compare/data/footnotes.html>. However, these facilities will still receive confidential feedback reports/facility-specific reports providing valuable information about post-surgery events. We refer readers to section XIV.B.6.b.(7) of this final rule with

comment period for more details about public reporting of this measure. We expect that smaller ASCs will still benefit from confidentially reviewing their measure results and individual patient-level outcomes in the facility-specific report, as these data are currently largely unknown to ASCs and providers.

Comment: One commenter requested that the dry run results be aggregated and made available in its entirety to the public for review and comment if the measure is finalized. The commenter also suggested that CMS conduct pilot testing for the measure with volunteer ASCs rather than conduct national dry runs.

Response: We refer readers to section XIV.B.6.b.(7) of this final rule with comment period where we discuss our dry run. The intent of the dry run is to test production of the measure and for ASCs to familiarize themselves with the measure and provide feedback to us. The dry run will generate confidential feedback reports for ASCs on measure performance and risk-standardized hospital visit rates, among other data. We plan to perform a dry run of the measure prior to implementation. The confidential dry run results will not be publicly reported or used for payment determination. We believe a dry run will be more beneficial than pilot testing. The dry run will include all ASCs rather than just a subset of volunteer ASCs and will enable all ASCs to gain familiarity with the measure and processes, as well as provide feedback to CMS on both the measure itself and the reports. This will also enable CMS to learn about any unanticipated nuances associated with measure implementation.

As proposed, we will not publicly report data for this measure until the CY 2022 payment determination and subsequent years. We do not believe publicly reporting data from the dry run is appropriate as we might still be working out unanticipated nuances; the data is preliminary and is therefore subject to change based on feedback provided by ASCs.

Comment: A commenter noted that although CMS believes that there would not be any additional burden because ASCs are not required to submit additional data, reviewing claims detail reports and measure scores would be associated with additional burden for someone at ASCs, likely a clinician.

Response: We thank the commenter for providing this input and acknowledge that this measure will be calculated completely from data already obtained from paid Medicare FFS claims submitted by ASCs, hospitals,

¹⁴² Landis J, Koch G. The measurement of observer agreement for categorical data, *Biometrics* 1977;33:159–174.

¹⁴³ Yale New Haven Health Services Corporation—Center for Outcomes Research and Evaluation (CORE). Measure Technical Report: Hospital Visits after Orthopedic Ambulatory Surgical Center Procedures (Version 1.0). May 2017. Available at: https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/HospitalQualityInits/Downloads/Version-10_Hospital-Visits_Orthopedic-ASC-Procedures_Measure-Technical-Report_052017.pdf.

¹⁴⁴ Landis J, Koch G. The measurement of observer agreement for categorical data, *Biometrics* 1977;33:159–174.

¹⁴⁵ The NQF considers ICC values ranging from 0.01–0.20 as “slight” reliability, 0.21–0.40 as “fair” reliability, 0.41 to 0.60 as “moderate” reliability, and 0.61 to 0.80 as “strong” reliability. http://www.qualityforum.org/Measuring_Performance/Improving_NQF_Process/Measure_Testing_Task_Force_Final_Report.aspx.

¹⁴⁶ See the Risk-Standardized Hospital Visits within 7 Days After Hospital Outpatient Surgery Measure. For ICC score of 0.50: <https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/HospitalQualityInits/Downloads/Hospital-Visits-after-Hospital-Outpatient-Surgery-Measure.pdf>.

¹⁴⁷ Yale New Haven Health Services Corporation—Center for Outcomes Research and Evaluation (CORE). Measure Technical Report: Hospital Visits after Orthopedic Ambulatory Surgical Center Procedures (Version 1.0). May 2017. Available at: https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/HospitalQualityInits/Downloads/Version-10_Hospital-Visits_Orthopedic-ASC-Procedures_Measure-Technical-Report_052017.pdf.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

and physicians for billing purposes. Because claims data are used, there is no burden on the part of ASCs to submit additional data for measure calculation. We strongly suggest that facilities allocate time to review their feedback report, because they contain actionable information to identify performance gaps and further develop quality improvement strategies. However, we note that these activities do not represent burden related to program requirements.

After consideration of the public comments we received, we are finalizing the proposal to adopt the ASC-17: Hospital Visits after Orthopedic Ambulatory Surgical Center Procedures measure in the ASCQR Program for the CY 2022 payment determination and subsequent years, as proposed.

c. Adoption of ASC-18: Hospital Visits After Urology Ambulatory Surgical Center Procedures Beginning With the CY 2022 Payment Determination

(1) Background

As the number of urology procedures performed in ASCs increases, it is of increasing importance to report the quality of care provided to patients undergoing these procedures. One study found that urology procedures accounted for 4.8 percent of unanticipated admissions, and that urology surgery patients were almost twice as likely as orthopedics, plastic surgery, or neurosurgery to be admitted following surgery.¹⁵¹ Similarly, a recent study found outpatient urology surgery has an overall 3.7 percent readmission rate.¹⁵² A third study using a 5-percent national sample of Medicare beneficiaries ages 65 and older who underwent one of 22 common outpatient urologic procedures at ASCs from 1998 to 2006 found a 7.9 percent 30-day risk-adjusted rate of inpatient admission following surgery, with more frequent same-day admissions following outpatient surgery at ASCs than at hospitals.¹⁵³

Because urology surgery performed at an ASC is a significant predictive factor for unanticipated admissions compared

to other procedures,¹⁵⁴ we believe measuring and reporting 7-day unplanned hospital visits following urology procedures will incentivize ASCs to improve care and care transitions. Many of the reasons for hospital visits following surgery at an ASC are preventable; patients often present to the hospital following urology surgery for complications of medical care, including urinary tract infection, calculus of the ureter, urinary retention, hematuria, and septicemia.¹⁵⁵ However, increased patient and staff education present opportunities to improve the success rate of urology surgeries in ASCs.¹⁵⁶ Therefore, we believe tracking and reporting these events would facilitate efforts to lower the rate of preventable adverse events and to improve the quality of care following urology procedures performed at an ASC.

(2) Overview of Measure

We believe it is important to minimize adverse patient outcomes associated with urology ASC surgeries. Therefore, in the CY 2018 OPPTS/ASC proposed rule (82 FR 33695), we proposed to adopt the ASC-18: Hospital Visits after Urology Ambulatory Surgical Center Procedures measure in the ASCQR Program for the CY 2022 payment determination and subsequent years. We expect the measure would promote improvement in patient care over time, because measurement coupled with transparency in publicly reporting measure information would make the rate of unplanned hospital visits (emergency department visits, observation stays, and unplanned inpatient admissions) following urology procedures at ASCs more visible to both ASCs and patients, and would incentivize ASCs to incorporate quality improvement activities to reduce these unplanned hospital visits. The measure also addresses the CMS National Quality Strategy domains of making care safer by reducing harm caused in the delivery of care and promoting effective communication and coordination of care.

Section 1890A of the Act requires the Secretary to establish a prerulemaking process with respect to the selection of certain categories of quality and efficiency measures. Under section 1890A(a)(2) of the Act, the Secretary

must make available to the public by December 1 of each year a list of quality and efficiency measures that the Secretary is considering for the Medicare program. The ASC-18: Hospital Visits after Urology Ambulatory Surgical Center Procedures measure was included on a publicly available document entitled “List of Measures under Consideration for December 1, 2016.”¹⁵⁷ The MAP reviewed this measure (MUC16-153) and recommended that this measure be refined and resubmitted prior to adoption by the ASCQR Program because, at the time of the MAP’s review, this measure was still undergoing field testing. The Workgroup stated testing results should demonstrate reliability and validity at the facility level in the ambulatory surgical setting, and recommended this measure be submitted to NQF for review and endorsement.¹⁵⁸

Since the MAP’s review and recommendation of ‘Refine and Resubmit’ in 2016, we have completed testing for this measure and continued to refine this proposed measure in response to the MAP’s recommendations. Results of continued development activities, including stakeholder feedback from the public comment period and pilot test findings will be presented to the MAP during the MAP feedback loop meeting in fall 2017. The proposed measure is consistent with the information submitted to the MAP, and the original MAP submission and our continued refinements support its scientific acceptability for use in quality reporting programs. Facility-level testing showed significant variation in unplanned hospital visits among ASCs after adjusting for case-mix differences, which suggests variation in quality of care. Our testing found moderate measure score reliability¹⁵⁹ for this measure, which is consistent with existing measures of patient outcomes in the ASC setting, such as ASC-12: Facility Seven-Day Risk-Standardized Hospital Visit Rate after Outpatient Colonoscopy (described in the CY 2015 OPPTS/ASC final rule with comment period at 79 FR 66973). Validity testing demonstrated that the measure scores

¹⁵¹ Fortier J. Unanticipated Admission after Ambulatory Surgery—A Prospective Study. *Canadian Journal of Anaesthesia*. 1998;45(7):612–619.

¹⁵² Rambachan A. Predictors of Readmission Following Outpatient Urological Surgery. *Annals of the Royal College of Surgeons of England. Journal of Urology*. 2014;192(1):183–188.

¹⁵³ Hollingsworth JM. Surgical Quality Among Medicare Beneficiaries Undergoing Outpatient Urological Surgery. *The Journal of Urology*. 2012;188(4):1274–1278.

¹⁵⁴ Fortier J. Unanticipated Admission after Ambulatory Surgery—A Prospective Study. *Canadian Journal of Anaesthesia*. 1998;45(7):612–619.

¹⁵⁵ Paez A. Adverse Events and Readmissions after Day-Care Urological Surgery. *International Brazilian Journal of Urology*. 2007;33(3):330–338.

¹⁵⁶ Ibid.

¹⁵⁷ National Quality Forum. *List of Measures under Consideration for December 1, 2016*. National Quality Forum, Dec. 2016. Available at: <http://www.qualityforum.org/map/>.

¹⁵⁸ National Quality Forum. 2016–2017 Spreadsheet of Final Recommendations to HHS and CMS, available at: <https://www.qualityforum.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=81593>.

¹⁵⁹ Landis JR, Koch GG. The Measurement of Observer Agreement for Categorical Data. *Biometrics*. 1977;33(1):159–174.

identify differences in quality across facilities. Detailed testing results are available in the technical report for this measure, located at: <https://www.cms.gov/medicare/Quality-Initiatives-Patient-Assessment-Instruments/HospitalQualityInits/Measure-Methodology.html>.

Sections 1833(i)(7)(B) and 1833(t)(17)(C)(i) of the Act, when read together, require the Secretary, except as the Secretary may otherwise provide, to develop measures appropriate for the measurement of the quality of care furnished by ASCs that reflect consensus among affected parties and, to the extent feasible and practicable, that include measures set forth by one or more national consensus building entities. However, we note that section 1833(i)(7)(B) of the Act does not require that each measure we adopt for the ASCQR Program be endorsed by a national consensus building entity, or by the NQF specifically. Further, under section 1833(i)(7)(B) of the Act, section 1833(t)(17)(C)(i) of the Act applies to the ASCQR Program, except as the Secretary may otherwise provide. Under this provision, the Secretary has further authority to adopt non-endorsed measures. As stated in the CY 2012 OPPS/ASC final rule with comment period (76 FR 74465 and 74505), we believe that consensus among affected parties can be reflected through means other than NQF endorsement, including consensus achieved during the measure development process, consensus shown through broad acceptance and use of measures, and consensus through public comment. We believe this proposed measure meets these statutory requirements.

The proposed ASC-18: Hospital Visits after Urology Ambulatory Surgical Center Procedures measure is not currently NQF-endorsed. However, we intend to submit this measure for review and endorsement by the NQF once an appropriate measure endorsement project has a call for measures. We believe that this measure is appropriate for the measurement of quality care furnished by ASCs because urology procedures are becoming increasingly common in ASCs and, as discussed above, can signify unanticipated admissions after care provided in ASCs. Such visits are an unexpected and potentially preventable outcome for patients with a low anticipated perioperative risk. We also believe this measure depicts consensus among affected parties, as it was developed with stakeholder input from both a Technical Expert Panel convened by a contractor as well as the measure

development public comment period.¹⁶⁰ During the MAP and measure development processes, public commenters supported the measure's focus on assessing patient outcomes after urology ASC and agreed that the measure would be meaningful and improve quality of care. In addition, the ASC-18: Hospital Visits after Urology Ambulatory Surgical Center Procedures measure addresses the MAP-identified priority measure area of surgical complications for the ASCQR Program.¹⁶¹ Therefore, we believe it is appropriate to incorporate this measure into the ASCQR Program measure set because collecting and publicly reporting this data will improve transparency, inform patients and providers, and foster quality improvement efforts.

(3) Data Sources

This measure is claims-based and uses Part A and Part B Medicare administrative claims and Medicare enrollment data to calculate the measure.

We proposed that the data collection period for the proposed ASC-18: Hospital Visits after Urology Ambulatory Surgical Center Procedures measure would be the 2 calendar years ending 2 years prior to the applicable payment determination year. For example, for the CY 2022 payment determination, the data collection period would be CY 2019 to 2020. Because these measure data are collected via claims, ASCs will not need to submit any additional data directly to CMS. We refer readers to section XIV.D.4. of this final rule with comment period for a more detailed discussion of the requirements for data submitted via claims.

(4) Measure Calculations

The measure outcome is all-cause, unplanned hospital visit occurring within seven days of the urology procedure performed at an ASC. For the purpose of this measure, "hospital visits" include emergency department visits, observation stays, and unplanned inpatient admissions. When there are

two or more qualifying surgical procedures within a 7-day period, the measure considers all procedures as index procedures. However, the timeframe for outcome assessment is defined as the interval between procedures (including the day of the next procedure) and then 7 days after the last procedure.

The facility-level score is a risk-standardized hospital visit rate, calculated by multiplying the ratio of the predicted to the expected number of postsurgical hospital visits among the given ASC's patients by the national observed hospital visit rate for all ASCs. For each ASC, the numerator of the ratio is the number of hospital visits predicted for the ASC's patients accounting for its observed rate, the number of the urology procedures performed at the ASCs, the case-mix, and the surgical complexity mix. The denominator of the ratio is the expected number of hospital visits given the ASC's case-mix and surgical complexity mix. A ratio of less than one indicates the ASC facility's patients were estimated as having fewer post-surgical visits than expected compared to ASCs with similar surgical complexity and patients; and a ratio of greater than one indicates the ASC facility's patients were estimated as having more visits than expected. The national observed hospital visit rate is the national unadjusted proportion of patients who had a hospital visit following a urology ASC surgery. For more information on measure calculations, we refer readers to: <https://www.cms.gov/medicare/Quality-Initiatives-Patient-Assessment-Instruments/HospitalQualityInits/Measure-Methodology.html>.

(5) Cohort

The patient cohort for the proposed ASC-18: Hospital Visits after Urology Ambulatory Surgical Center Procedures measure includes all Medicare beneficiaries ages 65 and older undergoing outpatient urology procedures at an ASC who have 12 prior months of Medicare fee-for-service Parts A and B enrollment. The target group of procedures are those that: (1) Are routinely performed at ASCs; (2) involve increased risk of post-surgery hospital visits; and (3) are routinely performed by urologists.

Procedures included in the measure cohort are on Medicare's list of covered ambulatory surgical center (ASC) procedures.¹⁶² Medicare developed this

¹⁶⁰ Yale New Haven Health Services Corporation—Center for Outcomes Research and Evaluation (CORE). Public Comment Summary Report: Development of Facility-Level Quality Measures of Unplanned Hospital Visits after Selected Ambulatory Surgical Center Procedures. Fall 2016. Available at: <https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/MMS/CallforPublicComment.html>.

¹⁶¹ National Quality Forum. "MAP 2017 Considerations for Implementing Measures in Federal Programs: Hospitals." Report. 2017. Available at: <http://www.qualityforum.org/map/under/Hospitals-Final-Report>.

¹⁶² Centers for Medicare and Medicaid Services. "Ambulatory Surgical Center (ASC) Payment: Addenda Updates." Available at: https://www.cms.gov/medicare/medicare-fee-for-service-payment/ascpayment/11_addenda_updates.html.

list to identify surgeries have a low to moderate risk profile. Surgeries on the ASC list of covered procedures do not involve or require major or prolonged invasion of body cavities, extensive blood loss, major blood vessels, or care that is either emergent or life threatening.¹⁶³ Medicare annually reviews and updates this list, and includes a transparent public comment submission and review process for addition and/or removal of procedure codes.¹⁶⁴ The current list is accessible in the Downloads section at: https://www.cms.gov/medicare/medicare-fee-for-service-payment/ascpayment/11_addenda_updates.html. In addition, to focus the measure only on the subset of surgeries on Medicare's list of covered ASC procedures that impose a meaningful risk of post-urology ASC surgery hospital visits, the measure includes only "major" and "minor" procedures, as indicated by the MPFS global surgery indicator (GSI) values of 090 and 010, respectively, and therapeutic cystoscopy procedures. This list of GSI values is publicly available at: <https://www.cms.gov/Medicare/Medicare-fee-for-service-payment/physicianfeesched/pfs-federal-regulation-notices-items/cms-1590-fc.html> (download Addendum B). Moreover, to identify the subset of ASC procedures typically performed by urologists, we used the Clinical Classifications Software (CCS) developed by the Agency for Healthcare Research and Quality (AHRQ) and include in this measure procedures from two of AHRQ's categories, "operations on the urinary system" and "operations on the male genital organs."¹⁶⁵ For more cohort details, we refer readers to the measure technical report located at: <https://www.cms.gov/medicare/Quality-Initiatives-Patient-Assessment-Instruments/HospitalQualityInits/Measure-Methodology.html>.

The measure excludes patients who survived at least 7 days following a urology procedure at an ASC, but were not continuously enrolled in Medicare fee-for-service Parts A and B in the 7 days after surgery. These patients are excluded to ensure all patients captured under this measure have full data available for outcome assessment. There are no additional inclusion or exclusion criteria for the proposed ASC-18 measure. Additional methodology and measure development details are

available at: <https://www.cms.gov/medicare/Quality-Initiatives-Patient-Assessment-Instruments/HospitalQualityInits/Measure-Methodology.html>.

(6) Risk Adjustment

The statistical risk-adjustment model includes nine clinically relevant risk-adjustment variables that are strongly associated with risk of hospital visits within seven days following ASC urology surgery. The measure risk adjusts for age, six comorbidities, number of qualifying procedures, and work Relative Value Units (RVUs) to adjust for surgical complexity.¹⁶⁶ Additional risk adjustment details are available in the technical report at: <https://www.cms.gov/medicare/Quality-Initiatives-Patient-Assessment-Instruments/HospitalQualityInits/Measure-Methodology.html>.

(7) Public Reporting

As stated above, facility-level testing showed variation in unplanned hospital visits among ASCs after adjusting for case-mix differences, which suggests variation in quality of care and opportunities for quality improvement.¹⁶⁷ Reliability testing showed fair measure score reliability.¹⁶⁸ As expected, the reliability increased for ASCs with more patients; ASCs with at least 250 cases showed moderate reliability, consistent with other publicly reported Medicare claims-based, risk-adjusted outcome measures. In the CY 2018 OPPI/ASC proposed rule (82 FR 33694), we noted that if this measure is adopted, we proposed to publicly report results only for facilities with sufficient case numbers to meet moderate reliability standards.¹⁶⁹ CMS will determine the case size cutoff for meeting moderate reliability standards using the intraclass correlation (ICC) during the measure dry run (discussed below) by testing the reliability of the scores at different case sizes in the dry run data. However, we would also provide confidential performance data directly to smaller facilities which do not meet the criteria for sufficient case

numbers for reliability considerations that would benefit from seeing their measure results and individual patient-level outcomes, as these data are currently largely unknown to ASCs and providers. The validity testing results demonstrated that the measure scores are valid and useful measures of ASC urology surgical quality of care and will provide ASCs with information that can be used to improve their quality of care. Detailed testing results are available in the technical report for this measure, located at: <https://www.cms.gov/medicare/Quality-Initiatives-Patient-Assessment-Instruments/HospitalQualityInits/Measure-Methodology.html>.

(8) Provision of Facility-Specific Information Prior to Public Reporting

In the CY 2018 OPPI/ASC proposed rule (82 FR 33694), we noted that if this proposed measure is finalized, but before the official data collection period or public reporting for the proposed ASC-18 measure, we intend to conduct a dry run. A dry run is a period of confidential feedback during which ASCs may review their dry-run measure results, and in addition, further familiarize themselves with the measure methodology, and ask questions. For the dry-run, we intend to use the most current 2-year set of complete claims (usually 12 months prior to the start date) available at the time of dry run. For example, if the dry run began in June 2018, the most current 2-year set of data available would likely be July 2015 to June 2017. Because we use paid, final action Medicare claims, ASCs would not need to submit any additional data for the dry run. The dry run would generate confidential feedback reports for ASCs, including patient-level data indicating whether the patient had a hospital visit and, if so, the type of visit (emergency department visit, observation stay, or unplanned inpatient admission), the admitting facility, and the principal discharge diagnosis. Further, the dry run would enable ASCs to see their risk-standardized hospital visit rate prior to the measure being implemented. General information about the dry run as well as confidential facility-specific reports would be made available for ASCs to review on their accounts at: <http://www.qualitynet.org>. We intend to continue to generate these reports for ASCs after we implement the measure so ASCs can use the information to identify performance gaps and develop quality improvement strategies.

The confidential dry run results are not publicly reported and do not affect payment. We expect the dry run to take

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ Healthcare Cost and Utilization Project. *Clinical Classifications Software for Services and Procedures*. Available at: https://www.hcup-us.ahrq.gov/toolsoftware/ccs_svcsproc/ccssvcproc.jsp.

¹⁶⁶ S. Coberly. The Basics: Relative Value Units (RVUs). National Health Policy Forum. January 12, 2015. Available at: http://www.nhpf.org/library/the-basics/Basics_RVUs_01-12-15.pdf.

¹⁶⁷ Yale New Haven Health Services Corporation. *Hospital Visits after Orthopedic Ambulatory Surgical Center Procedures (Version 1.0)*. May 2017. Available at: https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/HospitalQualityInits/Downloads/Version-10-Hospital-Visits-Orthopedic-ASC-Procedures-Measure-Technical-Report_052017.pdf.

¹⁶⁸ Landis JR, Koch GG. The Measurement of Observer Agreement for Categorical Data. *Biometrics*. 1977;33(1):159-174.

¹⁶⁹ Ibid.

approximately one month to conduct, during which facilities would be provided the confidential report and the opportunity to review their performance and provide feedback to us. However, after the dry run, measure results would have a payment impact and would be publicly reported beginning with the CY 2022 payment determination and for subsequent years as proposed. Although not previously stated in the CY 2018 OPPTS/ASC proposed rule (82 FR 33694), we note that the primary purpose of the records maintained in the National Claims History system of records (SOR) is for evaluating and studying the operation and effectiveness of the Medicare program, which aligns with the purposes of the ASCQR Program and a permissible use of beneficiary information. In addition, under 45 CFR 164.506(c)(4) of the HIPAA Privacy Rule, we may disclose protected health information to another covered entity, such as the ASCs, provided that both the ASC and CMS have or had a relationship with each individual who is the subject of the PHI being requested, the PHI pertains to such relationship, and the disclosure is for the purposes of conducting quality assessment and improvement activities listed in paragraph (1) or (2) of the definition of "health care operations" at 45 CFR 164.501. We believe that this provision is extensive enough to cover the uses that we would expect an ASC to make of the PHI.

We invited public comment on our proposal to adopt the ASC-18: Hospital Visits after Urology Ambulatory Surgical Center Procedures measure beginning with the CY 2022 payment determination as discussed above.

Comment: A few commenters supported the proposed adoption of the ASC-18: Hospital Visits after Urology Ambulatory Surgical Center Procedures measure in the ASCQR Program. One of the commenters noted that the measure will provide patients with valuable data and address clinical areas critical to providers.

Response: We thank the commenters for their support. We agree that measuring quality of care associated with urology procedures performed at ASCs is patient-centered and is an important clinical care area to evaluate.

Comment: A few commenters believed that the measure should be refined and resubmitted prior to rulemaking, as suggested by the MAP. Several commenters noted or were concerned that the measure lacks NQF endorsement. A few commenters also suggested that CMS seek input from the MAP on the finalized measure prior to proposing for inclusion in the program.

Response: Section 1833(h)(7)(B) of the Act does not require that each measure we adopt for the ASCQR Program be endorsed by a national consensus building entity, or the NQF specifically. Under this provision, the Secretary has further authority to adopt non-endorsed measures. As stated in the CY 2012 OPPTS/ASC final rule with comment period (76 FR 74465 and 74505), we believe the requirement that measures reflect consensus among affected parties can be achieved in other ways, including through the measure development process, broad acceptance and use of the measure, and public comments. As part of the measure development process, a national Technical Expert Panel (TEP), clinical experts, and stakeholders provided input at multiple points during development. We believe the ASC-18 measure meets these statutory requirements.

We strive to adopt NQF-endorsed measures when possible. Although ASC-18 is not currently NQF-endorsed, our research and analysis conducted during development demonstrate that the measure is accurate, valid, and actionable. We refer readers to the technical report for more information about the measure and testing results: https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/HospitalQualityInits/Downloads/Version-10_Hospital-Visits_Urology-ASC-Procedures_Measure-Technical-Report_052017.pdf. We will submit this measure, with complete evidence, specifications, and testing results, to NQF for endorsement when an appropriate NQF project has a call for the measure.

In addition, in December 2016, the MAP Hospital Workgroup reviewed and classified the measure as "Refine and Resubmit Prior to Rulemaking."¹⁷⁰ We understand that the measure received this classification because: (1) The measure was still undergoing field testing at the time, and (2) the MAP also recommended that the measure be submitted to the NQF for review and endorsement. Between that initial MAP review in December 2016 and the CY 2018 OPPTS/ASC proposed rule, we completed field testing and refined the measure.¹⁷¹ The final methodology

¹⁷⁰ Spreadsheet of MAP 2017 Final Recommendations. February 1, 2017. Available at: <http://www.qualityforum.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=84452>.

¹⁷¹ MAP 2017 Considerations for Implementing Measures in Federal Programs: Hospitals. Final Report. February 15, 2017. Available at: http://www.qualityforum.org/Publications/2017/02/2017_Considerations_for_Implementing_Measures_Final_Report_-_Hospitals.aspx.

report, which was presented in the proposed rule, included the final results of measure testing and completed measure specifications that occurred between the MAP's review in December 2016 and CMS' proposal to adopt the measure in the ASCQR Program.¹⁷² We also intend to update the MAP at the next appropriate opportunity. As stated above, we also intend to submit the measure to the NQF for endorsement during the next appropriate call for measures.

Comment: A commenter expressed concern about the attribution of outcomes. Specifically, the commenter flagged eight of the top reasons for hospital visits within 7 days of urologic procedures that likely reflect routine follow-up rather than quality of care as intended by the measure. Another commenter suggested that CMS develop a numerator exclusion for unrelated hospital visits.

Response: We acknowledge that the rate of hospital visits is not expected to be zero, since some patients will have visits for reasons unrelated to the procedure. In designing the measure, we narrowed the measure to include surgical procedures that: (1) Are routinely performed at ASCs; (2) involve increased risk of post-surgery hospital visits; and (3) are routinely performed by urologists. In addition, the measure is risk-adjusted for patient demographics, clinical characteristics, and surgical procedural complexity, so that facilities that experience more unrelated visits due to a generally higher-risk patient mix will not be disadvantaged. We refer readers to the methods section in the measure specifications for more information about the risk-adjustment methodology.

In addition, we only measure the rate of *unplanned* hospital admissions; ED visits and observation stays are never considered planned.^{173 174} This approach removes from the outcome admissions that are not a signal of quality of care, because they represent:

¹⁷² Yale New Haven Health Services Corporation—Center for Outcomes Research and Evaluation (CORE). Measure Technical Report: Hospital Visits after Urology Ambulatory Surgical Center Procedures (Version 1.0). May 2017. Available at: https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/HospitalQualityInits/Downloads/Version-10_Hospital-Visits_Urology-ASC-Procedures_Measure-Technical-Report_052017.pdf.

¹⁷³ Horwitz, Leora I., et al. "Development and validation of an algorithm to identify planned readmissions from claims data." *Journal of hospital medicine* 10.10 (2015): 670–677.

¹⁷⁴ Ranasinghe, Isuru, et al. "Differences in colonoscopy quality among facilities: development of a post-colonoscopy risk-standardized rate of unplanned hospital visits." *Gastroenterology* 150.1 (2016): 103–113.

(1) A condition or diagnosis that is considered to be always planned (such as transplants or maintenance chemotherapy); or (2) that are considered potentially planned (such as cardiovascular procedures) and are not accompanied by an acute diagnosis. The planned admission algorithm is based on CMS' widely-used Planned Readmission Algorithm v4.0.¹⁷⁵ We refer readers to the measure methodology report at: <https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/HospitalQualityInits/Measure-Methodology.html> for more details.

Regarding the commenter's concerns about the attribution of outcomes, and whether hospital visit within 7 days of ASC procedure is a sign of poor quality, we believe that the measure captures the full range of potentially serious adverse events related to urologic procedures performed at ASCs. We designed the outcome timeframe to encompass the first 7 days for capture of hospital visits (ED visits, observation stays, and unplanned admissions), because existing literature suggests that the vast majority of adverse events after an urology procedure occur within the first 7 days following the procedure.^{176 177} and because the highest rates of hospital visits were observed in claims data within 7 days following the procedure. A 7-day timeframe helps to ensure that the measure will capture adverse events following the procedure, but will not capture events impacted by factors unrelated to the care patients received.¹⁷⁸ We appreciate the commenter's careful review of the top hospital visit diagnoses within seven days of urologic procedures. We welcome specific examples of potentially planned admissions

following outpatient urologic procedures.

In response to a commenter's suggestion that we develop a numerator exclusion for unrelated hospital visits, this measure was intentionally designed to broadly evaluate all-cause hospital visits to capture serious adverse events experience by patients after undergoing urologic ASC procedures, rather than a narrow set of identifiable complications, for many reasons. The outcome of all-cause hospital visits is consistent with a patient-centric view of care that is designed to prompt ASC providers to minimize the risk and reduce the need for a broad range of outcomes after undergoing urologic ASC procedures, including the risk of dehydration, nausea and vomiting, dizziness, and urinary retention. Measuring only hospital visits that are overtly related to a procedure, such as visits for pain and bleeding, would limit the measure's intended broad impact on quality improvement efforts. These are common problems that may or may not be related to a recent ASC procedure. Thus, the measure is structured so that facilities that most effectively minimize patient risk of these outcomes will perform better on the measure.

Comment: A commenter suggested that CMS provide a detailed clinical review of all the measure results by several seasoned urologists to ensure the measure algorithm is appropriate.

Response: In developing the measure, we incorporated significant input from various experts and stakeholders. In addition to the MUC and MAP processes described above, a multidisciplinary team of clinicians, health services researchers, and statisticians were informed, in part, by a national TEP consisting of patients, methodologists, researchers, and providers, including urologists who conducted a detailed clinical review of all the measure results to ensure the measure algorithm is appropriate. We also held a public comment period soliciting stakeholder input on the measure methodology, including the planned admission algorithm. However, we will continue to evaluate the measure, as our goal is to ensure that the measure accurately reflects the quality of care provided in ASCs.

We appreciate the commenter's careful review of the top hospital visit diagnoses within seven days of urology procedures. We welcome specific examples of potentially planned admissions following outpatient urologic procedures.

Comment: Several commenters were concerned that ASCs may not have actionable information generated from

ASC-18. Specifically, some commenters did not support adoption of the measure, because measure score calculation relies on retrospective claims data. The commenters expressed concerns that the delay in providing data to facilities would provide limited usefulness for quality improvement or for consumers in choosing an ASC facility. Regarding a similar measure, ASC-12 Facility Risk-Standardized Visit Rate after Outpatient Colonoscopy, one commenter noted that in their members' experience with the confidential feedback reports, facilities were already aware of most of the visits in the claims detail report and did not review the reports unless the facilities were categorized as underperforming. The commenter also questioned the usefulness of the measure to make distinctions among facilities and to consumers, because the performance for the overwhelming majority of the ASCs would be no different than expected.

Response: We acknowledge the commenters' concerns regarding the use of claims data for the ASC-18 measure; however, the measure would provide facilities with the most recently available, patient-level data to help guide quality improvement efforts that would also be low burden.

Further, we believe that measures of hospital events following specific types of surgical procedures fully based on Medicare FFS claims recently adopted (for example, ASC-12: Facility 7-Day Risk Standardized Hospital Visit Rate after Outpatient Colonoscopy Measure) and including those newly finalized in this final rule that is, ASC-17: Hospital Visits after Orthopedic Ambulatory Surgical Center Procedures and ASC-18: Hospital Visits after Urology Ambulatory Surgical Center Procedures) will better inform Medicare beneficiaries and other consumers about post-procedure complication rates. Existing ASC quality measures tend to focus on very rare, patient safety-related events. For example, ASC-3 counts cases in which a wrong site, wrong side, wrong patient, wrong procedure, or wrong implant event occurred (76 FR 74499).¹⁷⁹ Measures designed to capture more common adverse outcomes that patients experience, such as urinary retention, urinary tract infection, pain, and other complications prompting acute care hospital visits or admissions

¹⁷⁹ Centers for Medicare & Medicaid Services. Ambulatory Surgical Center Quality Reporting Specifications Manual Release Notes Version: 6.0. 2016; Available at: <http://qualitynet.org/dcs/ContentServer?c=Page&pagename=QnetPublic%2FPage%2FQnetTier2&cid=1228772475754>.

¹⁷⁵ Yale New Haven Health Services Corporation—Center for Outcomes Research and Evaluation (CORE). Measure Technical Report: Hospital Visits after Urology Ambulatory Surgical Center Procedures (Version 1.0). May 2017. Available at: https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/HospitalQualityInits/Downloads/Version-10-Hospital-Visits_Urology-ASC-Procedures_Measure-Technical-Report_052017.pdf.

¹⁷⁶ Fleisher LA, Pasternak LR, Herbert R, Anderson GF. Inpatient hospital admission and death after outpatient surgery in elderly patients: Importance of patient and system characteristics and location of care. *Archives of Surgery*. 2004;139(1):67–72.

¹⁷⁷ Mattila K, Toivonen J, Janhunen L, Rosenberg PH, Hynynen M. Postdischarge symptoms after ambulatory surgery: First-week incidence, intensity, and risk factors. *Anesthesia and Analgesia*. 2005;101(6):1643–1650.

¹⁷⁸ Parry, Nicola. "7-Day Readmissions: Better Indicators of Patient Care." *Medscape*, 2016.

are lacking at this time, and this is what this measure is intended to accomplish.

While we appreciate the commenter's feedback that some ASCs were already aware of most of the visits in the claims detail report and did not review the reports unless the facilities were categorized as underperforming, that is not always the case. Providers at ASCs are more often unaware of patients' subsequent acute care visits given that separate providers (for example, emergency department physicians) tend to provide post-urological care when it is required.¹⁸⁰ This measure is intended to bring greater awareness to a larger number of ASCs and patients, in addition to actionable information to lower the rate of preventable adverse events and to improve the quality of care following procedures performed at an ASC.

Although the majority of ASCs would be expected to have risk-standardized rates that would be classified as "no different than the national rate" on *Hospital Compare*, we believe that the measure will be able to make distinction among facilities and to consumers because the variation in risk-standardized hospital visit rates across ASCs nationally suggests that there is still room for quality improvement. *Hospital Compare* will also report facilities' risk-standardized rates, and facilities will receive confidential feedback reports to support quality improvement efforts. Furthermore, feedback from national TEP members showed that the ASC-18 measure, as specified, can be used to distinguish between better and worse quality facilities.¹⁸¹ This shows TEP agreement with the overall face validity of the measure.

Comment: A few commenters expressed concerns about risk adjustment. A commenter noted that the measure is not risk adjusted to account for socioeconomic status and other factors beyond a hospitals' control. Another commenter expressed concern about including condition category (CC 82), Respirator dependence/tracheostomy status, on the list of condition categories that are not risk-adjusted if the condition occurs only at

¹⁸⁰ Mezei G, Chung F. Return hospital visits and hospital readmissions after ambulatory surgery. *Annals of Surgery*. 1999;230(5):721-727.

¹⁸¹ Yale New Haven Health Services Corporation—Center for Outcomes Research and Evaluation (CORE). Measure Technical Report: Hospital Visits after Urology Ambulatory Surgical Center Procedures (Version 1.0). May 2017. Available at: https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/HospitalQualityInits/Downloads/Version-10_Hospital-Visits_Urology-ASC-Procedures_Measure-Technical-Report_052017.pdf.

the time of the procedure. The commenter noted that this type of condition is not something that develops acutely within the timeframe of an ASC procedure, but rather is reflective of a more chronic patient condition.

Response: We understand the important role that factors outside of an ASC's control, for example, socioeconomic and sociodemographic status, play in the care of patients. Although the risk-adjustment methodology does not stratify by social risk factors, it does account for risk by adjusting for risk factors associated with increased risk for hospital visits after surgery. In developing this measure, we evaluated the potential effects of risk adjusting for three socioeconomic status (SES) factors that are available in CMS claims (Medicaid dual-eligibility status, African-American race, and the AHRQ SES index). Our results show that adjusting for these three factors at the patient level do not change the measure scores. We assessed the relationship of SES to hospital visits at the patient and facility levels. Unadjusted and adjusted ASC-level risk-standardized hospital visit rates were highly correlated (Spearman correlation coefficients of nearly 1.0) when calculated with and without the addition of the three SES variables (Medicaid dual-eligibility status, African-American race, and the AHRQ SES index). This indicates that including SES variables in ASC-level risk-adjusted measure score will result in limited differences in measure results after accounting for other risk factors, such as age and comorbidities. We refer readers to the methodology in the measure specifications for more information about SES testing for this measure at: <https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/HospitalQualityInits/Measure-Methodology.html>. We also refer readers to section XIV.B.2. of this final rule with comment period where we discuss social risk factors in the ASCQR Program in more detail.

Furthermore, we appreciate the commenter's concern about including condition category (CC) 82 on the list of condition categories that are not risk-adjusted for if they occur only at the time of the procedure.¹⁸² Condition categories are used to classify diagnoses into clinically coherent groups.¹⁸³ We consolidated like risk factors into

¹⁸² Ibid.

¹⁸³ HCUP CCS Fact Sheet. Healthcare Cost and Utilization Project (HCUP). January 2012. Agency for Healthcare Research and Quality, Rockville, MD. <https://www.hcup-us.ahrq.gov/toolssoftware/ccs/ccsfactsheet.jsp>.

candidate variables, which were the variables that we considered for the risk-adjustment model. We agree with the commenter for noting that CC 82 is unlikely to develop acutely during the timeframe of a procedure; we will review this group of codes and will consider revising the list of CCs that are not risk-adjusted for if the condition occurs at the time of the procedure. As explained above, this measure was reviewed using a consensus-driven approach, with input from a national TEP and surgeons, including urologists, providing care in the ASC setting. Potential candidate risk factors and condition categories were identified from related quality measures and the literature;¹⁸⁴ ¹⁸⁵ ¹⁸⁶ a preliminary list of risk factors was developed and then revised based on national TEP and clinical expert review that included several urologists. These risk variables were further released and reviewed during the measure development public comment period prior to the selection of the final model.¹⁸⁷ This consensus-based approach was used to achieve clinical face validity prior to the model selection.

Comment: One commenter noted that low-volume situations tend to produce measure scores that lack reliability. The commenter noted that the measure is only "fairly" reliable and suggested the reliability for a measure intended for public reporting should be substantially reliable, or have an ICC of 0.61 to 0.80. Furthermore, the commenter noted that the measure also suffers from limited discriminatory power because the number of underperforming facilities is very small. The commenter urged CMS to ensure that the publicly reported scores are reliable.

Response: We thank the commenter for their feedback about the measure reliability. We disagree with the commenter and believe that ASC-18 is

¹⁸⁴ Crew JP, Turner KJ, Millar J, Cranston DW. Is day case surgery in urology associated with high admission rates? *Annals of The Royal College of Surgeons of England*. 1997;79(6):416-419.

¹⁸⁵ Fleisher LA, Pasternak LR, Herbert R, Anderson GF. Inpatient hospital admission and death after outpatient surgery in elderly patients: Importance of patient and system characteristics and location of care. *Archives of Surgery*. 2004;139(1):67-72.

¹⁸⁶ Paez A, Redondo E, Linares A, Rios E, Vallejo J, Sanchez-Castilla M. Adverse events and readmissions after day-case urological surgery. *International Brazilian Journal of Urology*. 2007;33(3):330-338.

¹⁸⁷ Yale New Haven Health Services Corporation. Hospital Visits after Orthopedic Ambulatory Surgical Center Procedures (Version 1.0). May 2017. Available at: https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/HospitalQualityInits/Downloads/Version-10_Hospital-Visits_Orthopedic-ASC-Procedures_Measure-Technical-Report_052017.pdf.

sufficiently reliable to be included in the ASCQR Program. Our calculated intraclass correlation coefficient (ICC),¹⁸⁸ a measure of reliability or the degree to which the measure can produce accurate and consistent results across multiple measurements of the same entities in a time period, for this measure was 0.45, indicating “moderate” reliability.¹⁸⁹ The NQF considers ICC values ranging from 0.01–0.20 as “slight” reliability, 0.21–0.40 as “fair” reliability, 0.41 to 0.60 as “moderate” reliability, and 0.61 to 0.80 as “strong” reliability.¹⁹⁰ We disagree that the measure reliability should be “substantially” reliable or have an ICC of 0.61 to 0.80, and believe the publicly reported scores will be sufficiently reliable. The results of reliability testing are consistent with existing measures of patient outcomes in the ambulatory surgery setting.¹⁹¹ Therefore, we believe the measure is sufficiently reliable.

Regarding the comment about lack of discriminatory power, we agree that the many small-volume ASCs will limit the ability to make distinctions in performance between facilities. ASCs with few cases in a given year limit our ability to capture variation in ASC-level measure scores because our modeling methodology is conservative and will estimate measure scores toward the national mean for facilities with small volumes. Specifically, hospitals with relatively few cases in the performance period may have a true rate that is worse/better than the national average. However, the model estimates their rate as close to the mean because their low volume does not provide enough information to accurately estimate a value near their true rate. As a result, the model may capture less variation than truly exists due to low case sizes. To improve the measure’s ability to detect quality differences, we crafted our proposal to use 2 years of data for public reporting to expand the number of cases available for estimating rates across all

facilities and to increase both the reliability of the measure score and the ability to discriminate performance across facilities. Furthermore, ASC facilities that have too few cases to reliably estimate a measure score (moderate reliability as discussed in the prior paragraph) would be treated in the same way as other facilities with too few cases and would not have their scores posted on *Hospital Compare*; their data would be replaced with a footnote. We discuss our *Hospital Compare* footnotes at: <https://www.medicare.gov/hospital-compare/data/Footnotes.html>. However, these facilities will still receive confidential feedback reports/facility-specific reports providing valuable information about post-surgery events. We refer readers to section XIV.B.6.c.(7) of this final rule with comment period for more details about public reporting of this measure. We expect that smaller ASCs will still benefit from confidentially reviewing their measure results and individual patient-level outcomes in the facility-specific report, as these data are currently largely unknown to ASCs and providers.

Comment: One commenter requested that the dry run results be aggregated and made available in its entirety to the public for review and comment if the measure is finalized. The commenter also suggested that CMS conduct pilot testing for the measure with volunteer ASCs rather than conduct national dry runs. Another commenter suggested that CMS pilot test the measure prior to implementation to ensure that the measure adequately account for the nuances related to urologic surgery.

Response: We refer readers to section XIV.B.6.c.(7) of this final rule with comment period where we discuss our dry run. The intent of the dry run is to test production of the measure and for ASCs to familiarize themselves with the measure and provide feedback to CMS. The dry run will generate confidential reports for ASCs on measure performance and risk-standardized hospital visit rates, among other data. We plan to perform a dry run of the measure prior to implementation. The confidential dry run results will not be publicly reported or used for payment determination. We believe a dry run will be more beneficial than pilot testing. The dry run will include all ASCs rather than just a subset of volunteer ASCs and will enable all ASCs to gain familiarity with the measure and processes, as well as provide feedback to CMS on both the measure itself and the reports. This will also enable CMS to learn about any

unanticipated nuances associated with measure implementation.

As proposed we will not publicly report data for this measure until the CY 2022 payment determination and subsequent years. We do not believe publicly reporting data from the dry run is appropriate as we might still be working out unanticipated nuances; the data is preliminary and is therefore subject to change based on feedback provided by ASCs.

Comment: One commenter noted that although CMS believes that there would not be any additional burden because ASCs are not required to submit additional data, reviewing claims detail reports and measure scores would be associated with additional burden for someone at ASCs, likely a clinician.

Response: We thank the commenter for providing this input and acknowledge that this measure will be calculated completely from data already obtained from paid Medicare FFS claims submitted by ASCs, hospitals, and physicians for billing purposes. Because claims data are used, there is no burden on the part of ASCs to submit additional data for measure calculation. We strongly suggest that facilities allocate time to review their feedback reports, because they contain actionable information to identify performance gaps and further develop quality improvement strategies. However, we note that these activities do not represent burden related to program requirements.

Comment: One commenter expressed concern over the measure specifications, including the accuracy of background data on the number of unplanned hospital visits.

Response: We interpret commenter to be referring to Table 4 in the ASC–18 Measure Technical Report published in May 2017 and located at: <https://www.cms.gov/medicare/Quality-Initiatives-Patient-Assessment-Instruments/HospitalQualityInits/Measure-Methodology.html>. In the technical report for this measure, the column labeled “number of unplanned hospital visits” was incorrectly labeled and should read “number of procedure performed.” The remainder of the table is correct. We will address this discrepancy in future technical documentation. We thank the commenter for pointing out the inconsistency.

After consideration of the public comments we received, we are finalizing the proposal to adopt the ASC–18: Hospital Visits after Urology Ambulatory Surgical Center Procedures measure in the ASCQR Program for the

¹⁸⁸ Landis J, Koch G. The measurement of observer agreement for categorical data, *Biometrics* 1977;33:159–174.

¹⁸⁹ The NQF considers ICC values ranging from 0.01–0.20 as “slight” reliability, 0.21–0.40 as “fair” reliability, 0.41 to 0.60 as “moderate” reliability, and 0.61 to 0.80 as “strong” reliability. Available at: http://www.qualityforum.org/Measuring_Performance/Improving_NQF_Process/Measure_Testing_Task_Force_Final_Report.aspx.

¹⁹⁰ Landis J, Koch G. The measurement of observer agreement for categorical data, *Biometrics* 1977;33:159–174.

¹⁹¹ See the Risk-Standardized Hospital Visits within 7 Days After Hospital Outpatient Surgery Measure. For ICC score of 0.50: Available at: <https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/HospitalQualityInits/Downloads/Hospital-Visits-after-Hospital-Outpatient-Surgery-Measure.pdf>.

CY 2022 payment determination and subsequent years, as proposed.

d. Summary of Previously Adopted Measures and Newly Finalized ASCQR Program Measures for the CY 2022 Payment Determination and Subsequent Years

determination and subsequent years is listed below.

The measure set for the ASCQR Program CY 2022 payment

ASCQR PROGRAM MEASURE SET WITH PREVIOUSLY AND NEWLY FINALIZED MEASURES FOR THE CY 2022 PAYMENT DETERMINATION AND SUBSEQUENT YEARS

ASC No.	NQF No.	Measure name
ASC-1	0263	Patient Burn.
ASC-2	0266	Patient Fall.
ASC-3	0267	Wrong Site, Wrong Side, Wrong Patient, Wrong Procedure, Wrong Implant.
ASC-4	0265 †	All-Cause Hospital Transfer/Admission.
ASC-8	0431	Influenza Vaccination Coverage among Healthcare Personnel.
ASC-9	0658	Endoscopy/Polyp Surveillance: Appropriate Follow-Up Interval for Normal Colonoscopy in Average Risk Patients.
ASC-10	0659	Endoscopy/Polyp Surveillance: Colonoscopy Interval for Patients with a History of Adenomatous Polyps—Avoidance of Inappropriate Use.
ASC-11	1536	Cataracts: Improvement in Patient’s Visual Function within 90 Days Following Cataract Surgery.*
ASC-12	2539	Facility 7-Day Risk-Standardized Hospital Visit Rate after Outpatient Colonoscopy.
ASC-13	None	Normothermia Outcome.
ASC-14	None	Unplanned Anterior Vitrectomy.
ASC-15a	None	OAS CAHPS—About Facilities and Staff.**
ASC-15b	None	OAS CAHPS—Communication About Procedure.**
ASC-15c	None	OAS CAHPS—Preparation for Discharge and Recovery.**
ASC-15d	None	OAS CAHPS—Overall Rating of Facility.**
ASC-15e	None	OAS CAHPS—Recommendation of Facility.**
ASC-17	None	Hospital Visits after Orthopedic Ambulatory Surgical Center Procedures.***
ASC-18	None	Hospital Visits after Urology Ambulatory Surgical Center Procedures.***

† We note that NQF endorsement for this measure was removed.

* Measure voluntarily collected effective beginning with the CY 2017 payment determination as set forth in section XIV.E.3.c. of the CY 2015 OPPI/ASC final rule with comment period (79 FR 66984 through 66985).

** Measure finalized for delay beginning with CY 2018 reporting until further action in future rulemaking as discussed in section XIV.B.4. of this final rule with comment period.

*** New measure finalized for the CY 2022 payment determination and subsequent years.

7. ASCQR Program Measures and Topics for Future Consideration

In the CY 2013 OPPI/ASC final rule with comment period (77 FR 68493 through 68494), we set forth our considerations in the selection of ASCQR Program quality measures. We seek to develop a comprehensive set of quality measures to be available for widespread use for making informed decisions and quality improvement in the ASC setting (77 FR 68496). We also seek to align these quality measures with the National Quality Strategy (NQS), the CMS Strategic Plan (which includes the CMS Quality Strategy), and our other quality reporting and value-based purchasing (VBP) programs, as appropriate. Accordingly, as we stated in the CY 2015 OPPI/ASC final rule with comment period (79 FR 66979), in considering future ASCQR Program measures, we are focusing on the following NQS and CMS Quality Strategy measure domains: Make care safer by reducing harm caused in the delivery of care; strengthen person and family engagement as partners in their care; promote effective communication

and coordination of care; promote effective prevention and treatment of chronic disease; work with communities to promote best practices of healthy living; and make care affordable.

We invited public comment on one measure developed by the CDC for potential inclusion in the ASCQR Program in future rulemaking, the Ambulatory Breast Procedure Surgical Site Infection (SSI) Outcome measure (NQF #3025). This potential measure is discussed in more detail below.

Healthcare-associated infections (HAIs) are a major cause of morbidity and mortality in healthcare settings in the United States, with the most recent prevalence surveys of HAIs estimating that approximately four percent of inpatients in acute care settings have developed at least one HAI, translating to 721,800 infections in 648,000 patients in 2011.¹⁹² Surgical site infection (SSI) is one of the most common HAIs, comprising approximately 22 percent of all HAIs, and contribute greatly to the

mortality and cost burden of HAIs.¹⁹³ Breast SSIs represent a substantial proportion of SSIs overall in inpatient settings, and have one of the highest infection risks of any procedure type in outpatient settings.¹⁹⁴ While SSI rates following breast procedures vary from one percent to over 30 percent depending on procedure type,¹⁹⁵ the

¹⁹³ Ibid.

¹⁹⁴ This statement is based on an analysis of data reported to the National Healthcare Safety Network (NHSN). Out of 67,150 ASC procedures report to NHSN from 2010 to 2013, 30,787 (45.9 percent) were breast procedures. Out of the 142 surgical site infections reported from ASCs during the same time period, 78 (54.9 percent) were related to breast procedures, indicating an SSI risk of 0.25 percent. This was the highest volume and SSI risk out of all outpatient ASC procedures reported in the timeframe.

¹⁹⁵ Vilar-Compte D, Jacquemin B, Robles-Vidal C, and Volkow P. Surgical Site Infections in Breast Surgery: Case-Control Study. *World Journal of Surgery*. 2004;28(3):242–246; Mannien J, Wille JC, Snoeren RL, van den Hof S. Impact of Postdischarge Surveillance on Surgical Site Infection Rates for Several Surgical Procedures: Results from the Nosocomial Surveillance Network in the Netherlands. *Infection Control and Hospital Epidemiology*. 2006;27:809–816; Vilar-Compte D., Rosales S., Hernandez-Mello N, Maafs E and Volkow P. Surveillance, Control, and Prevention of Surgical Site Infections in Breast Cancer Surgery: A

¹⁹² Magill SS, Edwards JR, Bamberg W, Beldavs ZG, Dumyati G, Kainer MA. Multistate Point-Prevalence Survey of Health Care-Associated Infections. *NEJM*. 2014;370:1198–1208.

trend in surgery transitioning to outpatient and ambulatory surgery settings due to advances in surgical techniques and economic incentives for ambulatory surgery make these events an outcome of interest for the ASCQR Program.

Numerous individual studies and systematic reviews provide strong evidence that measurement and feedback of surgical site infections leads to lower SSI rates in the long term.¹⁹⁶ Although standardized metrics have been developed to measure SSI rates for inpatient surgeries in the hospital setting,¹⁹⁷ these have not yet been developed for outpatient surgeries in ASCs, which comprise a fast-growing proportion of all surgeries performed in the United States.¹⁹⁸ We believe this measure, if adopted in the future, could serve as a quantitative guide for ASCs, enabling them to benchmark SSI rates in their facilities against nationally aggregated data and set targets for improvement.

This issue is of interest to the ASCQR Program because breast procedures are becoming increasingly common at ASCs.¹⁹⁹ In addition, the Ambulatory Breast Procedure Surgical Site Infection Outcome measure addresses the MAP-identified measure gap area of surgical quality measures, including surgical site infection measures, for the ASCQR Program.²⁰⁰

The Ambulatory Breast Procedure Surgical Site Infection (SSI) Outcome measure was included on the 2016 MUC list²⁰¹ and reviewed by the MAP. The MAP conditionally supported the

measure (MUC16–155), noting the rapid shift of care to the ambulatory surgery setting and the need to ensure transparency about the safety of ambulatory surgery centers.²⁰² The MAP further noted that this measure should be submitted for NQF review and endorsement.²⁰³ A summary of the MAP recommendations can be found at: <https://www.qualityforum.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=81593>. We note that this measure received NQF endorsement in January 2017, and therefore satisfies the MAP's condition for support.²⁰⁴

The Ambulatory Breast Procedure Surgical Site Infection Outcome measure is used to assess the risk-adjusted Standardized Infection Ratio (SIR) for all SSIs following breast procedures conducted at ASCs among adult patients and reported to the CDC's National Healthcare Safety Network. The measure compares the reported number of SSIs observed at an ASC with a predicted value based on nationally aggregated data. The numerator for this measure is all SSIs during the 30-day and 90-day postoperative periods following breast procedures in ASCs. The term SSI as used in this measure is defined in accordance with the CDC NHSN's surveillance protocol as an infection, following a breast procedure, of either the skin, subcutaneous tissue and breast parenchyma at the incision site (superficial incisional SSI), deep soft tissues of the incision site (deep incisional SSI), or any part of the body deeper than the fascial/muscle layers that is opened or manipulated during the operative procedure (organ/space SSI).²⁰⁵ The denominator for this measure is all adult patients (defined as patients ages 18 to 108 years) undergoing breast procedures, as specified by the operative codes that comprise the breast procedure category of the NHSN Patient Safety Component Protocol, at an ASC. This measure cohort excludes hospital inpatient and outpatient departments, pediatric patients (patients younger than 18 years) and very elderly patients (older than 108 years), and brain-dead patients whose organs are being removed for donor purposes. The specifications for

this measure for the ASC setting can be found at: <http://www.qualityforum.org/QPS/> after searching "Ambulatory Breast Procedure Surgical Site Infection Outcome Measure."

We invited public comment on the possible inclusion of this measure in the ASCQR Program measure set in the future.

Comment: Several commenters supported the inclusion of the Ambulatory Breast Procedure Surgical Site Infection (SSI) Outcome measure (NQF #3025) in the ASCQR Program in future rulemaking, noting that the measure is fully developed, was tested in the ASC setting, and addresses an important area of care. One commenter recommended that CMS consider refining this and other measures so that data is collected at the NPI level, rather than by CCN. One commenter agreed that breast procedure SSI outcomes are a concern, but noted that significant development and testing may be required before the Ambulatory Breast Procedure Surgical Site Infection (SSI) Outcome measure (NQF #3025) is ready for implementation due to the difficulty of capturing data on whether an SSI has occurred. One commenter expressed concern that the measure could lead to unintended consequences related to the administration of perioperative antibiotics across breast procedures.

Response: We thank commenters for their support and recommendations. We will consider the suggestions and concerns as we craft future policy. In addition, we note that our goal is to develop a parsimonious measure set made up of meaningful measures that fill important gaps with consideration of the impact on burden in the ASCQR Program.

8. Maintenance of Technical Specifications for Quality Measures

We refer readers to the CY 2012 OPPI/ASC final rule with comment period (76 FR 74513 through 74514), where we finalized our proposal to follow the same process for updating the ASCQR Program measures that we adopted for the Hospital OQR Program measures, including the subregulatory process for making updates to the adopted measures. In the CY 2013 OPPI/ASC final rule with comment period (77 FR 68496 through 68497), the CY 2014 OPPI/ASC final rule with comment period (78 FR 75131), and the CY 2015 OPPI/ASC final rule with comment period (79 FR 66981), we provided additional clarification regarding the ASCQR Program policy in the context of the previously finalized Hospital OQR Program policy, including the processes for addressing

5-year Experience. American Journal of Infection Control. 2009;37(8):674–679.

¹⁹⁶ Anderson DJ, Podgorny K, Berríos-Torres S, et al. Strategies to Prevent Surgical Site Infections in Acute Care Hospitals: 2014 Update. Infection Control and Hospital Epidemiology. 2014;35:605–627; Mangram AJ, Horan TC, Pearson ML, Silver LC, Jarvis WR. Guideline for Prevention of Surgical Site Infection. Hospital Infection Control Practices Advisory Committee. Infection Control and Hospital Epidemiology. 1999; 20:250–278; Gaynes R, Richards C, Edwards JR, et al. Feeding Back Surveillance Data to Prevent Hospital-Acquired Infections. Emerging Infectious Diseases. 2001;7:295–298.

¹⁹⁷ Mu Y, et al. Improving Risk-Adjusted Measures of Surgical Site Infection for the National Healthcare Safety Network. Infection Control and Hospital Epidemiology. 2011;32(10):970–986.

¹⁹⁸ Ibid.

¹⁹⁹ Cullen KA, Hall MJ, Golosinskiy A, Statistics NfCh. Ambulatory Surgery in the United States, 2006. National Health Statistics Report; 2009.

²⁰⁰ National Quality Forum. "MAP 2017 Considerations for Implementing Measures in Federal Programs: Hospitals." Report. 2017. Available at: <http://www.qualityforum.org/map/under/Hospitals—FinalReport>.

²⁰¹ Available at: http://www.qualityforum.org/Setting_Priorities/Partnership/Measure_Applications_Partnership.aspx, under "2016 Measures Under Consideration List (PDF)."

²⁰² National Quality Forum. 2016–2017 Spreadsheet of Final Recommendations to HHS and CMS, available at: <https://www.qualityforum.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=81593>.

²⁰³ Ibid.

²⁰⁴ National Quality Forum. Endorsed measure specification available at: <http://www.qualityforum.org/QPS/3025>.

²⁰⁵ Centers for Disease Control and Prevention. "Surgical Site Infection (SSI) Event. Available at: https://www.cdc.gov/nhsn/pdfs/pscmanual/9pscssi_current.pdf.

nonsubstantive and substantive changes to adopted measures. In the CY 2016 OPPTS/ASC final rule with comment period (80 FR 70531), we provided clarification regarding our decision to not display the technical specifications for the ASCQR Program on the CMS Web site, but stated that we will continue to display the technical specifications for the ASCQR Program on the QualityNet Web site. In addition, our policies regarding the maintenance of technical specifications for the ASCQR Program are codified at 42 CFR 416.325. We did not propose any changes to our policies regarding the maintenance of technical specifications for the ASCQR Program.

9. Public Reporting of ASCQR Program Data

In the CY 2012 OPPTS/ASC final rule with comment period (76 FR 74514 through 74515), we finalized a policy to make data that an ASC submitted for the ASCQR Program publicly available on a CMS Web site after providing an ASC an opportunity to review the data to be made public. In the CY 2016 OPPTS/ASC final rule with comment period (80 FR 70531 through 70533), we finalized our policy to publicly display data by the National Provider Identifier (NPI) when the data are submitted by the NPI and to publicly display data by the CCN when the data are submitted by the CCN. In addition, we codified our policies regarding the public reporting of ASCQR Program data at 42 CFR 416.315 (80 FR 70533). In the CY 2017 OPPTS/ASC final rule with comment period, we formalized our current public display practices regarding timing of public display and the preview period by finalizing our proposals to publicly display data on the *Hospital Compare* Web site, or other CMS Web site as soon as practicable after measure data have been submitted to CMS; to generally provide ASCs with approximately 30 days to review their data before publicly reporting the data; and to announce the timeframes for each preview period starting with the CY 2018 payment determination on a CMS Web site and/or on our applicable listservs (81 FR 79819 through 79820). We did not propose any changes to these policies. However, we note that in section XIV.B.6.b. and c. of this final rule with comment period, we are finalizing two new measures: ASC-17: Hospital Visits after Orthopedic Ambulatory Surgical Center Procedures, and ASC-18: Hospital Visits after Urology Ambulatory Surgical Center Procedures, beginning with the CY 2022 payment determination, and specific

public reporting policies associated with these measures.

C. Administrative Requirements

1. Requirements Regarding QualityNet Account and Security Administrator

We refer readers to the CY 2014 OPPTS/ASC final rule with comment period (78 FR 75132 through 75133) for a detailed discussion of the QualityNet security administrator requirements, including setting up a QualityNet account, and the associated timelines, for the CY 2014 payment determination and subsequent years. In the CY 2016 OPPTS/ASC final rule with comment period (80 FR 70533), we codified the administrative requirements regarding maintenance of a QualityNet account and security administrator for the ASCQR Program at 42 CFR 416.310(c)(1)(i). We refer readers to section XIV.D.3.b.1. of this final rule with comment period where we are finalizing our proposals to expand submission via the CMS online tool to also allow for batch data submission and make corresponding changes to the 42 CFR 416.310(c)(1)(i).

2. Requirements Regarding Participation Status

We refer readers to the CY 2014 OPPTS/ASC final rule with comment period (78 FR 75133 through 75135) for a complete discussion of the participation status requirements for the CY 2014 payment determination and subsequent years. In the CY 2016 OPPTS/ASC final rule with comment period (80 FR 70533 and 70534), we codified these requirements regarding participation status for the ASCQR Program at 42 CFR 416.305. We did not propose any changes to these policies.

D. Form, Manner, and Timing of Data Submitted for the ASCQR Program

1. Requirements Regarding Data Processing and Collection Periods for Claims-Based Measures Using Quality Data Codes (QDCs)

We refer readers to the CY 2014 OPPTS/ASC final rule with comment period (78 FR 75135) for a complete summary of the data processing and collection periods for the claims-based measures using QDCs for the CY 2014 payment determination and subsequent years. In the CY 2016 OPPTS/ASC final rule with comment period (80 FR 70534), we codified the requirements regarding data processing and collection periods for claims-based measures using QDCs for the ASCQR Program at 42 CFR 416.310(a)(1) and (2). We did not propose any changes to these requirements.

We note that, in section XIV.B.3.b.(1) of this final rule with comment period, we are finalizing a proposal to remove one claims-based measure using QDCs, ASC-5: Prophylactic Intravenous (IV) Antibiotic Timing, beginning with the CY 2019 payment determination. The following previously finalized claims-based measures using QDCs will be collected for the CY 2020 payment determination and subsequent years:

- ASC-1: Patient Burn;
- ASC-2: Patient Fall;
- ASC-3: Wrong Site, Wrong Side, Wrong Patient, Wrong Procedure, Wrong Implant; and
- ASC-4: Hospital Transfer/ Admission.

2. Minimum Threshold, Minimum Case Volume, and Data Completeness for Claims-Based Measures Using QDCs

We refer readers to the CY 2014 OPPTS/ASC final rule with comment period (78 FR 75135 through 75137), the CY 2016 OPPTS/ASC final rule with comment period (80 FR 70534 through 70535) as well as 42 CFR 416.310(a)(3) and 42 CFR 416.305(c) for our policies about minimum threshold, minimum case volume, and data completeness for claims-based measures using QDCs. We did not propose any changes to these policies.

3. Requirements for Data Submitted via an Online Data Submission Tool

We refer readers to the CY 2012 OPPTS/ASC final rule with comment period (76 FR 74505 through 74509); CY 2014 OPPTS/ASC final rule with comment period (78 FR 75137 through 75140); CY 2015 OPPTS/ASC final rule with comment period (79 FR 66983 through 66986); CY 2016 OPPTS/ASC final rule with comment period (80 FR 70535 through 70536); CY 2017 OPPTS/ASC final rule with comment period (81 FR 79820 through 79822); and 42 CFR 416.310(c) for our previously finalized policies for data submitted via an online data submission tool. For more information on data submission using QualityNet, we refer readers to: <https://www.qualitynet.org/dcs/ContentServer?c=Page&pagename=QnetPublic%2FPages%2FQnetTier2&cid=1228773314768>. We note that we are finalizing proposals to remove two measures submitted via a CMS online data submission tool, ASC-6 and ASC-7, in section XIV.B.3.b.(2) and XIV.B.3.b.(3) of this final rule with comment period. We are not finalizing our proposal to adopt one measure submitted via a CMS online data submission tool, as described in section XIV.B.6.a. of this final rule with comment period.

a. Requirements for Data Submitted via a Non-CMS Online Data Submission Tool

We refer readers to CY 2014 OPPS/ASC final rule with comment period (78 FR 75139 through 75140) and CY 2015 OPPS/ASC final rule with comment period (79 FR 66985 through 66986) for our requirements regarding data submitted via a non-CMS online data submission tool (CDC NHSN Web site). We codified our existing policies regarding the data collection time periods for measures involving online data submission and the deadline for data submission via a non-CMS online data submission tool at 42 CFR 416.310(c)(2). Currently, we only have one measure (ASC-8: Influenza Vaccination Coverage among Healthcare Personnel) that is submitted via a non-CMS online data submission tool.

We did not propose any changes to the reporting requirements for this measure.

b. Requirements for Data Submitted via a CMS Online Data Submission Tool

We refer readers to the CY 2014 OPPS/ASC final rule with comment period (78 FR 75137 through 75139), CY 2016 OPPS/ASC final rule with comment period (80 FR 70535 through 70536), CY 2017 OPPS/ASC final rule with comment period (81 FR 79821 through 79822), and 42 CFR 416.310(c)(1) for our requirements regarding data submitted via a CMS online data submission tool. We are currently using the QualityNet Web site as our CMS online data submission tool: <https://www.qualitynet.org/dcs/ContentServer?c=Page&pagename=QnetPublic%2FPage%2FQnetHomePage&cid=1120143435383>. In the CY 2018 OPPS/ASC proposed rule (82 FR 33701), we made one proposal to expand the method of data submission via a CMS online data submission tool.

(1) Batch Submission

We did not propose any changes to our policies regarding data submitted via a CMS online data submission tool when data is entered for individual facilities. Currently, for individual facility data entry, users must have a QualityNet account and use one Hospital Quality Reporting (HQR) External File per facility that is uploaded into the QualityNet secure portal. However, using one HQR External File that only allows data entry for one facility can be burdensome for entities responsible for submitting such data for multiple facilities, such as multi-facility ASCs. Therefore, in an effort to streamline the process, we

proposed to expand the CMS online tool to also allow for batch submission beginning with data submitted during CY 2018 for the CY 2020 payment determination and subsequent years.

Batch submission is submission of data for multiple facilities simultaneously using a single, electronic file containing data from multiple facilities submitted via one agent QualityNet account. Under the batch submission process, ASC agents (for example, a corporate representative for a corporate entity consisting of multiple ASC facilities with separate NPIs) would be assigned a vendor ID and an ASC's representative would submit the Security Administrator (SA) form with the assigned vendor ID for the agent to establish their own QualityNet account. Once approved, the agent may submit data for any ASC associated with that ID, individually or in a batch, and access data reports for the same ASCs. Agents would only have access to data reports for facilities that have authorized them to have access. For batch submission, agents would be provided the HQR external file layout with which to upload their associated ASCs' data under the agents' QualityNet account. In order to submit batch data, agents would need to meet all QualityNet account requirements, such as establishing a QualityNet account and maintaining a QualityNet security administrator. Additional details regarding logistics of batch data submission would be included in future guidance in the Specifications Manual.

In addition, we proposed to make corresponding changes to 42 CFR 416.310(c)(1)(i) to reflect this proposal and replace the term "ASCs" with the phrase "ASCs, and any agents submitting data on an ASC's behalf."

We invited public comment on our proposals, as discussed above, to: (1) Expand the CMS online tool to also allow for batch submission of measure data beginning with data submitted during CY 2018, and (2) make corresponding changes to modify 42 CFR 416.310(c)(1)(i) to reflect the aforementioned proposal.

Comment: Several commenters supported the proposal to allow batch submission, noting that it will increase submission efficiency and decrease administrative burden. One commenter requested that the process for batch submission be determined in a timely fashion to allow ASCs to use this option prior to the 2018 data submission deadline.

Response: We thank the commenters for their support and agree that batch submission will increase efficiency and decrease administrative burden. In

addition, as noted above, we proposed to expand the CMS online tool to allow for batch submission beginning with data submitted during CY 2018 for the CY 2020 payment determination and subsequent years, such that the option will be available prior to the 2018 data submission deadline.

After consideration of the public comments we received, we are finalizing our proposals to: (1) Expand the CMS online tool to also allow for batch submission of measure data beginning with data submitted during CY 2018, and (2) make corresponding changes to modify 42 CFR 416.310(c)(1)(i).

(2) Measures Using the CMS Online Data Submission Tool for the CY 2020 Payment Determination and Subsequent Years

In sections XIV.B.3.b.(2) and XIV.B.3.b.(3) of this final rule with comment period, respectively, we are finalizing proposals to remove two measures collected via a CMS online data submission tool—ASC-6: Safe Survey Checklist Use and ASC-7: ASC Facility Volume Data on Selected Surgical Procedures—beginning with the CY 2019 payment determination. The following previously finalized measures will require data to be submitted via a CMS online data submission tool for the CY 2020 payment determination and subsequent years:

- ASC-9: Endoscopy/Polyp Surveillance: Appropriate Follow-Up Interval for Normal Colonoscopy in Average Risk Patients;
- ASC-10: Endoscopy/Polyp Surveillance: Colonoscopy Interval for Patients with a History of Adenomatous Polyps—Avoidance of Inappropriate Use; and
- ASC-11: Cataracts: Improvement in Patients' Visual Function within 90 Days Following Cataract Surgery.²⁰⁶

We are not finalizing our proposal to adopt one new measure collected via a CMS online data submission tool, ASC-16: Toxic Anterior Segment Syndrome, beginning with the CY 2021 payment determination, as described in section XIV.B.6.a. of this final rule with comment period.

4. Requirements for Non-QDC Based, Claims-Based Measure Data

We refer readers to the CY 2015 OPPS/ASC final rule with comment

²⁰⁶ We note that the ASC-11 measure is voluntarily collected effective beginning with the CY 2017 payment determination, as set forth in section XIV.E.3.c. of the CY 2015 OPPS/ASC final rule with comment period (79 FR 66984 through 66985).

period (79 FR 66985) and the CY 2016 OPPS/ASC final rule with comment period (80 FR 70536) for our previously adopted policies regarding data processing and collection periods for claims-based measures for the CY 2018 payment determination and subsequent years. In addition, in the CY 2016 OPPS/ASC final rule with comment period (80 FR 70536), we codified these policies at 42 CFR 416.310(b). We did not propose any changes to these requirements.

We note that one previously finalized measure, ASC-12: Facility 7-Day Risk-Standardized Hospital Visit Rate after Outpatient Colonoscopy, will be collected via claims for the CY 2020 payment determination and subsequent years (79 FR 66970 through 66978). In addition, in sections XIV.B.6.b. and c., respectively, of this final rule with comment period, we are finalizing our proposals to adopt two new claims-based measures—ASC-17: Hospital Visits after Orthopedic Ambulatory Surgical Center Procedures, and ASC-18: Hospital Visits after Urology Ambulatory Surgical Center Procedures—beginning with the CY 2022 payment determination.

5. Requirements for Data Submission for ASC-15a-e: Outpatient and Ambulatory Surgery Consumer Assessment of Healthcare Providers and Systems (OAS CAHPS) Survey-Based Measures

We refer readers to the CY 2017 OPPS/ASC final rule with comment period (81 FR 79822 through 79824) for our previously finalized policies regarding survey administration and vendor requirements for the CY 2020 payment determination and subsequent years. In addition, we codified these policies at 42 CFR 416.310(e). However, in section XIV.B.4. of this final rule with comment period, we are finalizing a proposal to delay implementation of the ASC-15a-e: OAS CAHPS Survey-based measures beginning with the CY 2020 payment determination (CY 2018 data submission) until further action in future rulemaking and refer readers to that section for more details.

As noted in the CY 2017 OPPS/ASC final rule with comment period (81 FR 79815), some commenters suggested shortening sections of the survey, such as the “About You” section. We continue to evaluate the utility of individual questions as we collect new data from the survey’s voluntary national implementation, and will consider different options for shortening the OAS CAHPS Survey without the loss of important data in the future. Specifically, we continue to consider the removal of two demographic

questions—the “gender” and “age” questions—from the OAS CAHPS Survey in a future update.

Comment: A few commenters supported removal of the gender and age questions from the survey.

Response: We thank the commenters for their suggestions. We will take these comments under consideration as we craft policies for the OAS CAHPS Survey.

6. Extraordinary Circumstances Extensions or Exemptions for the CY 2019 Payment Determination and Subsequent Years

a. Background

We refer readers to the FY 2013 IPPS/LTCH PPS final rule (77 FR 53642 through 53643), the CY 2014 OPPS/ASC final rule with comment period (78 FR 75140 through 75141), the CY 2017 OPPS/ASC final rule with comment period (81 FR 79824 through 79825), and 42 CFR 416.310(d) for the ASCQR Program’s policies for extraordinary circumstance extensions or exemptions (ECE) requests.²⁰⁷

Many of our quality reporting and value-based purchasing programs share a common process for requesting an exception from program reporting due to an extraordinary circumstance not within a provider’s control. We refer readers to the Hospital IQR Program (76 FR 51615 through 51652, 78 FR 50836 through 50837, 79 FR 50277, 81 FR 57181 through 57182, and 42 CFR 412.140(c)(2)), the Hospital OQR Program (77 FR 68489, 78 FR 75119 through 75120, 79 FR 66966, and 80 FR 70524), the IPFQR Program (77 FR 53659 through 53660 and 79 FR 45978), and the PCHQR Program (78 FR 50848), as well as the HAC Reduction Program (80 FR 49542 through 49543) and the Hospital Readmissions Reduction Program (80 FR 49542 through 49543), for program-specific information about extraordinary circumstances exemption requests. As noted below, some of these policies were updated in the FY 2018 IPPS/LTCH PPS final rule.

In reviewing the policies for these programs, we recognized that there are five areas in which these programs have variances regarding ECE requests. These are: (1) Allowing the facilities or hospitals to submit a form signed by the facility’s or hospital’s CEO versus CEO or designated personnel; (2) requiring the form be submitted within 30 days

following the date that the extraordinary circumstance occurred versus within 90 days following the date the extraordinary circumstance occurred; (3) inconsistency regarding specification of a timeline for us to provide our formal response notifying the facility or hospital of our decision; (4) inconsistency regarding specification of our authority to grant ECEs due to CMS data system issues; and (5) referring to the program as “extraordinary extensions/exemptions” versus as “extraordinary circumstances exceptions.” We believe addressing these five areas, as appropriate, can improve administrative efficiencies for affected facilities or hospitals. We note that, in the FY 2018 IPPS/LTCH PPS final rule, we examined our policies in these areas for the Hospital Readmissions Reduction Program, the HAC Reduction Program, the Hospital IQR Program, the PCHQR Program and the IPFQR Program (82 FR 38240, 38277, 38410, 38425 and 38473 through 38474, respectively) and finalized proposals to address differences in these areas for those programs. In section XIII.D.8. of this final rule with comment period, we are also finalizing revisions to our ECE policies for the Hospital OQR Program.

With the exception of the terminology used to describe these processes (item 5 above), the ASCQR Program is aligned with other quality reporting programs. As a result, in the CY 2018 OPPS/ASC proposed rule (82 FR 33702), we proposed to rename the process as the extraordinary circumstances exceptions (ECE) policy and make conforming changes to 42 CFR 416.310(d). These are discussed below.

b. ECE Policy Nomenclature

We have observed that while all quality programs listed above have developed similar policies to provide exceptions from program requirements to facilities that have experienced extraordinary circumstances, such as natural disasters, these programs refer to these policies using inconsistent terminology. Some programs refer to these policies as “extraordinary circumstances extensions/exemptions” while others refer to the set of policies as “extraordinary circumstances exceptions.” Several programs (specifically, the Hospital VBP Program, the HAC Reduction Program, and the Hospital Readmissions Reduction Program) are not able to grant extensions to required data reporting timelines due to their reliance on data external to their program, and thus the term, “extraordinary circumstances extensions/exemptions” is not

²⁰⁷ In the CY 2015 OPPS/ASC final rule with comment period (79 FR 66987), we stated that we will refer to the process as the “Extraordinary Circumstances Extensions or Exemptions” process rather than the “Extraordinary Circumstances Extensions or Waivers” process.

applicable to all programs. However, all of the described programs are able to offer exceptions from their reporting requirements. Therefore, in an effort to align across CMS quality programs, we proposed to change the name of this policy from “extraordinary circumstances extensions or exemption” to “extraordinary circumstances exceptions” for the ASCQR Program, beginning January 1, 2018, and to revise § 416.310(d) of our regulations to reflect this change.

We invited public comment on these proposals as discussed above.

Comment: A few commenters supported the proposal to align the ECE policy with other quality reporting programs.

Response: We thank commenters for their support.

After consideration of the public comments we received, we are finalizing the proposals to rename the process as the extraordinary circumstances exceptions (ECE) policy and make conforming changes to 42 CFR 416.310(d).

c. Timeline for CMS Response to ECE Requests

We also note that we believe it is important for facilities to receive timely feedback regarding the status of ECE requests. We strive to complete our review of each ECE request as quickly as possible. However, we recognize that the number of requests we receive, and the complexity of the information provided impacts the actual timeframe to make ECE determinations. To improve transparency of our process, we believe it is appropriate to clarify that we will strive to complete our review of each request within 90 days of receipt.

7. ASCQR Program Reconsideration Procedures

We refer readers to the FY 2013 IPPS/LTCH PPS final rule (77 FR 53643 through 53644), the CY 2014 OPSS/ASC final rule with comment period (78 FR 75141), the CY 2016 OPSS/ASC final rule with comment period (80 FR 70537), and 42 CFR 416.330 for the ASCQR Program’s reconsideration policy. We did not propose any changes to this policy.

E. Payment Reduction for ASCs That Fail To Meet the ASCQR Program Requirements

1. Statutory Background

We refer readers to section XVI.D.1. of the CY 2013 OPSS/ASC final rule with comment period (77 FR 68499) for a detailed discussion of the statutory background regarding payment

reductions for ASCs that fail to meet the ASCQR Program requirements.

2. Reduction to the ASC Payment Rates for ASCs That Fail To Meet the ASCQR Program Requirements for a Payment Determination Year

The national unadjusted payment rates for many services paid under the ASC payment system equal the product of the ASC conversion factor and the scaled relative payment weight for the APC to which the service is assigned. Currently, the ASC conversion factor is equal to the conversion factor calculated for the previous year updated by the multifactor productivity (MFP)-adjusted CPI-U update factor, which is the adjustment set forth in section 1833(i)(2)(D)(v) of the Act. The MFP-adjusted CPI-U update factor is the Consumer Price Index for all urban consumers (CPI-U), which currently is the annual update for the ASC payment system, minus the MFP adjustment. As discussed in the CY 2011 MPFS final rule with comment period (75 FR 73397), if the CPI-U is a negative number, the CPI-U would be held to zero. Under the ASCQR Program in accordance with section 1833(i)(7)(A) of the Act and as discussed in the CY 2013 OPSS/ASC final rule with comment period (77 FR 68499), any annual increase shall be reduced by 2.0 percentage points for ASCs that fail to meet the reporting requirements of the ASCQR Program. This reduction applied beginning with the CY 2014 payment rates (77 FR 68500). For a complete discussion of the calculation of the ASC conversion factor, we refer readers to section XII.G. of this final rule with comment period.

In the CY 2013 OPSS/ASC final rule with comment period (77 FR 68499 through 68500), in order to implement the requirement to reduce the annual update for ASCs that fail to meet the ASCQR Program requirements, we finalized our proposal that we would calculate two conversion factors: A full update conversion factor and an ASCQR Program reduced update conversion factor. We finalized our proposal to calculate the reduced national unadjusted payment rates using the ASCQR Program reduced update conversion factor that would apply to ASCs that fail to meet their quality reporting requirements for that calendar year payment determination. We finalized our proposal that application of the 2.0 percentage point reduction to the annual update may result in the update to the ASC payment system being less than zero prior to the application of the MFP adjustment.

The ASC conversion factor is used to calculate the ASC payment rate for services with the following payment indicators (listed in Addenda AA and BB to the proposed rule, which are available via the Internet on the CMS Web site): “A2”, “G2”, “P2”, “R2” and “Z2”, as well as the service portion of device-intensive procedures identified by “J8” (77 FR 68500). We finalized our proposal that payment for all services assigned the payment indicators listed above would be subject to the reduction of the national unadjusted payment rates for applicable ASCs using the ASCQR Program reduced update conversion factor (77 FR 68500).

The conversion factor is not used to calculate the ASC payment rates for separately payable services that are assigned status indicators other than payment indicators “A2”, “G2”, “J8”, “P2”, “R2” and “Z2.” These services include separately payable drugs and biologicals, pass-through devices that are contractor-priced, brachytherapy sources that are paid based on the OPSS payment rates, and certain office-based procedures, certain radiology services and diagnostic tests where payment is based on the MPFS nonfacility PE RVU-based amount, and a few other specific services that receive cost-based payment (77 FR 68500). As a result, we also finalized our proposal that the ASC payment rates for these services would not be reduced for failure to meet the ASCQR Program requirements because the payment rates for these services are not calculated using the ASC conversion factor and, therefore, not affected by reductions to the annual update (77 FR 68500).

Office-based surgical procedures (performed more than 50 percent of the time in physicians’ offices) and separately paid radiology services (excluding covered ancillary radiology services involving certain nuclear medicine procedures or involving the use of contrast agents) are paid at the lesser of the MPFS nonfacility PE RVU-based amounts or the amount calculated under the standard ASC ratesetting methodology. Similarly, in section XII.D.2.b. of the CY 2015 OPSS/ASC final rule with comment period (79 FR 66933 through 66934), we finalized our proposal that payment for the new category of covered ancillary services (that is, certain diagnostic test codes within the medical range of CPT codes for which separate payment is allowed under the OPSS and when they are integral to covered ASC surgical procedures) will be at the lower of the MPFS nonfacility PE RVU-based (or technical component) amount or the rate calculated according to the standard

ASC ratesetting methodology. In the CY 2013 OPPTS/ASC final rule with comment period (77 FR 68500), we finalized our proposal that the standard ASC ratesetting methodology for this type of comparison would use the ASC conversion factor that has been calculated using the full ASC update adjusted for productivity. This is necessary so that the resulting ASC payment indicator, based on the comparison, assigned to these procedures or services is consistent for each HCPCS code, regardless of whether payment is based on the full update conversion factor or the reduced update conversion factor.

For ASCs that receive the reduced ASC payment for failure to meet the ASCQR Program requirements, we believe that it is both equitable and appropriate that a reduction in the payment for a service should result in proportionately reduced coinsurance liability for beneficiaries (77 FR 68500). Therefore, in the CY 2013 OPPTS/ASC final rule with comment period (77 FR 68500), we finalized our proposal that the Medicare beneficiary's national unadjusted coinsurance for a service to which a reduced national unadjusted payment rate applies will be based on the reduced national unadjusted payment rate.

In that final rule with comment period, we finalized our proposal that all other applicable adjustments to the ASC national unadjusted payment rates would apply in those cases when the annual update is reduced for ASCs that fail to meet the requirements of the ASCQR Program (77 FR 68500). For example, the following standard adjustments would apply to the reduced national unadjusted payment rates: The wage index adjustment; the multiple procedure adjustment; the interrupted procedure adjustment; and the adjustment for devices furnished with full or partial credit or without cost (77 FR 68500). We believe that these adjustments continue to be equally applicable to payment for ASCs that do not meet the ASCQR Program requirements (77 FR 68500).

In the CY 2015, CY 2016 and CY 2017 OPPTS/ASC final rules with comment period (79 FR 66981 through 66982; 80 FR 70537 through 70538; and 81 FR 79825 through 79826, respectively), we did not make any other changes to these policies.

In the CY 2018 OPPTS/ASC proposed rule (82 FR 33702 through 33703), we did not propose any changes to these policies for CY 2018.

XV. Files Available to the Public via the Internet

The Addenda to the OPPTS/ASC proposed rules and the final rules with comment period are published and available only via the Internet on the CMS Web site. To view the Addenda to this final rule with comment period pertaining to CY 2018 payments under the OPPTS, we refer readers to the CMS Web site at: <http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/HospitalOutpatientPPS/Hospital-Outpatient-Regulations-and-Notices.html>; select "1678-FC" from the list of regulations. All OPPTS Addenda to this final rule with comment period are contained in the zipped folder entitled "2018 OPPTS 1678-FC Addenda" at the bottom of the page. To view the Addenda to this final rule with comment period pertaining to CY 2018 payments under the ASC payment system, we refer readers to the CMS Web site at: <http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/ASCPayment/ASC-Regulations-and-Notices.html>; select "1678-FC" from the list of regulations. All ASC Addenda to this final rule with comment period are contained in the zipped folders entitled "Addendum AA, BB, DD1, DD2, and EE."

XVI. Collection of Information Requirements

A. Statutory Requirement for Solicitation of Comments

Under the Paperwork Reduction Act of 1995, we are required to provide 60-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

In the CY 2018 OPPTS/ASC proposed rule (82 FR 33705 through 33710), we solicited public comment on each of these issues for the following sections of this document that contain information collection requirements (ICRs).

B. ICRs for the Hospital OQR Program

1. Background

The Hospital OQR Program is generally aligned with the CMS quality reporting program for hospital inpatient services known as the Hospital IQR Program (82 FR 20031 through 20075). We refer readers to the CY 2011 through CY 2017 OPPTS/ASC final rules with comment periods (75 FR 72111 through 72114; 76 FR 74549 through 74554; 77 FR 68527 through 68532; 78 FR 75170 through 75172; 79 FR 67012 through 67015; 80 FR 70580 through 70582; and 81 FR 79862 through 79863, respectively) for detailed discussions of Hospital OQR Program information collection requirements we have previously finalized. The information collection requirements associated with the Hospital OQR Program are currently approved under OMB control number 0938-1109.

In section XIII.B.4.c. of this final rule with comment period, we are finalizing the removal of six measures. Specifically, beginning with the CY 2020 payment determination, we are finalizing, as proposed, to remove: (1) OP-21: Median Time to Pain Management for Long Bone Fracture; and (2) OP-26: Hospital Outpatient Volume Data on Selected Outpatient Surgical Procedures. Also, while we proposed to remove: (1) OP-1: Median Time to Fibrinolysis, (2) OP-4: Aspirin at Arrival, (3) OP-20: Door to Diagnostic Evaluation by a Qualified Medical Professional, and (4) OP-25: Safe Surgery Checklist beginning with the CY 2021 payment determination, we are finalizing removal of these measures with modification so that removal begins with the CY 2020 payment determination, one year earlier than proposed. To summarize, the following measures will be removed for the CY 2020 payment determination: (1) OP-1: Median Time to Fibrinolysis; (2) OP-4: Aspirin at Arrival; (3) OP-20: Door to Diagnostic Evaluation by a Qualified Medical Professional; (4) OP-21: Median Time to Pain Management for Long Bone Fracture; (5) OP-25: Safe Surgery Checklist; and (6) OP-26: Hospital Outpatient Volume Data on Selected Outpatient Surgical Procedures. We expect these finalized proposals will reduce the burden of reporting for the Hospital OQR Program, as discussed in more detail below. We note that we discuss only the changes in burden resulting from the provisions in this final rule with comment period.

In section XIII.B.10.b. of this final rule with comment period, we are finalizing our proposal, with modification, to publicly report OP-18c using data

beginning with patient encounters during the third quarter of CY 2017. However, we do not expect our modifications to affect the burden estimates made in the CY 2018 OP/ASC proposed rule (82 FR 33705 through 33708), as discussed below.

In section XIII.B.5. of this final rule with comment period, we are finalizing our proposal to delay the OP-37a-e: Outpatient and Ambulatory Surgery Consumer Assessment of Healthcare Providers and Systems (OAS CAHPS) Survey-based measures beginning with the CY 2020 payment determination (CY 2018 data collection period) until further notice in future rulemaking.

In addition, in this final rule with comment period, beginning with the CY 2020 payment determination, we are finalizing our proposals: (1) To codify at § 419.46(e) our previously finalized process for targeting hospitals for validation of chart-abstracted measures (section XIII.D.7.b. of this final rule with comment period); (2) to formalize the educational review process and use it to correct incorrect validation results for chart-abstracted measures (section XIII.D.7.c. of this final rule with comment period); (3) to align the first quarter for which hospitals must submit data for all hospitals that did not participate in the previous year's Hospital OQR Program, and make corresponding revisions at 42 CFR 419.46(c)(3) (section XIII.D.1. of this final rule with comment period); and (4) to align the naming of the Extraordinary Circumstances Exceptions (ECE) policy and make conforming changes to the CFR (section XIII.D.8.a. of this final rule with comment period). We are not finalizing our proposal to change the NOP submission deadlines such that hospitals are required to submit the NOP any time prior to registering on the QualityNet Web site and to make conforming revisions at 42 CFR 419.46(a) (section XIII.C.2.b. of this final rule with comment period). We do not believe that these changes will affect our burden estimates, as further discussed below.

2. Newly Finalized Change in Hourly Labor Cost for Burden Calculation for the Hospital OQR Program

In previous rules (80 FR 70581), we estimated that a hospital pays an individual approximately \$30 per hour to abstract and submit clinical data. We previously did not specify whether our wage estimate of \$30 included overhead and fringe benefit costs. However, although we did not specify that this estimate included fringe benefit costs, in previous rules (80 FR 70581), we used \$30 to calculate the total cost to

hospitals to pay for staff that abstract and submit clinical data. In CY 2018 OP/ASC proposed rule (82 FR 33705), we proposed a new cost to hospitals and specified that this cost included both wage and overhead and fringe benefit costs. Specifically, we proposed to estimate that reporting data for the Hospital OQR Program can be accomplished by staff with a median hourly wage of \$18.29 per hour.²⁰⁸ This labor rate is based on the Bureau of Labor Statistics (BLS) median hourly wage for a medical records and health information technician. The BLS is the principal Federal agency responsible for measuring labor market activity, working conditions, and price changes in the economy.²⁰⁹ Acting as an independent agency, the BLS provides objective information for not only the government, but also for the public.²¹⁰ The BLS describes medical records and health information technicians as those responsible for processing and maintaining health information data.²¹¹ Therefore, we believe it is reasonable to assume that these individuals would be tasked with abstracting clinical data for the Hospital OQR Program measures.

We also proposed to calculate the cost of overhead, including fringe benefits, at 100 percent of the mean hourly wage. This is necessarily a rough adjustment, both because fringe benefits and overhead costs vary significantly from employer to employer and because methods of estimating these costs vary widely from study to study. Nonetheless, we believe that doubling the hourly wage rate ($\$18.29 \times 2 = \36.58) to estimate total cost is a reasonably accurate estimation method. Accordingly, we calculate cost burden to hospitals using a wage plus benefits estimate of \$36.58 throughout the discussion below for the Hospital OQR Program.

We invited public comment on these proposals.

Comment: One commenter expressed concern that a medical records and health information technician with a wage of \$18.29 per hour is not appropriate to complete chart-abstractation and requested that we not reduce the estimated hourly wage rate from previous years.

Response: We note that we believe the wage for a medical records and health information technician is appropriate

²⁰⁸ BLS Occupational Employment Statistics; May 2016. Available at: <https://www.bls.gov/oes/current/oes292071.htm>.

²⁰⁹ <http://www.bls.gov/bls/infohome.htm>.

²¹⁰ Ibid.

²¹¹ BLS Occupational Employment Statistics; May 2016. Available at: <https://www.bls.gov/oes/current/oes292071.htm>.

for use in this program, because such a technician is described as an individual who compiles, processes, and maintains medical records of hospital and clinic patients in a manner consistent with medical, administrative, ethical, legal, and regulatory requirements of the health care system.²¹² We previously estimated a total cost to hospitals of \$30 per hour (80 FR 70581), though we have not previously specified whether that rate included overhead and fringe benefits as well as wage. We note that our current calculations result in a higher estimate of total hourly cost for hospitals, as we proposed to use a median hourly wage of \$18.29 per hour and double it to account for overhead and fringe benefits ($\$18.29 \times 2 = \36.58), resulting in a higher hourly cost to hospitals of \$36.58 per hour (compared to \$30 per hour) to estimate burden in the Hospital OQR Program.

After consideration of the public comment we received, we are finalizing our estimates, as presented in the proposed rule to: (1) Estimate that reporting data for the Hospital OQR Program can be accomplished by staff with a median hourly wage of \$18.29 per hour, and (2) calculate the cost of overhead, including fringe benefits, at 100 percent of the mean hourly wage. These result in a wage plus benefits estimate of \$36.58 for the Hospital OQR Program.

3. Estimated Burden Due to Newly Finalized Proposal To Delay OP-37a-e: Outpatient and Ambulatory Surgery Consumer Assessment of Healthcare Providers and Systems (OAS CAHPS) Survey-Based Measures Beginning With the CY 2020 Payment Determination

As described in section XIII.B.5. of this final rule with comment period, we are finalizing our proposal to delay OP-37a-e: Outpatient and Ambulatory Surgery Consumer Assessment of Healthcare Providers and Systems (OAS CAHPS) Survey-based measures beginning with the CY 2020 payment determination (CY 2018 data collection period). As we stated in the CY 2017 OP/ASC final rule with comment period (81 FR 79863), the information collection requirements associated with the five OAS CAHPS Survey-based measures (OP-37a, OP-37b, OP-37c, OP-37d, and OP-37e) are currently approved under OMB Control Number 0938-1240. For this reason, in the CY 2017 OP/ASC final rule with comment period (81 FR 79863), we did not provide an independent estimate of the burden associated with OAS CAHPS Survey based measures for the Hospital

²¹² Ibid.

OQR Program. Similarly, our finalized proposal to delay implementation of these measures does not affect our current burden estimates.

4. Estimated Burden Due to Proposal to Publicly Report OP-18c: Median Time From Emergency Department Arrival to Emergency Department Departure for Discharged Emergency Department Patients—Psychiatric/Mental Health Patients

In section XIII.B.10.b. of this final rule with comment period, we are finalizing, with modifications, our proposal to publicly report 18c: Median Time from Emergency Department Arrival to Emergency Department Departure for Discharged Emergency Department Patients—Psychiatric/Mental Health Patients beginning with patient encounters from the third quarter of 2017. As noted in that section, the data required for public reporting of OP-18c are already collected as part of the existing Hospital OQR Program requirements. Accordingly, we did not estimate changes to burden due to this proposal, and we do not expect the modifications we are finalizing to affect burden.

5. Estimated Burden Due to Newly Finalized Proposals for the CY 2020 Payment Determination and Subsequent Years

a. Burden Due to Measure Removals

In section XIII.B.4.c. of this final rule with comment period, we are finalizing the removal of six measures from the Hospital OQR Program. Specifically, beginning with the CY 2020 payment determination, we are finalizing, as proposed, to remove: (1) OP-21: Median Time to Pain Management for Long Bone Fracture; and (2) OP-26: Hospital Outpatient Volume Data on Selected Outpatient Surgical Procedures. Also, while we proposed to remove: (1) OP-1: Median Time to Fibrinolysis, (2) OP-4: Aspirin at Arrival, (3) OP-20: Door to Diagnostic Evaluation by a Qualified Medical Professional, and (4) OP-25: Safe Surgery Checklist beginning with the CY 2021 payment determination, we are finalizing removal of these measures with modification so that removal begins with the CY 2020 payment determination, one year earlier than proposed. In summary, we are finalizing removal of six measures beginning with the CY 2020 payment determination. We note that we have modified our estimates from the proposed rule (82 FR 33673) in order to streamline our discussion in light of the modification.

Specifically, we are finalizing the removal of four chart-abstracted

measures ((1) OP-1: Median Time to Fibrinolysis; (2) OP-4: Aspirin at Arrival; (3) OP-20: Door to Diagnostic Evaluation by a Qualified Medical Professional; and (4) OP-21: Median Time to Pain Management for Long Bone Fracture) and two web-based measures ((1) OP-25: Safe Surgery Checklist Use; and (2) OP-26: Hospital Outpatient Volume Data on Selected Outpatient Surgical Procedures). In total, we expect these finalized proposals will reduce burden by 457,490 hours and \$16.7 million for the CY 2020 payment determination. These estimates are described in detail below.

We calculated the burden reduction associated with the removal of chart-abstracted measures by considering the time per case to report chart-abstracted measures (submitted using a web-based tool) as well as the number of cases per hospital and the number of participating hospitals. In the CY 2016 OPPS/ASC final rule with comment period (80 FR 70582), we estimated the burden to collect chart-abstracted data for a single web-based measure, including OP-21, to be 2.92 minutes. In this final rule with comment period, we estimate that 3,300 outpatient hospitals report data under the Hospital OQR Program. Based on the most recent data from CY 2015 reporting, we also estimate that 947 cases are reported per hospital for each chart-abstracted measure. We note that although OP-1: Median Time to Fibrinolysis is a chart-abstracted measure, we do not expect removing this measure will reduce burden, as the data collected for this measure is required to calculate another program measure in the AMI measure set (OP-2: Fibrinolytic Therapy Received Within 30 Minutes of ED Arrival) and, therefore, will continue to be collected as an underlying part of OP-2 even though we are finalizing the proposal to remove OP-1. Accordingly, there is no change in burden associated with the finalized removal of this measure included in our calculations below.

Accordingly, we estimate a total burden reduction of 138.3 hours per outpatient hospital due to the removal of chart-abstracted measures (2.92 minutes per measure/60 minutes per hour \times 3 measure \times 947 cases per hospital). In total, across 3,300 outpatient hospitals, we estimate a burden reduction of 456,390 hours (138.3 hours per hospital \times 3,300 hospitals) and \$16,694,746 (456,390 total hours \times \$36.58 per hour) for the CY 2020 payment determination due to the finalized removal of (1) OP-1: Median Time to Fibrinolysis; (2) OP-4: Aspirin at Arrival; (3) OP-20: Door to Diagnostic Evaluation by a Qualified Medical

Professional; and (4) OP-21: Median Time to Pain Management for Long Bone Fracture.

We calculated the burden reduction associated with the finalized removal of two web-based measures (OP-25: Safe Surgery Checklist Use and OP-26: Hospital Outpatient Volume Data on Selected Outpatient Surgical Procedures) by considering the time per measure to report web-based measures as well as the number of participating hospitals. As we previously stated in the CY 2016 OPPS/ASC final rule with comment period (80 FR 70582), we estimate that hospitals spend approximately 10 minutes per measure to report web-based measures and that 3,300 outpatient hospitals report data under the Hospital OQR Program. Accordingly, for the CY 2020 payment determination, we estimate a total burden reduction of 1,100 hours across 3,300 outpatient hospitals due to the removal of two web-based measures (10 minutes per measure/60 minutes per hour \times 2 measures \times 3,300 hospitals). We further estimate a cost reduction of \$40,238 due to this finalized proposal (1,100 total hours \times \$36.58 per hour).

In total, we expect these finalized proposals will reduce burden by 457,490 hours (456,390 + 1,100) and \$16,734,984 (\$16,694,746 + \$40,238) for the CY 2020 payment determination.

b. Burden Due to Updates to Previously Finalized Chart-Abstracted Measure Validation Procedures and the Educational Review Process

We previously estimated the burden associated with validation of chart-abstracted measures in the CY 2013 and CY 2014 OPPS/ASC final rules with comment period (77 FR 68531 and 78 FR 75172, respectively). In section XIII.D.7.a. of this final rule with comment period, we are providing clarification on our procedures for validation of chart-abstracted measures to note that the 50 poorest performing outlier hospitals will be targeted for validation. We do not expect this clarification to affect burden because it does not alter the number of hospitals selected for validation or the requirements for those hospitals that are selected.

In addition, in section XIII.D.7.c. of this final rule with comment period, we are finalizing our proposal to formalize the process of allowing hospitals to use an educational review process to correct incorrect validation results for the first three quarters of validation for chart-abstracted measures. We also are finalizing our proposal to update the process to specify that if the results of an educational review indicate that we

incorrectly scored a hospital's medical records selected for validation, the corrected quarterly validation score will be used to compute the hospital's final validation score at the end of the calendar year. Under this policy, the educational review request process remains the same for the CY 2020 payment determination and subsequent years, except that revised scores identified through an educational review will be used to correct a hospital's validation score. As a result, we do not expect this policy to affect the burden experienced by hospitals, as our changes to this policy result in a change in the way we address educational review requests and not a change to the process hospitals must follow to request an education review.

As we stated in the CY 2014 OPPTS/ASC final rule with comment period (78 FR 75171), we believe there is a burden associated with successful participation in the Hospital OQR Program, where successful participation results in a full annual payment update (APU) for a particular payment determination. This burden includes, but is not limited to, maintaining familiarity with the Hospital OQR Program requirements, which includes checking feedback reports to indicate a facility's current status or performance (78 FR 75171). The overall administrative burden was estimated at 42 hours per hospital (78 FR 75171). As stated above, we do not believe this burden will change with the finalization of our policy to update the educational review process to include corrections because no additional activity on the part of hospitals is required.

c. Burden Due to Proposal To Update to NOP Submission Deadline

We previously estimated the burden associated with Hospital OQR Program participation and requirements in the CY 2014 OPPTS/ASC final rule with comment period (78 FR 75171). In section XIII.C.2. of this final rule with comment period, we are not finalizing our proposal to revise the NOP submission deadlines such that hospitals are required to submit the NOP any time prior to registering on the QualityNet Web site. We estimated that this proposal would have a negligible effect on the time and cost of completing the participation requirements. As a result, our decision not to finalize the proposal to revise the NOP submission deadline does not impact our burden estimates.

d. Burden Due To Aligning the First Quarter for Which Hospitals Must Submit Data for All Hospitals That Did Not Participate in the Previous Year's Hospital OQR Program

In section XIII.D.1 of this final rule with comment period, we are finalizing our proposals to align the timeline specifying the initial quarter for which hospitals must submit data for all hospitals that did not participate in the previous year's Hospital OQR Program, rather than specifying different timelines for hospitals with Medicare acceptance dates before versus after January 1 of the year prior to an affected annual payment update. Although this finalized proposal alters the timeline for hospitals to begin submitting data for the Hospital OQR Program, it does not alter program requirements. As a result, we do not anticipate that this proposal will affect burden.

e. Burden Due to Updates to the Previously Finalized ECE Policy

We previously estimated the burden associated with general and administrative Hospital OQR Program requirements in the CY 2014 OPPTS/ASC final rule with comment period (78 FR 75171). In section XIII.D.8. of this final rule with comment period, we discuss our finalized alignment of the naming of this exception policy and finalized proposal to update 42 CFR 419.46(d) to reflect our current ECE policies. We also are clarifying the timing of our response to ECE requests. Because we do not seek any new or additional information in our finalized ECE proposals, we believe the updates will have no effect on burden for hospitals.

C. ICRs for the ASCQR Program

1. Background

We refer readers to the CY 2012 OPPTS/ASC final rule with comment period (76 FR 74554), the FY 2013 IPPS/LTCH PPS final rule (77 FR 53672), and the CY 2013, CY 2014, CY 2015, CY 2016, and CY 2017 OPPTS/ASC final rules with comment periods (77 FR 68532 through 68533; 78 FR 75172 through 75174; 79 FR 67015 through 67016; 80 FR 70582 through 70584; and 81 FR 79863 through 79865, respectively) for detailed discussions of the ASCQR Program information collection requirements we have previously finalized. The information collection requirements associated with the ASCQR Program are currently approved under OMB control number 0938-1270. Below we discuss only the changes in burden that will result from the newly finalized provisions in this final rule with comment period.

In section XIV.B.3.b. of this final rule with comment period, we are finalizing our proposals, beginning with the CY 2019 payment determination, to remove three measures (ASC-5: Prophylactic Intravenous (IV) Antibiotic Timing, ASC-6: Safe Surgery Checklist Use, and ASC-7: Ambulatory Surgical Center Facility Volume Data on Selected Ambulatory Surgical Center Surgical Procedures) from the ASCQR Program measure set. In section XIV.B.6.a. of this final rule with comment period, we are not finalizing our proposal, beginning with the CY 2021 payment determination, to adopt one new measure, ASC-16: Toxic Anterior Segment Syndrome. In section XIV.B.6.b. and c. of this final rule with comment period, we are finalizing our proposals, beginning with the CY 2022 payment determination, to adopt two new measures collected via claims (ASC-17: Hospital Visits after Orthopedic Ambulatory Surgical Center Procedures and ASC-18: Hospital Visits after Urology Ambulatory Surgical Center Procedures). We expect these finalized proposals will reduce the overall burden of reporting data for the ASCQR Program, as discussed below.

In this final rule with comment period, we also are finalizing our proposals: (1) To delay ASC-15a-e: OAS CAHPS survey-based measures beginning with the CY 2020 payment determination (CY 2018 data collection) (section XIV.B.4. of this final rule with comment period); (2) to expand the CMS online tool to also allow for batch submission beginning with data submitted during CY 2018 and to make corresponding revisions to the CFR (section XIV.D.3.b. of this final rule with comment period); and, (3) to align the naming of the Extraordinary Circumstances Exceptions (ECE) policy beginning with CY 2018 and to make conforming changes to the CFR (section XIV.D.6.b. of this final rule with comment period). As discussed below, we do not expect these finalized proposals to affect our burden estimates.

2. Newly Finalized Change in Hourly Labor Cost for Burden Calculation for the ASCQR Program

To better align this program with our other quality reporting and value-based purchasing programs, we are finalizing our proposal to update our burden calculation methodology to standardize elements within our burden calculation. Specifically, we are finalizing our proposal to utilize an updated standard hourly labor cost for data reporting activities.

In the CY 2017 OPPTS/ASC final rule with comment period (81 FR 79863

through 79864), we finalized our proposal to use the hourly labor cost of \$32.84 (hourly wage plus fringe and overhead, discussed in more detail below) in estimating the labor costs associated with abstracting clinical data. This labor rate was based on the Bureau of Labor Statistics (BLS) median hourly wage for a medical records and health information technician of \$16.42 per hour.²¹³ The BLS is the principal Federal agency responsible for measuring labor market activity, working conditions, and price changes in the economy.²¹⁴ Acting as an independent agency, the BLS provides objective information for not only the government, but also for the public.²¹⁵ The BLS describes medical records and health information technicians as those responsible for processing and maintaining health information data.²¹⁶ Therefore, we believe it is reasonable to assume that these individuals will be tasked with abstracting clinical data for ASCQR Program measures.

The BLS recently released updated wage estimates for Medical Records and Health Information Technicians. These updates increased the median hourly wage from \$16.42 per hour to \$18.29 per hour.²¹⁷ Applying the same 100 percent overhead cost estimate finalized in the CY 2017 OPPTS/ASC final rule with comment period (81 FR 79863 through 79864) to estimate the elements assigned as “indirect” or “overhead” costs, we estimate an updated total hourly cost to ASCs of \$36.58. Therefore, we proposed to apply an updated hourly labor cost of \$36.58 (\$18.29 base salary + \$18.29 fringe and overhead) to our burden calculations for chart abstraction.

We invited public comment on this proposal. We did not receive any public comments and are finalizing our proposal to apply an updated hourly labor cost of \$36.58 (\$18.29 base salary + \$18.29 fringe and overhead) to our burden calculations for chart abstraction.

3. Estimated Burden of Newly Finalized ASCQR Program Proposals Beginning With CY 2018

In section XIV.B.4. of this final rule with comment period, we are finalizing

²¹³ Available at: <http://www.bls.gov/ooh/healthcare/medical-records-and-health-information-technicians.htm>.

²¹⁴ Available at: <http://www.bls.gov/bls/infhome.htm>.

²¹⁵ *Ibid.*

²¹⁶ BLS Occupational Employment Statistics; May 2016. Available at: <https://www.bls.gov/oes/current/oes292071.htm>.

²¹⁷ Available at: <https://www.bls.gov/ooh/healthcare/medical-records-and-health-information-technicians.htm>.

our proposal to delay ASC–15a–e: OAS CAHPS Survey-based measures beginning with the CY 2020 payment determination (CY 2018 data collection) until further notice in future rulemaking. As described in the CY 2017 OPPTS/ASC final rule with comment period (81 FR 79864), the information collection requirements associated with the five OAS CAHPS Survey based measures (ASC–15a, ASC–15b, ASC–15c, ASC–15d, and ASC–15e) are currently approved under OMB Control Number 0938–1240. For this reason, we did not provide an independent estimate of the burden associated with OAS CAHPS Survey administration for the ASCQR Program in the CY 2017 OPPTS/ASC final rule with comment period (81 FR 79864). Similarly, our finalized proposal to delay reporting on these measures does not affect our current burden estimates.

In section XIV.D.3. of this final rule with comment period, we are finalizing our proposals to expand the CMS online tool to also allow for batch submission beginning with data submitted during the CY 2018 reporting period and to make corresponding revisions to the CFR. We expect this finalized proposal to increase the efficiency of data submission via the CMS online tool. However, the finalized proposal does not change our data reporting requirements, and therefore, we do not expect a change in the burden experienced by ASCs.

In section XIV.D.6. of this final rule with comment period, we are finalizing our proposals to align the naming of the Extraordinary Circumstances Exceptions (ECE) policy beginning with CY 2018 and to make conforming changes to the CFR. We are also clarifying the timing of our response to ECE requests. Because we do not seek any new or additional information in our ECE finalized proposals, we believe the updates will have no effect on burden for hospitals.

4. Estimated Burden of Newly Finalized ASCQR Program Proposals for the CY 2019 Payment Determination

In section XIV.B.3.b. of this final rule with comment period, we are finalizing our proposals, beginning with the CY 2019 payment determination, to remove three measures from the ASCQR Program. These measures include one claims-based measure (ASC–5: Prophylactic Intravenous (IV) Antibiotic Timing) and two collected via a CMS online data submission tool (ASC–6: Safe Surgery Checklist Use and ASC–7: Ambulatory Surgical Center Facility Volume Data on Selected Ambulatory Surgical Center Surgical Procedures).

Data for ASC–5 is submitted via CMS claims using Quality Data Codes, which impose only a nominal burden on providers because these claims are already submitted for the purposes of payment. Therefore, we estimate a nominal reduction in burden associated with our finalized proposal to remove the ASC–5 measure from the ASCQR Program measure set beginning with the CY 2019 payment determination.

We believe 3,937 ASCs will experience a reduction in burden associated with our finalized proposals to remove ASC–6 and ASC–7 from the ASCQR Program measure set. In the CY 2014 OPPTS/ASC final rule with comment period (78 FR 75173), we finalized our estimates that each participating ASC will spend 10 minutes per measure per year to collect and submit the required data for the ASC–6 and ASC–7 measures, making the total estimated annual burden associated with each of these measures 657 hours (3,937 ASCs × 0.167 hours per ASC) and \$24,033 (657 hours × \$36.58 per hour). Therefore, we estimate a total reduction in burden of 1,314 (657 hours × 2 measures) hours and \$48,066 (1,314 hours × \$36.58 per hour) for all ASCs as a result of our finalized proposals to remove ASC–6 and ASC–7 from the ASCQR Program measure set. The reduction in burden associated with these requirements is available for review and comment under OMB Control Number 0938–1270.

5. Estimated Burden of ASCQR Program for the CY 2021 Payment Determination

In section XIV.B.6.a. of this final rule with comment period, we are not finalizing our proposal to adopt one new measure collected via a CMS online data submission tool, ASC–16: Toxic Anterior Segment Syndrome, beginning with the CY 2021 payment determination. Therefore, the initially estimated burden from the CY 2018 OPPTS/ASC proposed rule (82 FR 33709) does not apply.

6. Estimated Burden of ASCQR Program Newly Finalized Proposals for the CY 2022 Payment Determination

In section XIV.B.6.b. and c. of this final rule with comment period, we are finalizing our proposals, beginning with the CY 2022 payment determination, to adopt two measures collected via claims: (1) ASC–17: Hospital Visits after Orthopedic Ambulatory Surgical Center Procedures; and (2) ASC–18: Hospital Visits after Urology Ambulatory Surgical Center Procedures. Data used to calculate scores for these measures is collected via Part A and Part B Medicare administrative claims and Medicare

enrollment data, and therefore does not require ASCs to report any additional data. Because these measures do not require ASCs to submit any additional data, we do not believe there will be any additional burden associated with these proposals.

XVII. Response to Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this final rule with comment period, and, when we proceed with a subsequent document(s), we will respond to those comments in the preamble to that document.

XVIII. Economic Analyses

A. Regulatory Impact Analysis

1. Introduction

We have examined the impacts of this final rule with comment period, as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) (March 22, 1995, Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999), the Congressional Review Act (5 U.S.C. 804(2)), and Executive Order 13771 on Reducing Regulation and Controlling Regulatory Costs (January 30, 2017). This section of this final rule with comment period contains the impact and other economic analyses for the provisions that we are making for CY 2018.

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This final rule with comment period has been designated as an economically significant rule under section 3(f)(1) of Executive Order 12866 and a major rule under the Congressional Review Act. Accordingly, this final rule with

comment period has been reviewed by the Office of Management and Budget. We have prepared a regulatory impact analysis that, to the best of our ability, presents the costs and benefits of this final rule with comment period. In the CY 2018 OPPS/ASC proposed rule (82 FR 33710), we solicited public comments on the regulatory impact analysis in the proposed rule, and we are addressing any public comments we received in this final rule with comment period as appropriate.

2. Statement of Need

This final rule with comment period is necessary to make updates to the Medicare hospital OPPS rates. It is necessary to make changes to the payment policies and rates for outpatient services furnished by hospitals and CMHCs in CY 2018. We are required under section 1833(t)(3)(C)(ii) of the Act to update annually the OPPS conversion factor used to determine the payment rates for APCs. We also are required under section 1833(t)(9)(A) of the Act to review, not less often than annually, and revise the groups, the relative payment weights, and the wage and other adjustments described in section 1833(t)(2) of the Act. We must review the clinical integrity of payment groups and relative payment weights at least annually. We are revising the APC relative payment weights using claims data for services furnished on and after January 1, 2016, through and including December 31, 2016, and processed through June 30, 2017, and updated cost report information.

This final rule with comment period also is necessary to make updates to the ASC payment rates for CY 2018, enabling CMS to make changes to payment policies and payment rates for covered surgical procedures and covered ancillary services that are performed in an ASC in CY 2018. Because ASC payment rates are based on the OPPS relative payment weights for the majority of the procedures performed in ASCs, the ASC payment rates are updated annually to reflect annual changes to the OPPS relative payment weights. In addition, we are required under section 1833(i)(1) of the Act to review and update the list of surgical procedures that can be performed in an ASC not less frequently than every 2 years.

3. Overall Impacts for the OPPS and ASC Payment Provisions

We estimate that the total increase in Federal government expenditures under the OPPS for CY 2018, compared to CY 2017, due only to the changes to OPPS

finalized in this final rule with comment period, will be approximately \$690 million. Taking into account our estimated changes in enrollment, utilization, and case-mix for CY 2018, we estimate that the OPPS expenditures, including beneficiary cost-sharing, for CY 2018 will be approximately \$69.9 billion; approximately \$5.8 billion higher than estimated OPPS expenditures in CY 2017. Because this final rule with comment period is economically significant as measured by the threshold of an additional \$100 million in expenditures in 1 year, we have prepared this regulatory impact analysis that, to the best of our ability, presents its costs and benefits. Table 88 displays the distributional impact of the CY 2018 changes in OPPS payment to various groups of hospitals and for CMHCs.

We estimate that the update to the conversion factor and other adjustments (not including the effects of outlier payments, the pass-through estimates, and the application of the frontier State wage adjustment for CY 2017) will increase total OPPS payments by 1.3 percent in CY 2018. The changes to the APC relative payment weights, the changes to the wage indexes, the continuation of a payment adjustment for rural SCHs, including EACHs, and the payment adjustment for cancer hospitals will not increase OPPS payments because these changes to the OPPS are budget neutral. However, these updates will change the distribution of payments within the budget neutral system. We estimate that the total change in payments between CY 2017 and CY 2018, considering all payments, changes in estimated total outlier payments, pass-through payments, and the application of the frontier State wage adjustment outside of budget neutrality, in addition to the application of the OPD fee schedule increase factor after all adjustments required by sections 1833(t)(3)(F), 1833(t)(3)(G), and 1833(t)(17) of the Act, will increase total estimated OPPS payments by 1.4 percent.

We estimate the total increase (from changes to the ASC provisions in this final rule with comment period as well as from enrollment, utilization, and case-mix changes) in Medicare expenditures under the ASC payment system for CY 2018 compared to CY 2017 to be approximately \$130 million. Because the provisions for the ASC payment system are part of a final rule that is economically significant as measured by the \$100 million threshold, we have prepared a regulatory impact analysis of the changes to the ASC payment system that, to the best of our

ability, presents the costs and benefits of this portion of this final rule with comment period. Table 89 and 90 of this final rule with comment period display the redistributive impact of the CY 2018 changes regarding ASC payments, grouped by specialty area and then grouped by procedures with the greatest ASC expenditures, respectively.

4. Regulatory Review Costs

If regulations impose administrative costs on private entities, such as the time needed to read and interpret this final rule with comment period, we should estimate the cost associated with regulatory review. Due to the uncertainty involved with accurately quantifying the number of entities that will review the rule, we assume that the total number of unique commenters on this year's proposed rule will be the number of reviewers of this final rule with comment period. We acknowledge that this assumption may understate or overstate the costs of reviewing this rule. It is possible that not all commenters reviewed this year's proposed rule in detail, and it is also possible that some reviewers chose not to comment on the proposed rule. For these reasons, we believe that the number of past commenters would be a fair estimate of the number of reviewers of this final rule with comment period. In the CY 2018 OPPS/ASC proposed rule (82 FR 33711), we welcomed any comments on the approach in estimating the number of entities that will review the proposed rule. However, we did not receive any comments on our approach.

We also recognize that different types of entities are in many cases affected by mutually exclusive sections of this final rule with comment period, and therefore for the purposes of our estimate, we assume that each reviewer reads approximately 50 percent of the rule. In the CY 2018 OPPS/ASC proposed rule, we also sought public comments on this assumption, but we did not receive any comments.

Using the wage information from the BLS for medical and health service managers (Code 11-9111), we estimate that the cost of reviewing this rule is \$105.16 per hour, including overhead and fringe benefits (https://www.bls.gov/oes/2016/may/naics4_621100.htm). Assuming an average reading speed, we estimate that it will take approximately 8 hours for the staff to review half of this final rule with comment period. For each facility that reviews the rule, the estimated cost is \$841.28 (8 hours × \$105.16). Therefore, we estimate that the total cost of reviewing this

regulation is \$2,851,939 (\$841.28 × 3,390 reviewers).

5. Detailed Economic Analyses

a. Estimated Effects of OPPS Changes in This Final Rule With Comment Period

(1) Limitations of Our Analysis

The distributional impacts presented here are the projected effects of the CY 2018 policy changes on various hospital groups. We post on the CMS Web site our hospital-specific estimated payments for CY 2018 with the other supporting documentation for this final rule with comment period. To view the hospital-specific estimates, we refer readers to the CMS Web site at: <http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/HospitalOutpatientPPS/index.html>. At the Web site, select "regulations and notices" from the left side of the page and then select "CMS-1678-FC" from the list of regulations and notices. The hospital-specific file layout and the hospital-specific file are listed with the other supporting documentation for this final rule with comment period. We show hospital-specific data only for hospitals whose claims were used for modeling the impacts shown in Table 88 below. We do not show hospital-specific impacts for hospitals whose claims we were unable to use. We refer readers to section II.A. of this final rule with comment period for a discussion of the hospitals whose claims we do not use for ratesetting and impact purposes.

We estimate the effects of the individual policy changes by estimating payments per service, while holding all other payment policies constant. We use the best data available, but do not attempt to predict behavioral responses to our policy changes. In addition, we have not made adjustments for future changes in variables such as service volume, service-mix, or number of encounters.

In the CY 2018 OPPS/ASC proposed rule, we solicited public comment and information about the anticipated effects of the proposed changes included in the proposed rule on providers and our methodology for estimating them. Any public comments that we receive are addressed in the applicable sections of this final rule with comment period that discuss the specific policies.

(2) Estimated Effects of OPPS Changes to Part B Drug Payment on 340B Eligible Hospitals Paid Under the OPPS

In section V.B.7. of this final rule with comment period, we discuss our finalized policies to reduce the payment for nonpass-through, separately payable drugs purchased by certain 340B-

participating hospitals through the 340B Program. Rural SCHs, children's hospitals, and PPS-exempt cancer hospitals are excepted from this payment policy in CY 2018. Specifically, in this final rule with comment period, for CY 2018, for hospitals paid under the OPPS (other than those that are excepted for CY 2018), we are paying for separately payable drugs and biologicals that are obtained with a 340B discount, excluding those on pass-through payment status and vaccines, at ASP minus 22.5 percent instead of ASP+6 percent. For context, based on CY 2016 claims data, the total OPPS Part B drug payment is approximately \$10.2 billion.

We recognize that it may be difficult to determine precisely what the impact on Medicare spending will be because OPPS claims data do not currently indicate if the drug being provided was purchased with a 340B discount. Furthermore, a list of outpatient drugs covered under the 340B program is not publicly available. Accordingly, for purposes of estimating the impact for this final rule with comment period, as we did in the CY 2018 OPPS/ASC proposed rule, we assumed that all applicable drugs purchased by hospitals eligible to participate in the 340B Program were purchased at a discounted price under the 340B program. While we recognize that certain newly covered entities do not have access to 340B drug pricing for designated orphan drugs, we believe that our CY 2018 policy to except newly covered entity types such as rural SCHs, PPS-exempt cancer hospitals, and children's hospitals, largely mitigates the 340B drug spend attributable to orphan drugs and therefore does not dramatically affect our final estimate. In addition, for this final rule with comment period, we utilized the HRSA covered entity database to identify 340B participating hospitals and cross-checked these providers with the CY 2018 OPPS facility impact public use file to determine which 340B hospitals are paid under the OPPS. The HRSA covered entity database is available via the Internet at <https://340bopais.hrsa.gov/coveredentitysearch>. Using this database, we found 1,338 OPPS hospitals in the 340B program (compared to the 954 estimated for the proposed rule). Of these, 270 were rural SCHs, 47 were children's hospitals, and 3 were PPS-exempt cancer hospitals. We did not assume changes in the quantity of 340B purchased drugs provided by hospitals participating in the 340B program (thereby affecting unit volume) or

changes in the number of hospitals participating in the 340B program that may occur due to the payment reduction.

While we acknowledge that there are some limitations in Medicare's ability to prospectively calculate a precise estimate for purposes of this final rule with comment period, we note that each hospital has the ability to calculate how this policy will change its Medicare payments for separately payable drugs in CY 2018. Specifically, each hospital that is not participating in the 340B program or that is excepted from the policy to pay for drugs acquired under the 340B Program at ASP minus 22.5 percent in CY 2018 will know that its Medicare payments for drugs will be unaffected by this finalized policy; whereas each hospital participating in the 340B Program has access to 340B ceiling prices (and subceiling prices if it participates in the Prime Vendor Program), knows the volume of 340B drugs that it has historically billed to Medicare, and can generally project the specific covered 340B drugs (and volume thereof) for which it expects to bill Medicare in CY 2018. Accordingly, a hospital participating in the 340B Program is able to estimate the difference in payment that it will receive if Medicare pays ASP minus 22.5 percent instead of ASP+6 percent for 340B drugs.

Using the list of participating 340B providers (derived from the HRSA database) and updated CY 2016 claims data available for this final rule with comment period for the applicable separately payable drugs and biologicals, excluding those on pass-through payment status and vaccines, billed by hospitals eligible to participate in the 340B Program, except for those hospital types that are excepted from this policy in CY 2018, we estimate that OPPS payments for separately payable drugs, including beneficiary copayments, will decrease by approximately \$1.6 billion under this finalized policy, which reflects an additional estimated reduction of \$700 million over the proposed rule estimate of \$900 million. If PPS-exempt cancer hospitals, children's hospitals, and rural SCHs had *not* been excluded from the reduced drug payment in CY 2018, drug payments to PPS-exempt cancer hospitals would have been reduced by approximately \$29 million, to children's hospitals by approximately \$2 million, and to rural SCHs by approximately \$199 million—this would have resulted in a total savings estimate of approximately \$1.8 billion. Because we are implementing this payment reduction in a budget neutral manner

within the OPPS, the reduced payments for separately payable drugs purchased through the 340B Program will increase payment rates for other non-drug items and services paid under the OPPS by an offsetting aggregate amount.

Because data on drugs that are purchased with a 340B discount are not publicly available, we do not believe it is possible to more accurately estimate the amount of the aggregate payment reduction and the offsetting amount of the adjustment that is necessary to ensure budget neutrality through higher payment rates for other services. Furthermore, there are potential offsetting factors, including possible changes in provider behavior and overall market changes that would likely lower the impact of the payment reduction. As a result, we may need to make an adjustment in future years to revise the conversion factor once we have received more accurate data on drugs purchased with a 340B discount within the OPPS, similar to the adjustment we made for clinical diagnostic laboratory test packaging policy in the CY 2016 OPPS/ASC final rule with comment period (80 FR 70352 through 70357).

In this final rule, we project that reducing payment for 340B drugs to ASP minus 22.5 percent will increase OPPS payment rates for non-drug items and services by approximately 3.2 percent in CY 2018. The estimated impacts of this policy are displayed in Table 88 below. We note that the payment rates included in Addendum A and Addendum B of this final rule with comment period do not reflect the reduced payments for drugs purchased under the 340B Program; however, they do include the increase to payments rates for non-drug items and services due to the corresponding increase in the conversion factor. In the proposed rule (82 FR 33712), we reminded commenters that this estimate could change in the final rule based on a number of factors, including other policies that are adopted in the final rule and the availability of updated data and/or method of assessing the impact in the final rule. We sought public comment on our estimate and stated that we were especially interested in whether commenters believe there are other publicly available data sources or proxies that can be used for determining which drugs billed by hospitals paid under the OPPS were acquired under the 340B Program.

We proposed that the reduced payments for separately payable drugs and biologicals purchased under the 340B Program would be included in the budget neutrality adjustments, under

the requirements in section 1833(t)(9)(B) of the Act, and that the budget neutral weight scalar would not be applied in determining payments for these separately paid drugs and biologicals purchased under the 340B Program.

In addition, we solicited public comment on whether we should apply all or part of the savings generated by this payment reduction to increase payments for specific services paid under the OPPS, or under Part B generally, in CY 2018, rather than simply increasing the conversion factor. In particular, we sought public comment on whether and how the offsetting increase could be targeted to hospitals that treat a large share of indigent patients, especially those patients who are uninsured. Finally, we sought public comment on whether the redistribution of savings associated with the proposal would result in unnecessary increases in the volume of covered services paid under the OPPS that should be adjusted in accordance with section 1833(t)(2)(F) of the Act.

Comment: Several commenters stated that if the 340B drug payment policy was finalized, the funds should be redistributed across the OPPS, as has been the case for the application of budget neutrality in the past. One commenter supported CMS' proposal to implement the savings attributed to the 340B payment reduction in a budget neutral manner within the OPPS. Commenters noted that the budget neutrality requirement upon which CMS relied in the proposed rule at section 1833(t)(9)(B) of the Act has historically been interpreted by CMS as requiring budget neutrality within the OPPS. Commenters strongly urged CMS to follow its longstanding interpretation of section 1833(t)(9)(B) of the Act and offset the full amount of the aggregate 340B payment reduction through offsetting payment increases within the OPPS.

MedPAC reiterated its March 2016 recommendation that that payments be distributed in proportion to the amount of uncompensated care that hospitals provide, "to make sure that dollars in the uncompensated care pool actually go to the hospitals providing the most uncompensated care." MedPAC commented that the 340B Program is not well targeted to hospitals that provide high levels of uncompensated care and noted that 40 percent of 340B hospitals provide less than the median level of uncompensated care. MedPAC stated that it believed that legislation would be needed to direct the savings to the uncompensated care pool because current law would require that the savings be retained within the OPPS to

make it budget neutral. However, MedPAC encouraged CMS to request that Congress enact the legislation necessary to allow CMS to implement its recommendation. MedPAC further noted that legislation would also allow CMS to apply the policy to all separately payable drugs, including those that are separately payable as a result of their pass-through status.

Response: We thank the commenters for their feedback. After consideration of the public comments we received, we are finalizing our proposal to fully redistribute the savings associated with adoption of the alternative payment methodology for drugs acquired under the 340B Program within the OPSS to non-drug items and services. That is, we will redistribute \$1.6 billion dollars in estimated lower payment for OPSS drugs by increasing the conversion factor for all OPSS non-drug items and services by 3.2 percent. We may revisit how the funds should be targeted in the future.

Comment: Some commenters challenged the accuracy of the \$900 million estimate CMS calculated in the proposed rule. According to these commenters, their analysis of the proposal would have an estimated impact in the range of \$1.2 billion to \$1.65 billion. As a result, these commenters asserted that if the proposed payment reductions are applied in a budget neutral manner within the OPSS through an offsetting increase in the conversion factor, their analysis showed that payments for non-drug APCs would increase across hospitals by about 3.7 percent (in contrast to CMS's estimate of 1.4 percent) based on the proposed rule data. Moreover, based on their analysis, the commenters believed the redistribution of the savings would result in a net decrease in payments to 340B hospitals of approximately 2.6 percent, or approximately \$800 million—funding that they stated was intended to support the congressionally-mandated mission of 340B hospitals—not be redistributed to other hospitals that do not participate in the 340B Program.

Response: We stated in the proposed rule that the estimate of the 340B payment reductions would likely change in the final rule based on updated data, revised assumptions, and final policies. For this final rule with comment period, as discussed in detail earlier, we used updated CY 2016 claims data and an updated list of 340B eligible providers to calculate an estimated impact of \$1.6 billion based on the final policy. As shown in Table 88 below this reflects a reduction of

about \$1.5 billion to urban hospitals and \$86 million to rural hospitals. We are redistributing the savings from this payment reduction in a budget neutral manner within the OPSS through an offsetting increase in the conversion factor. This increase to the conversion factor increases all OPSS non-drug payment rates to all providers under the OPSS by 3.2 percent. With respect to comments on the redistribution of the 340B savings to non-340B participating hospitals, we note that 340B hospitals will also receive the conversion factor increase.

Comment: In response to the comment solicitation on whether the savings generated by the reduced payment on 340B drugs should be used to increase payments for specific services paid under the OPSS or under Part B generally in CY 2018, commenters generally objected to the notion that CMS has authority to redistribute savings outside of OPSS. One commenter stated that CMS did not provide any analysis or justification to support a reading that section 1833(t)(9)(B) of the Act establishes a budget neutrality concept for the Medicare Part B Trust Fund. Another commenter stated that CMS should not redistribute the savings gained by the 340B proposal based on Medicare DSH metrics (that is, insured low-income days) because such metrics are not well correlated with uncompensated care costs. This commenter also expressed concern regarding the suitability of using uncompensated care as a metric “to identify hospitals that provide the most help to needy patients because it includes bad debt as well as charity care.” The commenter stated that bad debt is the amount that hospitals billed but did not collect, and therefore is not a measure of hospital assistance to the poor. Several commenters challenged the logic of reducing 340B payments to participating 340B hospitals, only to return the savings to the very same hospitals.

Response: We appreciate the feedback. Because the OPSS is a budget neutral payment system, historically CMS has maintained budget neutrality through offsetting estimated payment decreases/increases within the OPSS, such as by increasing/decreasing the conversion factor by an equal offsetting amount. We have articulated the policy justification for reducing drug payment to ASP minus 22.5 percent for 340B-acquired drugs in section V.B.7. of this final rule with comment period and are redistributing the resulting dollars within the OPSS to maintain budget neutrality for CY 2018. Therefore, we are finalizing our proposal to

redistribute the estimated reduction in payment for 340B-acquired drugs and biologicals by increasing the conversion factor, and we are not targeting the savings to specific services paid under the OPSS or under Part B generally. We continue to be interested in exploring ways that funds from a subsequent proposal could be targeted in future years to hospitals that serve a high share of low-income or uninsured patients.

Comment: Many commenters noted that CMS' proposal to redistribute the savings that result from the 340B reduction in a budget neutral manner within the OPSS would increase beneficiary copayments on non-drug services. Accordingly, the commenters stated that most patients would not directly receive the benefit of the 340B copayment reduction even if reduced payments for 340B drugs lower coinsurance amounts for these drugs. The commenters stated the proposal will likely increase costs for uninsured patients because 340B hospitals provide a disproportionate amount of care to that population and participating 340B hospitals may no longer be able to provide “discounts to low-income patients” or other uncompensated care. One commenter suggested that CMS, with stakeholder input, develop an outpatient hospital charity care metric that could be used to redistribute the 340B savings based on the level of outpatient charity care provided by the hospital.

Response: We appreciate the stakeholders' concerns. We believe that reducing payments on 340B purchased drugs to better align with hospital acquisition costs directly lowers drug costs for those beneficiaries who receive a covered outpatient drug from a 340B participating hospital. Further, to the extent that studies have found that 340B participating hospitals tend to use more high cost drugs, we believe that this 340B payment policy helps address drug pricing in the hospital outpatient setting by lessening the incentive for unnecessary utilization of costly drugs. In addition, even though many beneficiaries have supplemental coverage, those plans make coinsurance payments on behalf of beneficiaries. Thus, to the extent this policy lessens the coinsurance amount such supplemental plans would have to make, we would expect the price of such plans could decrease or otherwise reflect these lower costs in the future.

In summary, to maintain budget neutrality within the OPSS, the estimated \$1.6 billion in reduced drug payments from adoption of this final 340B payment methodology will be redistributed in an equal offsetting

amount to all hospitals paid under the OPSS through increasing the payment rates by 3.2 percent for non-drug items and services furnished by all hospitals paid under the OPSS for CY 2018.

(3) Estimated Effects of OPSS Changes on Hospitals

Table 88 below shows the estimated impact of this final rule with comment period on hospitals. Historically, the first line of the impact table, which estimates the change in payments to all facilities, has always included cancer and children's hospitals, which are held harmless to their pre-BBA amount. We also include CMHCs in the first line that includes all providers. We now include a second line for all hospitals, excluding permanently held harmless hospitals and CMHCs.

We present separate impacts for CMHCs in Table 88, and we discuss them separately below, because CMHCs are paid only for partial hospitalization services under the OPSS and are a different provider type from hospitals. In CY 2018, we are paying CMHCs for partial hospitalization services under APC 5853 (Partial Hospitalization for CMHCs), and we are paying hospitals for partial hospitalization services under APC 5863 (Partial Hospitalization for Hospital-Based PHPs).

The estimated increase in the total payments made under the OPSS is determined largely by the increase to the conversion factor under the statutory methodology. The distributional impacts presented do not include assumptions about changes in volume and service-mix. The conversion factor is updated annually by the OPD fee schedule increase factor as discussed in detail in section II.B. of this final rule with comment period. Section 1833(t)(3)(C)(iv) of the Act provides that the OPD fee schedule increase factor is equal to the market basket percentage increase applicable under section 1886(b)(3)(B)(iii) of the Act, which we refer to as the IPPS market basket percentage increase. The IPPS market basket percentage increase for FY 2018 is 2.7 percent (82 FR 38177). Section 1833(t)(3)(F)(i) of the Act reduces that 2.7 percent by the multifactor productivity adjustment described in section 1886(b)(3)(B)(xi)(II) of the Act, which is 0.6 percentage point for FY 2018 (which is also the MFP adjustment for FY 2018 in the FY 2018 IPPS/LTCH PPS final rule (82 FR 38177 through 38178)), and sections 1833(t)(3)(F)(ii) and 1833(t)(3)(G)(v) of the Act further reduce the market basket percentage increase by 0.75 percentage point, resulting in the OPD fee schedule increase factor of 1.35 percent. We are

using the OPD fee schedule increase factor of 1.35 percent in the calculation of the CY 2018 OPSS conversion factor. Section 10324 of the Affordable Care Act, as amended by HCERA, further authorized additional expenditures outside budget neutrality for hospitals in certain frontier States that have a wage index less than 1.0000. The amounts attributable to this frontier State wage index adjustment are incorporated in the CY 2018 estimates in Table 88.

To illustrate the impact of the CY 2018 changes, our analysis begins with a baseline simulation model that uses the CY 2017 relative payment weights, the FY 2017 final IPPS wage indexes that include reclassifications, and the final CY 2017 conversion factor. Table 88 shows the estimated redistribution of the increase or decrease in payments for CY 2018 over CY 2017 payments to hospitals and CMHCs as a result of the following factors: the impact of the APC reconfiguration and recalibration changes between CY 2017 and CY 2018 (Column 2); the wage indexes and the provider adjustments (Column 3); the combined impact of all of the changes described in the preceding columns plus the 1.35 percent OPD fee schedule increase factor update to the conversion factor; and the estimated impact taking into account all payments for CY 2018 relative to all payments for CY 2017, including the impact of changes in estimated outlier payments, the frontier State wage adjustment, and changes to the pass-through payment estimate (Column 6).

We did not model an explicit budget neutrality adjustment for the rural adjustment for SCHs because we are maintaining the current adjustment percentage for CY 2018. Because the updates to the conversion factor (including the update of the OPD fee schedule increase factor), the estimated cost of the rural adjustment, and the estimated cost of projected pass-through payment for CY 2018 are applied uniformly across services, observed redistributions of payments in the impact table for hospitals largely depend on the mix of services furnished by a hospital (for example, how the APCs for the hospital's most frequently furnished services will change), and the impact of the wage index changes on the hospital. However, total payments made under this system and the extent to which this final rule with comment period will redistribute money during implementation also will depend on changes in volume, practice patterns, and the mix of services billed between CY 2017 and CY 2018 by various groups

of hospitals, which CMS cannot forecast.

In CY 2016, we excluded all molecular pathology laboratory tests from our packaging policy, and in CY 2017, we expanded the laboratory packaging exception to apply to all advanced diagnostic laboratory tests (ADLTs) that meet the criteria of section 1834A(d)(5)(A) of the Act. For CY 2018, we sought public comments on whether laboratories (instead of hospitals) should be permitted to bill Medicare directly for molecular pathology tests and ADLTs that meet the criteria of section 1834A(d)(5)(A) of the Act (and are granted ADLT status by CMS), that are ordered less than 14 days following the date of a hospital outpatient's discharge from the hospital outpatient department.

The laboratory date of service (DOS) issue is discussed in section X.F. of this final rule with comment period. Because there are currently no laboratory tests designated as ADLTs and because the payment rate for laboratory tests excluded from our packaging policy billed by a hospital would have been the applicable rate for the laboratory test under the CLFS, any aspect of this discussion that is finalized in this final rule with comment period will not result in a net costs or savings to the program. Accordingly, section X.F. of this final rule with comment period is not included in the impact table in the regulatory impact analysis.

Overall, we estimate that the rates for CY 2018 will increase Medicare OPSS payments by an estimated 1.4 percent. Removing payments to cancer and children's hospitals because their payments are held harmless to the pre-OPSS ratio between payment and cost and removing payments to CMHCs results in an estimated 1.5 percent increase in Medicare payments to all other hospitals. These estimated payments will not significantly impact other providers.

Column 1: Total Number of Hospitals

The first line in Column 1 in Table 88 shows the total number of facilities (3,878), including designated cancer and children's hospitals and CMHCs, for which we were able to use CY 2016 hospital outpatient and CMHC claims data to model CY 2017 and CY 2018 payments, by classes of hospitals, for CMHCs and for dedicated cancer hospitals. We excluded all hospitals and CMHCs for which we could not plausibly estimate CY 2017 or CY 2018 payment and entities that are not paid under the OPSS. The latter entities include CAHs, all-inclusive hospitals, and hospitals located in Guam, the U.S.

Virgin Islands, Northern Mariana Islands, American Samoa, and the State of Maryland. This process is discussed in greater detail in section II.A. of this final rule with comment period. At this time, we are unable to calculate a DSH variable for hospitals that are not also paid under the IPPS because DSH payments are only made to hospitals paid under the IPPS. Hospitals for which we do not have a DSH variable are grouped separately and generally include freestanding psychiatric hospitals, rehabilitation hospitals, and long-term care hospitals. We show the total number of OPPS hospitals (3,765), excluding the hold-harmless cancer and children's hospitals and CMHCs, on the second line of the table. We excluded cancer and children's hospitals because section 1833(t)(7)(D) of the Act permanently holds harmless cancer hospitals and children's hospitals to their "pre-BBA amount" as specified under the terms of the statute, and therefore, we removed them from our impact analyses. We show the isolated impact on the 49 CMHCs at the bottom of the impact table and discuss that impact separately below.

Column 2: APC Recalibration—All Changes

Column 2 shows the estimated effect of APC recalibration. Column 2 also reflects any changes in multiple procedure discount patterns or conditional packaging that occur as a result of the changes in the relative magnitude of payment weights. As a result of APC recalibration, we estimate that urban hospitals will experience an increase of 0.1 percent, with the impact ranging from an increase of 0.1 percent to no change, depending on the number of beds. Rural hospitals will experience a decrease of 0.3 percent, with the impact ranging from a decrease of 0.2 percent to a decrease of 0.5 percent, depending on the number of beds. Major teaching hospitals will experience an increase of 0.1 percent.

Column 3: Wage Indexes and the Effect of the Provider Adjustments

Column 3 demonstrates the combined budget neutral impact of the APC recalibration; the updates for the wage indexes with the FY 2018 IPPS post-reclassification wage indexes; the rural adjustment; and the cancer hospital payment adjustment. We modeled the independent effect of the budget neutrality adjustments and the OPD fee schedule increase factor by using the relative payment weights and wage indexes for each year, and using a CY 2017 conversion factor that included the OPD fee schedule increase and a budget

neutrality adjustment for differences in wage indexes.

Column 3 reflects the independent effects of the updated wage indexes, including the application of budget neutrality for the rural floor policy on a nationwide basis. This column excludes the effects of the frontier State wage index adjustment, which is not budget neutral and is included in Column 6. We did not model a budget neutrality adjustment for the rural adjustment for SCHs because we are continuing the rural payment adjustment of 7.1 percent to rural SCHs for CY 2018, as described in section II.E. of this final rule with comment period.

We modeled the independent effect of updating the wage indexes by varying only the wage indexes, holding APC relative payment weights, service-mix, and the rural adjustment constant and using the CY 2018 scaled weights and a CY 2017 conversion factor that included a budget neutrality adjustment for the effect of the changes to the wage indexes between CY 2017 and CY 2018. The FY 2018 wage policy results in modest redistributions.

There is a slight increase of less than 0.1 in Column 3 for the CY 2018 cancer hospital payment adjustment budget neutrality calculation because we are using a payment-to-cost ratio target for the cancer hospital payment adjustment in CY 2018 of 0.88, compared to the CY 2017 OPPS/ASC final rule with comment period (81 FR 79869) payment-to-cost ratio target of 0.91. We note that, in accordance with section 16002 of the 21st Century Cures Act, we are applying a budget neutrality factor calculated as if the cancer hospital adjustment target payment-to-cost ratio was 0.89, not the 0.88 target payment-to-cost ratio we are applying in section II.F. of this final rule with comment period.

Column 4: Effect of the Reduced Payment for 340B Drugs

Column 4 demonstrates the total payment effect of the finalized reduction in payment for drugs purchased under the 340B Program from ASP+6 percent to ASP minus 22.5 percent. This column includes both the reduced payment for 340B acquired drugs and the increase to the conversion factor for budget neutrality purposes, which increases payment for all non-drug services. For rural sole community hospitals, this column shows a 2.6 percent increase, reflecting a 0.0 percent increase for drugs (because these providers are exempt from these reductions) and a 3.2 percent increase for non-drug services.

Column 5: All Budget Neutrality Changes Combined With the Market Basket Update

Column 5 demonstrates the combined impact of all of the changes previously described and the update to the conversion factor of 1.35 percent. Overall, these changes will increase payments to urban hospitals by 1.2 percent and to rural hospitals by 2.5 percent. Urban hospitals will receive an increase in line with the 1.3 percent overall increase for all facilities after the update is applied to the proposed budget neutrality adjustments. The increase for classes of rural hospitals is more variable with sole community hospitals receiving a 3.9 percent increase and other rural hospitals receiving an increase of 0.8 percent.

Column 6: All Changes for CY 2018

Column 6 depicts the full impact of the CY 2018 policies on each hospital group by including the effect of all of the changes for CY 2018 and comparing them to all estimated payments in CY 2017. Column 6 shows the combined budget neutral effects of Columns 2 through 4; the OPD fee schedule increase; the impact of the frontier State wage index adjustment; the impact of estimated OPPS outlier payments as discussed in section II.G. of this final rule with comment period; the change in the Hospital OQR Program payment reduction for the small number of hospitals in our impact model that failed to meet the reporting requirements (discussed in section XIII. of this final rule with comment period); and the difference in total OPPS payments dedicated to transitional pass-through payments.

Of those hospitals that failed to meet the Hospital OQR Program reporting requirements for the full CY 2017 update (and assumed, for modeling purposes, to be the same number for CY 2018), we included 33 hospitals in our model because they had both CY 2016 claims data and recent cost report data. We estimate that the cumulative effect of all of the changes for CY 2018 will increase payments to all facilities by 1.4 percent for CY 2018. We modeled the independent effect of all of the changes in Column 6 using the final relative payment weights for CY 2017 and the final relative payment weights for CY 2018. We used the final conversion factor for CY 2017 of \$75.001 and the final CY 2018 conversion factor of \$78.636 discussed in section II.B. of this final rule with comment period.

Column 6 contains simulated outlier payments for each year. We used the 1-year charge inflation factor used in the

FY 2018 IPPS/LTCH PPS final rule (82 FR 38527) of 4.6 percent (1.04574) to increase individual costs on the CY 2016 claims, and we used the most recent overall CCR in the July 2017 Outpatient Provider-Specific File (OPSF) to estimate outlier payments for CY 2017. Using the CY 2016 claims and a 4.6 percent charge inflation factor, we currently estimate that outlier payments for CY 2017, using a multiple threshold of 1.75 and a fixed-dollar threshold of \$3,825 will be approximately 1.11 percent of total payments. The estimated current outlier payments of 1.11 percent are incorporated in the comparison in Column 6. We used the same set of claims and a charge inflation factor of 9.4 percent (1.09357) and the CCRs in the July 2017 OPSF, with an adjustment of 0.985569, to reflect relative changes in cost and charge inflation between CY 2016 and CY 2018,

to model the CY 2018 outliers at 1.0 percent of estimated total payments using a multiple threshold of 1.75 and a fixed-dollar threshold of \$4,150. The charge inflation and CCR inflation factors are discussed in detail in the FY 2018 IPPS/LTCH PPS final rule (82 FR 38527). Overall, we estimate that facilities will experience an increase of 1.4 percent under this final rule with comment period in CY 2018 relative to total spending in CY 2017. This projected increase (shown in Column 6) of Table 88 reflects the 1.35 percent OPD fee schedule increase factor, plus 0.2 percent for the change in the pass-through estimate between CY 2017 and CY 2018, minus a decrease of 0.11 percent for the difference in estimated outlier payments between CY 2017 (1.11 percent) and CY 2018 (1.0 percent). We estimate that the combined effect of all of the changes for CY 2018 will increase

payments to urban hospitals by 1.3 percent. Overall, we estimate that rural hospitals will experience a 2.7 percent increase as a result of the combined effects of all of the changes for CY 2018. Among hospitals by teaching status, we estimate that the impacts resulting from the combined effects of all changes will include a decrease of 0.9 percent for major teaching hospitals and an increase of 2.9 percent for nonteaching hospitals. Minor teaching hospitals will experience an estimated increase of 1.7 percent. In our analysis, we also have categorized hospitals by type of ownership. Based on this analysis, we estimate that voluntary hospitals will experience an increase of 1.3 percent, proprietary hospitals will experience an increase of 4.5 percent, and governmental hospitals will experience no change.

TABLE 88—ESTIMATED IMPACT OF THE CY 2018 CHANGES FOR THE HOSPITAL OUTPATIENT PROSPECTIVE PAYMENT SYSTEM

	Number of hospitals	APC recalibration (all changes)	New wage index and provider adjustments	340B adjustment	All budget neutral changes (combined cols 2–4) with market basket update	All changes
	(1)	(2)	(3)	(4)	(5)	(6)
ALL FACILITIES*	3,878	0.0	0.0	0.0	1.3	1.4
ALL HOSPITALS (excludes hospitals permanently held harmless and CMHCs)	3,765	0.0	0.1	-0.1	1.4	1.5
URBAN HOSPITALS:	2,951	0.1	0.1	-0.3	1.2	1.3
LARGE URBAN (GT 1 MILL.)	1,589	0.1	0.0	-0.2	1.2	1.3
OTHER URBAN (LE 1 MILL.)	1,362	0.0	0.2	-0.3	1.3	1.4
RURAL HOSPITALS:	814	-0.3	0.0	1.4	2.5	2.7
SOLE COMMUNITY	372	-0.2	0.1	2.6	3.9	4.1
OTHER RURAL	442	-0.4	-0.2	0.0	0.8	0.9
BEDS (URBAN):						
0–99 BEDS	1,021	0.0	0.0	1.9	3.3	3.4
100–199 BEDS	850	0.0	0.2	1.2	2.8	2.9
200–299 BEDS	468	0.1	0.1	0.5	2.0	2.1
300–499 BEDS	399	0.1	0.0	-0.4	1.1	1.2
500 + BEDS	213	0.0	0.1	-2.2	-0.7	-0.6
BEDS (RURAL):						
0–49 BEDS	333	-0.5	-0.2	2.1	2.7	2.9
50–100 BEDS	297	-0.2	-0.2	1.9	2.8	3.0
101–149 BEDS	97	-0.3	0.1	1.1	2.3	2.5
150–199 BEDS	49	-0.2	0.1	0.7	1.9	2.1
200 + BEDS	38	-0.3	0.4	0.8	2.4	2.5
REGION (URBAN):						
NEW ENGLAND	144	0.2	0.4	-0.3	1.7	1.7
MIDDLE ATLANTIC	348	0.1	-0.2	-0.1	1.2	1.3
SOUTH ATLANTIC	463	0.0	0.3	-0.4	1.3	1.4
EAST NORTH CENT	471	0.0	0.1	-0.2	1.3	1.4
EAST SOUTH CENT	178	-0.1	-0.1	-1.6	-0.4	-0.3
WEST NORTH CENT	191	0.0	0.5	-0.6	1.3	1.4
WEST SOUTH CENT	513	0.0	0.3	0.9	2.5	2.6
MOUNTAIN	211	0.3	-0.9	-0.2	0.5	0.8
PACIFIC	383	0.1	0.0	-0.6	0.8	0.9
PUERTO RICO	49	-0.2	0.2	2.9	4.3	4.4
REGION (RURAL):						
NEW ENGLAND	21	0.1	1.5	1.2	4.2	4.2

TABLE 88—ESTIMATED IMPACT OF THE CY 2018 CHANGES FOR THE HOSPITAL OUTPATIENT PROSPECTIVE PAYMENT SYSTEM—Continued

	Number of hospitals	APC recalibration (all changes)	New wage index and provider adjustments	340B adjustment	All budget neutral changes (combined cols 2–4) with market basket update	All changes
	(1)	(2)	(3)	(4)	(5)	(6)
MIDDLE ATLANTIC	53	0.0	-0.5	1.8	2.6	2.7
SOUTH ATLANTIC	124	-0.4	-0.6	0.7	1.1	1.2
EAST NORTH CENT	122	-0.2	0.0	1.5	2.7	2.8
EAST SOUTH CENT	155	-0.6	-0.1	0.0	0.7	0.8
WEST NORTH CENT	98	-0.1	0.2	2.4	3.9	4.1
WEST SOUTH CENT	161	-0.6	0.3	2.6	3.6	3.7
MOUNTAIN	56	0.0	-0.3	1.9	3.0	3.3
PACIFIC	24	-0.1	0.1	1.7	3.0	3.1
TEACHING STATUS:						
NON-TEACHING	2,655	0.0	0.1	1.3	2.8	2.9
MINOR	761	0.1	0.1	0.1	1.6	1.7
MAJOR	349	0.1	0.0	-2.4	-1.0	-0.9
DSH PATIENT PERCENT:						
0	10	0.0	0.2	3.2	4.8	4.9
GT 0–0.10	272	0.2	-0.1	2.8	4.4	4.5
0.10–0.16	263	0.1	0.0	2.7	4.3	4.4
0.16–0.23	572	0.1	0.3	2.6	4.4	4.5
0.23–0.35	1,132	0.0	0.1	-0.4	1.0	1.2
GE 0.35	935	0.0	0.0	-2.2	-0.9	-0.8
DSH NOT AVAILABLE**	581	-2.0	0.1	2.0	1.4	1.5
URBAN TEACHING/DSH:						
TEACHING & DSH	1,002	0.1	0.0	-1.1	0.3	0.4
NO TEACHING/DSH	1,386	0.1	0.2	1.3	3.0	3.1
NO TEACHING/NO DSH	10	0.0	0.2	3.2	4.8	4.9
DSH NOT AVAILABLE**	553	-2.0	0.1	1.9	1.4	1.5
TYPE OF OWNERSHIP:						
VOLUNTARY	1,979	0.0	0.0	-0.3	1.2	1.3
PROPRIETARY	1,293	0.1	0.1	2.7	4.4	4.5
GOVERNMENT	493	-0.1	0.2	-1.6	-0.1	0.0
CMHCs	49	12.5	0.2	3.2	17.8	17.2

Column (1) shows total hospitals and/or CMHCs.

Column (2) includes all CY 2018 OPSS policies and compares those to the CY 2017 OPSS.

Column (3) shows the budget neutral impact of updating the wage index by applying the FY 2018 hospital inpatient wage index, including all hold harmless policies and transitional wages. The rural adjustment continues our current policy of 7.1 percent so the budget neutrality factor is 1. The budget neutrality adjustment for the cancer hospital adjustment is 1.0008 because the target payment-to-cost ratio changes from 0.91 in CY 2017 to 0.89 in CY 2018 and is further reduced by 1 percentage point to 0.88 in accordance with the 21st Century Cures Act. However, this reduction does not affect the budget neutrality adjustment consistent with statute.

Column (4) shows the impact of the 340B drug payment reductions and the corresponding increase in non-drug payments.

Column (5) shows the impact of all budget neutrality adjustments and the addition of the 1.35 percent OPD fee schedule update factor (2.7 percent reduced by 0.6 percentage points for the productivity adjustment and further reduced by 0.75 percentage point as required by law).

Column (6) shows the additional adjustments to the conversion factor resulting from the frontier adjustment, a change in the pass-through estimate, and adding estimated outlier payments.

* These 3,878 providers include children and cancer hospitals, which are held harmless to pre-BBA amounts, and CMHCs.

** Complete DSH numbers are not available for providers that are not paid under IPPS, including rehabilitation, psychiatric, and long-term care hospitals.

(4) Estimated Effects of OPSS Changes on CMHCs

The last line of Table 88 demonstrates the isolated impact on CMHCs, which furnish only partial hospitalization services under the OPSS. In CY 2017, CMHCs are paid under APC 5853 (Partial Hospitalization (3 or more services) for CMHCs). We modeled the impact of this APC policy assuming that CMHCs will continue to provide the same number of days of PHP care as seen in the CY 2016 claims data used for this final rule with comment period. We

excluded days with 1 or 2 services because our policy only pays a per diem rate for partial hospitalization when 3 or more qualifying services are provided to the beneficiary. We estimate that CMHCs will experience an overall 17.2 percent increase in payments from CY 2017 (shown in Column 6). We note that this includes the trimming methodology described in section VIII.B. of this final rule with comment period.

Column 3 shows that the estimated impact of adopting the FY 2018 wage index values will result in a small

increase of 0.2 percent to CMHCs.

Column 5 shows that combining this OPD fee schedule increase factor, along with changes in APC policy for CY 2018 and the FY 2018 wage index updates, will result in an estimated increase of 17.8 percent. Column 6 shows that adding the changes in outlier and pass-through payments will result in a total 17.2 percent increase in payment for CMHCs. This reflects all changes to CMHCs for CY 2018.

(5) Estimated Effect of OPSS Changes on Beneficiaries

For services for which the beneficiary pays a copayment of 20 percent of the payment rate, the beneficiary's payment will increase for services for which the OPSS payments will rise and will decrease for services for which the OPSS payments will fall. For further discussion on the calculation of the national unadjusted copayments and minimum unadjusted copayments, we refer readers to section II.I. of this final rule with comment period. In all cases, section 1833(t)(8)(C)(i) of the Act limits beneficiary liability for copayment for a procedure performed in a year to the hospital inpatient deductible for the applicable year.

We estimate that the aggregate beneficiary coinsurance percentage will be 18.5 percent for all services paid under the OPSS in CY 2018. The estimated aggregate beneficiary coinsurance reflects general system adjustments, including the CY 2018 comprehensive APC payment policy discussed in section II.A.2.e. of this final rule with comment period.

(6) Estimated Effects of OPSS Changes on Other Providers

The relative payment weights and payment amounts established under the OPSS affect the payments made to ASCs as discussed in section XII. of this final rule with comment period. No types of providers or suppliers other than hospitals, CMHCs, and ASCs will be affected by the changes in this final rule with comment period.

(7) Estimated Effects of OPSS Changes on the Medicare and Medicaid Programs

The effect on the Medicare program is expected to be an increase of \$690 million in program payments for OPSS services furnished in CY 2018. The effect on the Medicaid program is expected to be limited to copayments that Medicaid may make on behalf of Medicaid recipients who are also Medicare beneficiaries. We refer readers to our discussion of the impact on beneficiaries in section XVIII.A.4.a.(4) of this final rule with comment period.

(8) Alternative OPSS Policies Considered

Alternatives to the OPSS changes we are making and the reasons for our selected alternatives are discussed throughout this final rule with comment period.

- Alternatives considered for the enforcement instruction for the supervision of outpatient therapeutic services in critical access hospitals (CAHs) and certain small rural hospitals

We considered whether to address enforcement of the direct supervision requirement for outpatient therapeutic services in CAHs and small, rural hospitals with fewer than 100 beds by extending the notice of nonenforcement while we further develop our policies. There are grounds for applying the same supervision requirements to CAHs as to all other hospitals. One of these grounds is that hospital outpatient services are furnished "incident to" physicians' services, and we believe that the incident to rules apply equally to critical access and other types of hospitals. We also believe that Medicare should purchase the same basic level of quality and safe outpatient care for all beneficiaries, whether from a CAH, a small rural hospital, or other hospitals. At the same time, we acknowledge that in order to ensure the same level of outpatient care is furnished in CAHs and small rural hospitals as other hospitals, we need to continue the national discussion about what constitutes the appropriate supervision for a given service. We also need to acknowledge the challenges CAHs and small, rural hospitals have in recruiting and retaining physicians and qualified non-physician practitioners.

Therefore, we are extending the notice of nonenforcement for CAHs and small rural hospitals with fewer than 100 beds for CY 2018 and CY 2019, to give all parties time to submit specific services to be considered for a reduced minimum supervision standard. We believe that the policies in this final rule with comment period will address industry concerns while maintaining an adequate level of safety and quality of care in the hospital outpatient services that Medicare purchases.

- Alternatives Considered for the Methodology for Assigning Skin Substitutes to High or Low Cost Groups

We refer readers to section V.B.1.d. of this final rule with comment period for a discussion of our proposal to assign any skin substitute product that was assigned to the high cost group in CY 2017 to the high cost group in CY 2018, regardless of whether the product's mean unit cost (MUC) or the product's per day cost (PDC) exceeds or falls below the overall CY 2018 MUC or PDC threshold. We will continue to assign products that exceed either the overall CY 2018 MUC or PDC threshold to the high cost group. We also considered, but

did not propose or finalize, retaining our methodology from CY 2017 and assigning skin substitutes to the high cost group based on whether an individual product's MUC or PDC exceeded the overall CY 2018 MUC or PDC threshold based on calculations done for either the proposed rule or this final rule with comment period.

b. Estimated Effects of CY 2018 ASC Payment System Policies

Most ASC payment rates are calculated by multiplying the ASC conversion factor by the ASC relative payment weight. As discussed fully in section XII. of this final rule with comment period, we are setting the CY 2018 ASC relative payment weights by scaling the CY 2018 OPSS relative payment weights by the ASC scalar of 0.8990. The estimated effects of the updated relative payment weights on payment rates are varied and are reflected in the estimated payments displayed in Tables 89 and 90 below.

Beginning in CY 2011, section 3401 of the Affordable Care Act requires that the annual update to the ASC payment system (which currently is the CPI-U) after application of any quality reporting reduction be reduced by a productivity adjustment. The Affordable Care Act defines the productivity adjustment to be equal to the 10-year moving average of changes in annual economy-wide private nonfarm business multifactor productivity (MFP) (as projected by the Secretary for the 10-year period ending with the applicable fiscal year, year, cost reporting period, or other annual period). For ASCs that fail to meet their quality reporting requirements, the CY 2018 payment determinations will be based on the application of a 2.0 percentage points reduction to the annual update factor, which currently is the CPI-U. We calculated the CY 2018 ASC conversion factor by adjusting the CY 2017 ASC conversion factor by 1.0007 to account for changes in the pre-floor and pre-reclassified hospital wage indexes between CY 2017 and CY 2018 and by applying the CY 2018 MFP-adjusted CPI-U update factor of 1.2 percent (projected CPI-U update of 1.7 percent minus a projected productivity adjustment of 0.5 percentage point). The CY 2018 ASC conversion factor is \$45.575.

(1) Limitations of Our Analysis

Presented here are the projected effects of the changes for CY 2018 on Medicare payment to ASCs. A key limitation of our analysis is our inability to predict changes in ASC service-mix between CY 2016 and CY 2018 with precision. We believe that the net effect

on Medicare expenditures resulting from the CY 2018 changes will be small in the aggregate for all ASCs. However, such changes may have differential effects across surgical specialty groups as ASCs continue to adjust to the payment rates based on the policies of the revised ASC payment system. We are unable to accurately project such changes at a disaggregated level. Clearly, individual ASCs will experience changes in payment that differ from the aggregated estimated impacts presented below.

(2) Estimated Effects of ASC Payment System Policies on ASCs

Some ASCs are multispecialty facilities that perform a wide range of surgical procedures from excision of lesions to hernia repair to cataract extraction; others focus on a single specialty and perform only a limited range of surgical procedures, such as eye, digestive system, or orthopedic procedures. The combined effect on an individual ASC of the update to the CY 2018 payments will depend on a number of factors, including, but not limited to, the mix of services the ASC provides, the volume of specific services provided by the ASC, the percentage of its patients who are Medicare beneficiaries, and the extent to which an ASC provides different services in the coming year. The following discussion presents tables that display estimates of the impact of the CY 2018 updates to the ASC payment system on Medicare payments to ASCs, assuming the same mix of services as reflected in our CY 2016 claims data. Table 89 depicts the estimated aggregate percent change in payment by surgical specialty or

ancillary items and services group by comparing estimated CY 2017 payments to estimated CY 2018 payments, and Table 90 shows a comparison of estimated CY 2017 payments to estimated CY 2018 payments for procedures that we estimate will receive the most Medicare payment in CY 2017.

Table 89 shows the estimated effects on aggregate Medicare payments under the ASC payment system by surgical specialty or ancillary items and services group. We have aggregated the surgical HCPCS codes by specialty group, grouped all HCPCS codes for covered ancillary items and services into a single group, and then estimated the effect on aggregated payment for surgical specialty and ancillary items and services groups. The groups are sorted for display in descending order by estimated Medicare program payment to ASCs. The following is an explanation of the information presented in Table 89.

- Column 1—Surgical Specialty or Ancillary Items and Services Group indicates the surgical specialty into which ASC procedures are grouped and the ancillary items and services group which includes all HCPCS codes for covered ancillary items and services. To group surgical procedures by surgical specialty, we used the CPT code range definitions and Level II HCPCS codes and Category III CPT codes as appropriate, to account for all surgical procedures to which the Medicare program payments are attributed.
- Column 2—Estimated CY 2017 ASC Payments were calculated using CY 2016 ASC utilization (the most recent full year of ASC utilization) and CY 2017 ASC payment rates. The surgical

specialty and ancillary items and services groups are displayed in descending order based on estimated CY 2017 ASC payments.

- Column 3—Estimated CY 2018 Percent Change is the aggregate percentage increase or decrease in Medicare program payment to ASCs for each surgical specialty or ancillary items and services group that are attributable to updates to ASC payment rates for CY 2018 compared to CY 2017.

As seen in Table 89, for the six specialty groups that account for the most ASC utilization and spending, we estimate that the update to ASC payment rates for CY 2017 will result in a 1-percent increase in aggregate payment amounts for eye and ocular adnexa procedures, a 2-percent increase in aggregate payment amounts for digestive system procedures, 1-percent increase in aggregate payment amounts for nervous system procedures, a 3-percent increase in aggregate payment amounts for musculoskeletal system procedures, a 1-percent increase in aggregate payment amounts for genitourinary system procedures, and a 5-percent increase in aggregate payment amounts for integumentary system procedures.

Also displayed in Table 89 is a separate estimate of Medicare ASC payments for the group of separately payable covered ancillary items and services. The payment estimates for the covered surgical procedures include the costs of packaged ancillary items and services. We estimate that aggregate payments for these items and services will decrease by 44 percent for CY 2018.

TABLE 89—ESTIMATED IMPACT OF THE CY 2018 UPDATE TO THE ASC PAYMENT SYSTEM ON AGGREGATE CY 2018 MEDICARE PROGRAM PAYMENTS BY SURGICAL SPECIALTY OR ANCILLARY ITEMS AND SERVICES GROUP

Surgical specialty group (1)	Estimated CY 2017 ASC payments (in millions) (2)	Estimated CY 2018 percent change (3)
Total	\$4,460	1
Eye and ocular adnexa	1,688	1
Digestive system	852	2
Nervous system	849	1
Musculoskeletal system	530	3
Genitourinary system	186	1
Integumentary system	141	5
Ancillary items and services	55	-44

Table 90 below shows the estimated impact of the updates to the revised ASC payment system on aggregate ASC payments for selected surgical procedures during CY 2018. The table

displays 30 of the procedures receiving the greatest estimated CY 2017 aggregate Medicare payments to ASCs. The HCPCS codes are sorted in descending

order by estimated CY 2017 program payment.

- Column 1—CPT/HCPCS code.
- Column 2—Short Descriptor of the HCPCS code.

- Column 3—Estimated CY 2017 ASC Payments were calculated using CY 2016 ASC utilization (the most recent full year of ASC utilization) and the CY 2017 ASC payment rates. The estimated CY 2017 payments are expressed in millions of dollars.
- Column 4—Estimated CY 2018 Percent Change reflects the percent differences between the estimated ASC payment for CY 2017 and the estimated payment for CY 2018 based on the update.

TABLE 90—ESTIMATED IMPACT OF THE CY 2018 UPDATE TO THE ASC PAYMENT SYSTEM ON AGGREGATE PAYMENTS FOR SELECTED PROCEDURES

CPT/HCPCS code (1)	Short descriptor (2)	Estimated CY 2017 ASC payment (in millions) (3)	Estimated CY 2018 percent change (4)
66984	Cataract surg w/iol 1 stage	\$1,172	1
45380	Colonoscopy and biopsy	216	3
43239	Egd biopsy single/multiple	178	2
63685	Insrt/redo spine n generator	151	-1
45385	Colonoscopy w/lesion removal	146	3
63650	Implant neuroelectrodes	118	4
64483	Inj foramen epidural l/s	99	1
66982	Cataract surgery complex	94	1
0191T	Insert ant segment drain int	86	1
66821	After cataract laser surgery	69	0
64635	Destroy lumb/sac facet jnt	68	0
29827	Arthroscop rotator cuff repr	61	3
64493	Inj paravert f jnt l/s 1 lev	60	1
64590	Insrt/redo pn/gastr stimul	50	2
G0105	Colorectal scrn; hi risk ind	45	3
62323	Njx interlaminar lmb/sac	45	3
45378	Diagnostic colonoscopy	44	3
G0121	Colon ca scrn not hi rsk ind	42	3
64721	Carpal tunnel surgery	34	-1
15823	Revision of upper eyelid	32	6
29881	Knee arthroscopy/surgery	30	5
29880	Knee arthroscopy/surgery	26	5
67042	Vit for macular hole	25	1
28285	Repair of hammertoe	24	5
52000	Cystoscopy	23	-1
26055	Incise finger tendon sheath	23	6
43235	Egd diagnostic brush wash	23	2
64561	Implant neuroelectrodes	22	6
50590	Fragmenting of kidney stone	21	1
67904	Repair eyelid defect	20	2

(3) Estimated Effects of ASC Payment System Policies on Beneficiaries

We estimate that the CY 2018 update to the ASC payment system will be generally positive for beneficiaries with respect to the new procedures that we are adding to the ASC list of covered surgical procedures and for those that we are designating as office-based for CY 2018. First, other than certain preventive services where coinsurance and the Part B deductible is waived to comply with sections 1833(a)(1) and (b) of the Act, the ASC coinsurance rate for all procedures is 20 percent. This contrasts with procedures performed in HOPDs under the OPSS, where the beneficiary is responsible for copayments that range from 20 percent to 40 percent of the procedure payment (other than for certain preventive services). Second, in almost all cases, the ASC payment rates under the ASC payment system are lower than payment

rates for the same procedures under the OPSS. Therefore, the beneficiary coinsurance amount under the ASC payment system will almost always be less than the OPSS copayment amount for the same services. (The only exceptions would be if the ASC coinsurance amount exceeds the inpatient deductible. The statute requires that copayment amounts under the OPSS not exceed the inpatient deductible.) Beneficiary coinsurance for services migrating from physicians' offices to ASCs may decrease or increase under the revised ASC payment system, depending on the particular service and the relative payment amounts under the MPFS compared to the ASC. However, for those additional procedures that we are designating as office-based in CY 2018, the beneficiary coinsurance amount under the ASC payment system generally will be no greater than the beneficiary coinsurance under the

MPFS because the coinsurance under both payment systems generally is 20 percent (except for certain preventive services where the coinsurance is waived under both payment systems).

(4) Alternative ASC Payment Policies Considered

Alternatives to the ASC changes we are making and the reasons for our selected alternatives are discussed throughout this final rule with comment period.

c. Accounting Statements and Tables

As required by OMB Circular A-4 (available on the Office of Management and Budget Web site at: https://www.whitehouse.gov/omb/circulars_a004_a-4#a), we have prepared two accounting statements to illustrate the impacts of this final rule with comment period. The first accounting statement, Table 91 below, illustrates the

classification of expenditures for the CY 2018 estimated hospital OPSS incurred benefit impacts associated with the CY 2018 OPD fee schedule increase. The second accounting statement, Table 92

below, illustrates the classification of expenditures associated with the 1.2 percent CY 2018 update to the ASC payment system, based on the provisions of this final rule with

comment period and the baseline spending estimates for ASCs. Lastly, the tables classify most estimated impacts as transfers.

TABLE 91—ACCOUNTING STATEMENT: CY 2018 ESTIMATED HOSPITAL OPSS TRANSFERS FROM CY 2017 TO CY 2018 ASSOCIATED WITH THE CY 2018 HOSPITAL OUTPATIENT OPD FEE SCHEDULE INCREASE

Category	Transfers
Annualized Monetized Transfers	\$690 million.
From Whom to Whom	Federal Government to outpatient hospitals and other providers who receive payment under the hospital OPSS.
Total	\$690 million.

TABLE 92—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED TRANSFERS FROM CY 2017 TO CY 2018 AS A RESULT OF THE CY 2018 UPDATE TO THE ASC PAYMENT SYSTEM

Category	Transfers
Annualized Monetized Transfers	\$40 million.
From Whom to Whom	Federal Government to Medicare Providers and Suppliers.
Total	\$40 million.

d. Effects of Requirements for the Hospital OQR Program

(1) Background

We refer readers to the CY 2017 OPSS/ASC final rule with comment period (81 FR 79874), for the previously estimated effects of changes to the Hospital OQR Program for the CY 2018, CY 2019, and CY 2020 payment determinations. Of the 3,228 hospitals that met eligibility requirements for the CY 2017 payment determination, we determined that 87 hospitals did not meet the requirements to receive the full OPD fee schedule increase factor. Most of these hospitals (66 of the 87), chose not to participate in the Hospital OQR Program for the CY 2017 payment determination. We estimate that approximately 100 hospitals will not receive the full OPD fee schedule increase factor for the CY 2018 payment determination and subsequent years.

In section XIII.B.4.c. of this final rule with comment period, we are finalizing the removal of six measures. Specifically, beginning with the CY 2020 payment determination, we are finalizing, as proposed, to remove: (1) OP-21: Median Time to Pain Management for Long Bone Fracture; and (2) OP-26: Hospital Outpatient Volume Data on Selected Outpatient Surgical Procedures. Also, while we proposed to remove: (1) OP-1: Median Time to Fibrinolysis, (2) OP-4: Aspirin at Arrival, (3) OP-20: Door to Diagnostic Evaluation by a Qualified Medical Professional, and (4) OP-25: Safe Surgery Checklist beginning with the

CY 2021 payment determination, we are finalizing removal of these measures with modification so that removal begins with the CY 2020 payment determination, one year earlier than proposed. To summarize, the following measures will be removed for the CY 2020 payment determination: (1) OP-1: Median Time to Fibrinolysis; (2) OP-4: Aspirin at Arrival; (3) OP-20: Door to Diagnostic Evaluation by a Qualified Medical Professional; (4) OP-21: Median Time to Pain Management for Long Bone Fracture; (5) OP-25: Safe Surgery Checklist; and (6) OP-26: Hospital Outpatient Volume Data on Selected Outpatient Surgical Procedures. We expect these finalized proposals will reduce the burden of reporting for the Hospital OQR Program, as discussed in more detail below.

In section XIII.B.10.b. of this final rule with comment period, we are finalizing, with modifications, our proposal to publicly report OP-18c using data beginning with patient encounters during the third quarter of 2017. However, we do not expect our modifications to affect the burden estimates made in the CY 2018 OPSS/ASC proposed rule (82 FR 33705 through 33708), as discussed below.

In section XIII.B.5. of this final rule with comment period, we are finalizing our proposal to delay the OP-37a-e: Outpatient and Ambulatory Surgery Consumer Assessment of Healthcare Providers and Systems (OAS CAHPS) Survey-based measures beginning with the CY 2020 payment determination (CY

2018 data collection period) until further notice in future rulemaking.

In addition, in this final rule with comment period, beginning with the CY 2020 payment determination, we are finalizing our proposals: (1) To codify at § 419.46(e) our previously finalized process for targeting hospitals for validation of chart-abstracted measures (section XIII.D.7.b. of this final rule with comment period); (2) to formalize the educational review process and use it to correct incorrect validation results for chart-abstracted measures (section XIII.D.7.c. of this final rule with comment period); (3) to align the first quarter for which hospitals must submit data for all hospitals that did not participate in the previous year's Hospital OQR Program, and make corresponding revisions at 42 CFR 419.46(c)(3) (section XIII.D.1. of this final rule with comment period); and (4) to align the naming of the Extraordinary Circumstances Exceptions (ECE) policy and make conforming changes to the CFR (section XIII.D.8.a. of this final rule with comment period). We are not finalizing our proposals to change the NOP submission deadlines such that hospitals are required to submit the NOP any time prior to registering on the QualityNet Web site and to make conforming revisions at 42 CFR 419.46(a) (section XIII.C.2.b. of this final rule with comment period). We do not believe that these changes will affect our burden estimates, as further discussed below.

(2) Estimated Impact of Newly Finalized Proposal To Delay OP–37a–e: Outpatient and Ambulatory Surgery Consumer Assessment of Healthcare Providers and Systems (OAS CAHPS) Survey-Based Measures Beginning With the CY 2020 Payment Determination

As described in section XIII.B.5. of this final rule with comment period, we are finalizing our proposal to delay OP–37a–e: Outpatient and Ambulatory Surgery Consumer Assessment of Healthcare Providers and Systems (OAS CAHPS) Survey-based measures beginning with the CY 2020 payment determination (CY 2018 data collection period). As stated in the CY 2017 OP/ASC final rule with comment period (81 FR 79863), the information collection requirements associated with the five OAS CAHPS Survey-based measures (OP–37a, OP–37b, OP–37c, OP–37d, and OP–37e) are currently approved under OMB Control Number 0938–1240. For this reason, in the CY 2017 OP/ASC final rule with comment period (81 FR 79863), we did not provide an independent estimate of the burden associated with OAS CAHPS Survey based measures for the Hospital OQR Program. Similarly, our finalized proposal to delay implementation of these measures does not affect our current burden estimates.

(3) Estimated Impact of Proposal to Publicly Report OP–18c: Median Time From Emergency Department Arrival to Emergency Department Departure for Discharged Emergency Department Patients—Psychiatric/Mental Health Patients

In section XIII.B.10.b. of this final rule with comment period, we are finalizing, with modifications, our proposal to publicly report 18c: Median Time from Emergency Department Arrival to Emergency Department Departure for Discharged Emergency Department Patients—Psychiatric/Mental Health Patients beginning with patient encounters from the third quarter of 2017. As noted in that section, the data required for public reporting of OP–18c is already collected as part of the existing Hospital OQR Program requirements. Accordingly, we did not estimate changes to burden due to this proposal and we do not expect the modifications we are finalizing to affect burden.

(4) Estimated Impact of Newly Finalized Proposals for the CY 2020 Payment Determination and Subsequent Years

(a) Impact of Measure Removals

In section XIII.B.4.c. of this final rule with comment period, we are finalizing

our proposals to remove six measures from the Hospital OQR Program. Specifically, beginning with the CY 2020 payment determination, we are finalizing, as proposed, to remove: (1) OP–21: Median Time to Pain Management for Long Bone Fracture; and (2) OP–26: Hospital Outpatient Volume Data on Selected Outpatient Surgical Procedures. Also, while we proposed to remove: (1) OP 1: Median Time to Fibrinolysis, (2) OP–4: Aspirin at Arrival, (3) OP–20: Door to Diagnostic Evaluation by a Qualified Medical Professional, and (4) OP–25: Safe Surgery Checklist beginning with the CY 2021 payment determination, we are finalizing removal of these measures with modification so that removal begins with the CY 2020 payment determination, one year earlier than proposed. In summary, we are finalizing removal of six measures beginning with the CY 2020 payment determination. We note that we have modified our estimates from the proposed rule (82 FR 33673) in order to streamline our discussion in light of the modification.

Specifically, we are finalizing the removal of four chart-abstracted measures ((1) OP–1: Median Time to Fibrinolysis; (2) OP–4: Aspirin at Arrival; (3) OP–20: Door to Diagnostic Evaluation by a Qualified Medical Professional; and (4) OP–21: Median Time to Pain Management for Long Bone Fracture) and two web-based measures ((1) OP–25: Safe Surgery Checklist Use; and (2) OP–26: Hospital Outpatient Volume Data on Selected Outpatient Surgical Procedures). As described in section XVI.B. of this final rule with comment period, we expect these measure removals to reduce burden by 457,490 hours and \$16.7 million for the CY 2020 payment determination.

(b) Impact of Updates to Previously Finalized Chart-Abstracted Measure Validation Procedures and the Educational Review Process

In section XIII.D.7.a. of this final rule with comment period, we provide clarification on our procedures for validation of chart-abstracted measures to note that the 50 poorest performing outlier hospitals will be targeted for validation. We do not expect this clarification to affect burden because it does not alter the number of hospitals selected for validation or the requirements for those hospitals that are selected.

In addition, in section XIII.D.7.c. of this final rule with comment period, we are finalizing our proposal to formalize the process of allowing hospitals to use an educational review process to correct

incorrect validation results for the first three quarters of validation for chart-abstracted measures. We are also finalizing our proposal to update the process to specify that if the results of an educational review indicate that we incorrectly scored a hospital's medical records selected for validation, the corrected quarterly validation score will be used to compute the hospital's final validation score at the end of the calendar year. Under this finalized policy, the educational review request process remains the same for the CY 2020 payment determination and subsequent years, except that revised scores identified through an educational review will be used to correct a hospital's validation score. As a result, we do not expect this policy to affect the burden experienced by hospitals, as our changes to this policy result in a change in the way we address educational review requests and not a change to the process hospitals must follow to request an education review. As we stated in the CY 2014 OP/ASC final rule with comment period (78 FR 75171), we believe there is a burden associated with successful participation in the Hospital OQR Program, where successful participation results in a full annual payment update (APU) for a particular payment determination. This burden includes, but is not limited to, maintaining familiarity with the Hospital OQR Program requirements, which includes checking feedback reports to indicate a facility's current status or performance (78 FR 75171). The overall administrative burden was estimated at 42 hours per hospital (78 FR 75171). As stated above, we do not believe this burden will change with the finalization of our policy to update the educational review process to include corrections.

(c) Impact of Proposed Update to NOP Submission Deadline

In section XIII.C.2. of this final rule with comment period, we are not finalizing our proposal to revise the NOP submission deadlines such that hospitals are required to submit the NOP any time prior to registering on the QualityNet Web site. We estimated that this proposal would have a negligible effect on the time and cost of completing the participation requirements. As a result, our decision not to finalize the proposal to revise the NOP submission deadline does not affect our burden estimates.

(d) Impact of Aligning the First Quarter for Which Hospitals Must Submit Data for All Hospitals That Did Not Participate in the Previous Year's Hospital OQR Program

In section XIII.D.1 of this final rule with comment period, we are finalizing our proposal to align the timeline specifying the initial quarter for which hospitals must submit data for all hospitals that did not participate in the previous year's Hospital OQR Program, rather than specifying different timelines for hospitals with Medicare acceptance dates before versus after January 1 of the year prior to an affected annual payment update. Although this finalized proposal alters the timeline for hospitals to begin submitting data for the Hospital OQR Program, it does not alter program requirements. As a result, we do not anticipate that this policy will affect burden.

(e) Impact of Updates to the Previously Finalized ECE Policy

We previously estimated the burden associated with general and administrative Hospital OQR Program requirements in the CY 2014 OPPS/ASC final rule with comment period (78 FR 75171). In section XIII.D.8. of this final rule with comment period, we discuss our finalized alignment of the naming of this exception policy and finalized proposal to update 42 CFR 419.46(d) to reflect our current ECE policies. We are also clarifying the timing of our response to ECE requests. Because we do not seek any new or additional information in our finalized ECE proposals, we believe the updates will have no effect on burden for hospitals.

We refer readers to section XVI.B. of this final rule with comment period (information collection requirements) for a detailed discussion of the burden of the requirements for submitting data to the Hospital OQR Program.

e. Effects of Proposed Requirements for the ASCQR Program

1. Background

In section XIV. of this final rule with comment period, we discuss our proposals to adopt policies affecting the ASCQR Program. For the CY 2017 payment determination, of the 3,937 ASCs that met eligibility requirements for the ASCQR Program, 209 ASCs did not meet the requirements to receive the full annual payment update. We note that, in the CY 2017 OPPS/ASC final rule with comment period (81 FR 79874), we used the CY 2016 payment determination numbers as a baseline, and estimated that approximately 200 ASCs will not receive the full annual

payment update in CY 2018 due to failure to meet the ASCQR Program requirements (CY 2017 and CY 2018 payment determination information were not yet available).

In section XIV.B.3.b. of this final rule with comment period, we are finalizing our proposals, beginning with the CY 2019 payment determination, to remove three measures (ASC-5: Prophylactic Intravenous (IV) Antibiotic Timing, ASC-6: Safe Surgery Checklist Use, and ASC-7: Ambulatory Surgical Center Facility Volume Data on Selected Ambulatory Surgical Center Surgical Procedures) from the ASCQR Program measure set. In section XIV.B.6.a. of this final rule with comment period, we are not finalizing our proposal, beginning with the CY 2021 payment determination, to adopt one new measure, ASC-16: Toxic Anterior Segment Syndrome. In section XIV.B.6.b. and c. of this final rule with comment period, we are finalizing our proposals, beginning with the CY 2022 payment determination, to adopt two new measures collected via claims (ASC-17: Hospital Visits after Orthopedic Ambulatory Surgical Center Procedures and ASC-18: Hospital Visits after Urology Ambulatory Surgical Center Procedures). We expect these finalized proposals will reduce the overall burden of reporting data for the ASCQR Program, as discussed below.

In this final rule with comment period, we are also finalizing our proposals: (1) To delay ASC-15a-e: OAS CAHPS survey-based measures beginning with the CY 2020 payment determination (CY 2018 data collection) (section XIV.B.4. of this final rule with comment period); (2) to expand the CMS online tool to also allow for batch submission beginning with data submitted during CY 2018 and to make corresponding revisions to the CFR (section XIV.D.3.b. of this final rule with comment period); and, (3) to align the naming of the Extraordinary Circumstances Exceptions (ECE) policy beginning with CY 2018 and to make conforming changes to the CFR (section XIV.D.6.b. of this final rule with comment period). As discussed below, we do not expect these finalized proposals to affect our burden estimates.

2. Estimated Burden of Newly Finalized ASCQR Program Proposals Beginning With CY 2018

In section XIV.B.4. of this final rule with comment period, we are finalizing our proposal to delay ASC-15a-e: OAS CAHPS Survey-based measures beginning with the CY 2020 payment determination (CY 2018 data collection) until further notice in future

rulemaking. As described in the CY 2017 OPPS/ASC final rule with comment period (81 FR 79864), the information collection requirements associated with the five OAS CAHPS Survey based measures (ASC-15a, ASC-15b, ASC-15c, ASC-15d, and ASC-15e) are currently approved under OMB Control Number 0938-1240. For this reason, we did not provide an independent estimate of the burden associated with OAS CAHPS Survey administration for the ASCQR Program in the CY 2017 OPPS/ASC final rule with comment period (81 FR 79864). Similarly, our finalized proposal to delay reporting on these measures does not affect our current burden estimates.

For CY 2018, we are finalizing two additional policies. First, in section XIV.D.3.b. of this final rule with comment period, we are finalizing our proposal to expand the CMS online tool to also allow for batch submission beginning with data submitted during CY 2018 and to make corresponding revisions to the CFR. Second, in section XIV.D.6. of this final rule with comment period, we discuss our intent to align the naming of this exception policy and update 42 CFR 416.310(d) to reflect our current ECE policies. We are also clarifying the timing of CMS' response to ECE requests. Because none of these policies change the reporting requirements of the ASCQR Program or require ASCs to submit any new or additional information, we believe the updates will have no effect on burden for ASCs.

3. Estimated Burden of Newly Finalized ASCQR Program Proposals for the CY 2019 Payment Determination

In section XIV.B.3.b. of this final rule with comment period, we are finalizing our proposals to remove one claims-based measure (ASC-5: Prophylactic Intravenous (IV) Antibiotic Timing²¹⁸) and two measures collected via a CMS online data submission tool (ASC-6: Safe Surgery Checklist Use and ASC-7: ASC Facility Volume Data on Selected ASC Surgical Procedures) from the ASCQR Program measure set beginning with the CY 2019 payment determination. As discussed in section XVI.C.4. of this final rule with comment period, data for ASC-5 is submitted via

²¹⁸ As discussed in section XVI.C.4. of this final rule with comment period, data for ASC-5 is submitted via CMS claims using Quality Data Codes, which impose only a nominal burden on providers because these claims are already submitted for the purposes of payment. We therefore estimate a nominal reduction in burden associated with our finalized proposal to remove the ASC-5 measure from the ASCQR Program measure set beginning with the CY 2019 payment determination.

CMS claims using Quality Data Codes, which impose only a nominal burden on providers because these claims are already submitted for the purposes of payment. Therefore, we estimate a nominal reduction in burden associated with our finalized proposal to remove the ASC-5 measure from the ASCQR Program measure set beginning with the CY 2019 payment determination. As also discussed in section XVI.C.4. of this final rule with comment period, we estimate the proposals to remove ASC-6 and ASC-7 from the ASCQR Program measure set will reduce ASCs' data collection and submission burden by approximately 657 hours (3,937 ASCs × 0.167 hours per ASC) and \$24,033 (657 hours × \$36.58 per hour) per measure, or a total burden reduction of 1,314 (657 hours × 2 measures) and \$48,066 (1,314 hours × \$36.58 per hour) across all ASCs.

We did not propose to add any quality measures to the ASCQR measure set for the CY 2020 payment determination, and we do not believe that the other measures we previously adopted will cause any additional ASCs to fail to meet the ASCQR Program requirements. (We refer readers to section XIV.B.5. of this final rule with comment period for a list of these measures.) Therefore, we do not believe that these policies will increase the number of ASCs that do not receive a full annual payment update for the CY 2020 payment determination.

4. Estimated Burden of ASCQR Program for the CY 2021 Payment Determination

In section XIV.B.6.a. of this final rule with comment period, we are not finalizing our proposal to adopt one new measure collected via a CMS online data submission tool, ASC-16: Toxic Anterior Segment Syndrome. Therefore, the initially estimated burden from the CY 2018 OPPS/ASC proposed rule (82 FR 33721) does not apply.

5. Estimated Burden of ASCQR Program Newly Finalized Proposals for the CY 2022 Payment Determination

In sections XIV.B.6.b. and c. of this final rule with comment period, we are finalizing our proposals, beginning with the CY 2022 payment determination, to adopt two measures collected via claims: (1) ASC-17: Hospital Visits after Orthopedic Ambulatory Surgical Center Procedures; and (2) ASC-18: Hospital Visits after Urology Ambulatory Surgical Center Procedures. Data used to calculate scores for these measures is collected via Part A and Part B Medicare administrative claims and Medicare enrollment data, and therefore does not require ASCs to report any additional data. Because these measures do not

require ASCs to submit any additional data, we do not believe there will be any additional burden associated with these proposals.

We refer readers to the information collection requirements in section XVI.C. of this final rule with comment period for a detailed discussion of the financial and hourly burden of the ASCQR Program's current and proposed requirements.

B. Regulatory Flexibility Act (RFA) Analysis

The RFA requires agencies to analyze options for regulatory relief of small entities, if a rule has a significant impact on a substantial number of small entities. For purposes of the RFA, we estimate that most hospitals, ASCs and CMHCs are small entities as that term is used in the RFA. For purposes of the RFA, most hospitals are considered small businesses according to the Small Business Administration's size standards with total revenues of \$38.5 million or less in any single year or by the hospital's not-for-profit status. Most ASCs and most CMHCs are considered small businesses with total revenues of \$15 million or less in any single year. For details, see the Small Business Administration's "Table of Small Business Size Standards" at <http://www.sba.gov/content/table-small-business-size-standards>.

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 100 or fewer beds. We estimate that this final rule with comment period will increase payments to small rural hospitals by less than 3 percent; therefore, it should not have a significant impact on approximately 626 small rural hospitals.

The analysis above, together with the remainder of this preamble, provides a regulatory flexibility analysis and a regulatory impact analysis.

C. Unfunded Mandates Reform Act Analysis

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. That threshold

level is currently approximately \$148 million. This final rule with comment period does not mandate any requirements for State, local, or tribal governments, or for the private sector.

D. Reducing Regulation and Controlling Regulatory Costs

Executive Order 13771, titled Reducing Regulation and Controlling Regulatory Costs, was issued on January 30, 2017. Section 2(a) of Executive Order 13771 requires an agency, unless prohibited by law, to identify at least two existing regulations to be repealed when the agency publicly proposes for notice and comment, or otherwise promulgates, a new regulation. In furtherance of this requirement, section 2(c) of Executive Order 13771 requires that the new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations. OMB's guidance, issued on April 5, 2017, explains that "In general, Federal spending regulatory actions that cause only income transfers between taxpayers and program beneficiaries (e.g., regulations associated with . . . Medicare spending) are considered 'transfer rules' and are not covered by EO 13771. However, in some cases, such regulatory actions may impose requirements apart from transfers, or transfers may distort markets causing inefficiencies. In those cases, the actions would need to be offset to the extent they impose more than de minimis costs." As shown in the previous discussion of Regulatory Review Costs under section XVIII.A.4. of this final rule with comment period, we estimate that total regulatory review costs on the affected entities will be approximately \$2.8 million. As discussed in section XVI. of this final rule with comment period, we estimate that this rule leads to paperwork cost savings of approximately \$16.8 million per year on an ongoing basis. It has been determined that this final rule with comment period is a deregulatory action for the purposes of Executive Order 13771.

E. Conclusion

The changes we are making in this final rule with comment period will affect all classes of hospitals paid under the OPPS and will affect both CMHCs and ASCs. We estimate that most classes of hospitals paid under the OPPS will experience a modest increase or a minimal decrease in payment for services furnished under the OPPS in CY 2018. Table 88 demonstrates the estimated distributional impact of the OPPS budget neutrality requirements

that will result in a 1.4 percent increase in payments for all services paid under the OPPI in CY 2018, after considering all of the changes to APC reconfiguration and recalibration, as well as the OPD fee schedule increase factor, wage index changes, including the frontier State wage index adjustment, estimated payment for outliers, and changes to the pass-through payment estimate. However, some classes of providers that are paid under the OPPI will experience more significant gains or losses in OPPI payments in CY 2018.

The updates to the ASC payment system for CY 2018 will affect each of the approximately 5,500 ASCs currently approved for participation in the Medicare program. The effect on an individual ASC will depend on its mix of patients, the proportion of the ASC's patients who are Medicare beneficiaries, the degree to which the payments for the procedures offered by the ASC are changed under the ASC payment system, and the extent to which the ASC provides a different set of procedures in the coming year. Table 89 demonstrates the estimated distributional impact among ASC surgical specialties of the MFP-adjusted CPI-U update factor of 1.2 percent for CY 2018.

XIX. Federalism Analysis

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct costs on State and local governments, preempts State law, or otherwise has Federalism implications. We have examined the OPPI and ASC provisions included in this final rule with comment period in accordance with Executive Order 13132, Federalism, and have determined that they will not have a substantial direct effect on State, local or tribal governments, preempt State law, or otherwise have a Federalism implication. As reflected in Table 88 of this final rule with comment period, we estimate that OPPI payments to governmental hospitals (including State and local governmental hospitals) will experience no change under this final rule with comment period. While we do not know the number of ASCs or CMHCs with government ownership, we anticipate that it is small. The analyses we have provided in this section of this final rule with comment period, in conjunction with the remainder of this document, demonstrate that this final rule with comment period is consistent with the regulatory philosophy and principles identified in Executive Order

12866, the RFA, and section 1102(b) of the Act.

This final rule with comment period will affect payments to a substantial number of small rural hospitals and a small number of rural ASCs, as well as other classes of hospitals, CMHCs, and ASCs, and some effects may be significant.

List of Subjects

42 CFR Part 414

Administrative practice and procedure, Health facilities, Health professions, Kidney disease, Medicare, Reporting and recordkeeping requirements.

42 CFR Part 416

Health facilities, Health professions, Medicare, Reporting and recordkeeping requirements.

42 CFR Part 419

Hospitals, Medicare, Reporting and recordkeeping requirements.

For reasons stated in the preamble of this document, the Centers for Medicare & Medicaid Services is amending 42 CFR chapter IV as set forth below:

PART 414—PAYMENT FOR PART B MEDICAL AND OTHER HEALTH SERVICES

■ 1. The authority citation for part 414 continues to read as follows:

Authority: Secs. 1102, 1871, and 1881(b)(1) of the Social Security Act (42 U.S.C. 1302, 1395hh, and 1395rr(b)(1)).

■ 2. Section 414.510 is amended by adding paragraph (b)(5) to read as follows:

§ 414.510 Laboratory date of service for clinical laboratory and pathology specimens.

* * * * *

(b) * * *

(5) In the case of a molecular pathology test or a test designated by CMS as an ADLT under paragraph (1) of the definition of an advanced diagnostic laboratory test in § 414.502, the date of service of the test must be the date the test was performed only if—

(i) The test was performed following a hospital outpatient's discharge from the hospital outpatient department;

(ii) The specimen was collected from a hospital outpatient during an encounter (as both are defined in § 410.2 of this chapter);

(iii) It was medically appropriate to have collected the sample from the hospital outpatient during the hospital outpatient encounter;

(iv) The results of the test do not guide treatment provided during the hospital outpatient encounter; and

(v) The test was reasonable and medically necessary for the treatment of an illness.

PART 416—AMBULATORY SURGICAL SERVICES

■ 3. The authority citation for part 416 continues to read as follows:

Authority: Secs. 1102, 1138, and 1871 of the Social Security Act (42 U.S.C. 1302, 1320b-8, and 1395hh) and section 371 of the Public Health Service Act (42 U.S.C. 273).

■ 4. Section 416.310 is amended by revising paragraphs (c)(1)(i) and (d) to read as follows:

§ 416.310. Data collection and submission requirements under the ASCQR Program.

* * * * *

(c) * * *

(1) * * *

(i) *QualityNet account for web-based measures.* ASCs, and any agents submitting data on an ASC's behalf, must maintain a QualityNet account in order to submit quality measure data to the QualityNet Web site for all web-based measures submitted via a CMS online data submission tool. A QualityNet security administrator is necessary to set up such an account for the purpose of submitting this information.

* * * * *

(d) *Extraordinary circumstances exceptions.* CMS may grant an exception with respect to quality data reporting requirements in the event of extraordinary circumstances beyond the control of the hospital, such as when an act of nature affects an entire region or if CMS determines that a systemic problem with one of its data collection systems directly affected the ability of the hospitals to submit data. CMS may grant an exception as follows:

(1) *Upon request of the ASC.* Specific requirements for submission of a request for an exception are available on the QualityNet Web site; or

(2) *At the discretion of CMS.* CMS may grant exceptions to ASCs that have not requested them when CMS determines that an extraordinary circumstance has occurred.

* * * * *

PART 419—PROSPECTIVE PAYMENT SYSTEM FOR HOSPITAL OUTPATIENT DEPARTMENT SERVICES

■ 5. The authority citation for part 419 continues to read as follows:

Authority: Secs. 1102, 1833(t), and 1871 of the Social Security Act (42 U.S.C. 1302, 1395l(t), and 1395hh).

■ 6. Section 419.32 is amended by adding paragraph (b)(1)(iv)(B)(9) to read as follows:

§ 419.32 Calculation of prospective payment rates for hospital outpatient services.

* * * * *

(b) * * *

(1) * * *

(iv) * * *

(B) * * *

(9) For calendar year 2018, a multiproductivity adjustment (as determined by CMS) and 0.75 percentage point.

* * * * *

■ 7. Section 419.46 is amended—

■ a. In paragraph (a)(1) by removing the phrase “Web site” and adding in its place the term “website”.

■ b. In paragraphs (b) and (c)(2) by removing the phrase “Web site” and adding in its place the term “website”.

■ c. By revising paragraphs (c)(3)(i) and (ii) and (d).

■ d. By adding paragraph (e)(3).

■ e. In paragraphs (f)(1) and (g)(2) by removing the phrase “Web site” and adding in its place the term “website” wherever it appears.

The revisions and additions read as follow:

§ 419.46 Participation, data submission, and validation requirements under the Hospital Outpatient Quality Reporting (OQR) Program.

* * * * *

(c) * * *

(3) * * *

(i) Hospitals that did not participate in the previous year’s Hospital OQR Program must initially submit data beginning with encounters occurring during the first calendar quarter of the year prior to the affected annual payment update.

(ii) Hospitals that did not participate in the previous year’s Hospital OQR Program must follow data submission deadlines as specified in paragraph (c)(2) of this section.

* * * * *

(d) *Exception.* CMS may grant an exception to one or more data submission deadlines and requirements in the event of extraordinary circumstances beyond the control of the hospital, such as when an act of nature affects an entire region or locale or a systemic problem with one of CMS’ data collection systems directly or indirectly affects data submission. CMS may grant an exception as follows:

(1) *Upon request by the hospital.* Specific requirements for submission of a request for an exception are available on the QualityNet Web site.

(2) *At the discretion of CMS.* CMS may grant exceptions to hospitals that have not requested them when CMS determines that an extraordinary circumstance has occurred.

(e) * * *

(3) CMS will select a random sample of 450 hospitals for validation purposes, and will select an additional 50 hospitals for validation purposes based on the following criteria:

(i) The hospital fails the validation requirement that applies to the previous year’s payment determination; or

(ii) The hospital has an outlier value for a measure based on the data it submits. An “outlier value” is a measure value that is greater than 5 standard deviations from the mean of the measure values for other hospitals, and indicates a poor score.

* * * * *

■ 8. Section 419.71 is added to read as follows:

§ 419.71 Payment reduction for certain X-ray imaging services.

(a) *Definition.* For purposes of this section, the term “computed

radiography technology” means cassette-based imaging which utilizes an imaging plate to create the image involved.

(b) *Payment reduction for film X-ray imaging services.* For an imaging service that is an X-ray taken using film and that is furnished during 2017 or a subsequent year, the payment amount for such service (including the X-ray component of a packaged service) is reduced by 20 percent.

(c) *Payment reduction for computed radiography imaging services.* The payment amount for an imaging service that is an X-ray taken using computed radiography technology (including the X-ray component of a packaged service) is reduced by—

(1) 7 percent, for such services furnished in CY 2018, 2019, 2020, 2021, or 2022.

(2) 10 percent, for such services furnished in CY 2023 or a subsequent calendar year.

(d) *Application without regard to budget neutrality.* The reductions taken under this section are not considered adjustments under section 1833(t)(2)(E) of the Act and are not implemented in a budget neutral manner.

Dated: October 26, 2017.

Seema Verma,

Administrator, Centers for Medicare and Medicaid Services.

Dated: October 30, 2017.

Eric D. Hargan,

Acting Secretary, Department of Health and Human Services.

Editorial Note: Rule document 2017–23932 was originally published on pages 52356 through 52637 in the issue of Monday, November 13, 2017. In that publication, a section of the document was omitted due to a printing error. The corrected document is published here in its entirety.

[FR Doc. R1–2017–23932 Filed 11–1–17; 4:15 pm]

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Part III

The President

Space Policy Directive-1 of December 11, 2017—Reinvigorating America's Human Space Exploration Program

Presidential Documents

Title 3—

Space Policy Directive–1 of December 11, 2017

The President

Reinvigorating America’s Human Space Exploration Program

Memorandum for the Vice President[,] the Secretary of State[,] the Secretary of Defense[,] the Secretary of Commerce[,] the Secretary of Transportation[,] the Secretary of Homeland Security[,] the Director of National Intelligence[,] the Director of the Office of Management and Budget[,] the Assistant to the President for National Security Affairs[,] the Administrator of the National Aeronautics and Space Administration[,] the Director of the Office of Science and Technology Policy[,] the Assistant to the President for Homeland Security and Counterterrorism[, and] the Chairman of the Joint Chiefs of Staff

Section 1. *Amendment to Presidential Policy Directive–4.*

Presidential Policy Directive–4 of June 28, 2010 (National Space Policy), is amended as follows:

The paragraph beginning “Set far-reaching exploration milestones” is deleted and replaced with the following:

“Lead an innovative and sustainable program of exploration with commercial and international partners to enable human expansion across the solar system and to bring back to Earth new knowledge and opportunities. Beginning with missions beyond low-Earth orbit, the United States will lead the return of humans to the Moon for long-term exploration and utilization, followed by human missions to Mars and other destinations;”.

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

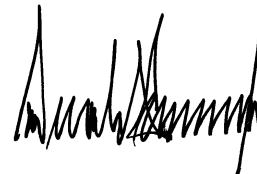
(i) the authority granted by law to an executive department or agency, or the head thereof; or

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

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

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

(d) This memorandum shall be published in the *Federal Register*.

A handwritten signature in black ink, appearing to be a stylized name, possibly "Donald Trump", written in a cursive style.

THE WHITE HOUSE,
Washington, December 11, 2017

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Federal Register

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H.R. 2810/P.L. 115-91
National Defense Authorization Act for Fiscal Year 2018 (Dec. 12, 2017; 131 Stat. 1283)

H.R. 4374/P.L. 115-92
To amend the Federal Food, Drug, and Cosmetic Act to

authorize additional emergency uses for medical products to reduce deaths and severity of injuries caused by agents of war, and for other purposes. (Dec. 12, 2017; 131 Stat. 2023)

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